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Volume 10

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VOLUME 10

FOREWORD

Benin is commonly known in Africa as a beacon of democracy and a constitutional State. Presidential and legislative elections have been held for the last 20 years without any hitches or violation of the constitution of 11 December 1990. The presidential system works well with the prime minister. However, the prime minister is not the head of the government and currently the decentralization process is on-going. On this basis, can we conclude that the rule of law has been accomplished in Benin? This volume of the «African Law Study Library» puts together the research work by PhD holders from the faculty of Law and political sciences (FADESP) of the University of Abomey-Calavi within the framework of a seminar tackling practical issues relating to the rule of law in Benin. This was the first seminar among a series of other seminars planned in West Africa. This seminar is within the on-going framework of similar workshops that have been organized in other regions of the African continent within the framework of the Rule of Law Program for Sub-Saharan Africa of the Konrad Adenauer Foundation.

The workshops' objective is to create a forum for scholars to reflect on legal realities in their respective countries. In practical terms, the concept of the Rule of Law should be developed within the regional, historical and cultural context.

The work herein represents reflections of four (4) young researchers from Benin on different aspects of achievement of the rule of law in Benin. Without a doubt, one of the fundamentals of the rule of law is an efficient and independent justice system that guarantees rights and freedoms of citizens. Baï Irène Aimée KOOVI therefore focuses on the «Mechanisms of ensuring judicial independence in Benin and the issues of reform». Bachard Accorédé LIAMIDI interrogates the individual protection in criminal procedures and considers «the defense rights before the court of assizes». Sakinatou BELLO, on her part, examines the role of «the judiciary vis-à-vis international conventions relating to the rights of the child». She interrogates an aspect which is crucial for different jurisdictions faced with domestication of international law into municipal law and its interdependence. Certainly, regional integration is currently vital for the majority of countries, a fortiori for the countries which adhere to securing of investments legal environment with the view of economic development. Iréné ACLOMBESSI clarifies this aspect particularly by carrying out analysis of the «Settlement of lawsuits under OHADA law».

We thank the FADESP authorities for having made it possible to have the seminar geared towards sustainable collaboration. We also wish to thank Konrad Adenauer Foundation which has integrated our project within the framework of its Rule of Law Program for Sub-Saharan Africa. Finally, we express our sincere gratitude to the participants for their commitment. However, the views expressed herein are those of the authors and do not necessarily represent those of the Foundation.

Ibrahim Salami

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SETTLEMENT OF LAWSUITS UNDER OHADA LAW

By Iréné ACLOMBESSI*

INTRODUCTION

The promotion of the rule of law is premised on diverse conditions among them, peaceful and fair legal settlements of lawsuits. Benin, a West African francophone state is at the heart of this reality which operates partly within OHADA¹ legal regime.

It is not only the decision of the African heads of state and government of the CFA zone² and OHADA (Organization for the Harmonization of Business Laws in Africa) but equally a requirement for the business people who claim improvement of the legal and judicial environment of companies in order to secure their investments³. The minister for trade and industry of Niger declared, during the opening of the seminar on the sensitization of harmonized laws which was organized in Niamey on the 9th June 1998, that the legal and judicial security is one of the necessary conditions for sustainable confidence of national and international investors. He equally stated that developing a dynamic private sector and promoting trade exchange cannot be considered as a sustainable economic and social development hence the need to ensure presence of a legal framework that is conducive to investments⁴. Whatever is developed to secure a legal investment environment should take into account the legal settlement of disputes that may arise from the protagonists of the investment chain. This will increase confidence and faith in the legal business framework systems. Investment chain protagonists are notably: creditors, third parties and investors. In order to appreciate the attractiveness of the legal trade space offered in Africa in general and Benin in particular, our research will revolve around the subject entitled: *Settlement of lawsuits / disputes under OHADA law*. To better understand the subject matter, it is necessary to clarify certain concepts.

Indeed, *solutio*, in Latin, means a mental activity that intent to surmount a difficulty issue, resolve an issue, a practical and theoretical problem. The problem to be solved here is the *dispute/lawsuit* where one needs to distinguish the related notions such as controversy/ differences, contestation, conflict, and contentious issues.

Firstly, *contestation* is nothing other than what the interested parties are disagreeing on⁵, whilst *controversy/difference* is a contestation between two or several persons emanating from divergent opinions or interests. At the beginning of *conflict*, there is controversy which, here, must be legal for it to be considered as such. In fact, controversy is legally qualified if based on the application or interpretation of the existing law and can only be solved by dropping the claims of one of the parties or through modification of the positive law⁶.

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¹ OHADA is the Organization for the Harmonization of Business Laws in Africa.

² Refers to the entire African countries (Countries that use Franc CFA and the Comoros) linked to France through institutionalized monetary cooperation. It is worth noting that the replacement of the French franc by Euro has not affected the operations of this monetary zone, the Comorian CFA franc is now defined by a parity fixed in relation to Euro.

³ Alhousseini MOULOUL, legal regime of the trade companies within the OHADA space: Example from Niger, Doctorate thesis, (University of Paris I Panthéon-Sorbonne), LGDJ-EJA, mars 2005, pp. 13 - 20.

⁴ Le Sahel (journal), n°5565 of Wednesday 10 June 1998, p. 2.

⁵ Art. 57 of the French procedural civil code, 2010 edition.

⁶ Gérard CORNU, Association Henri Capitant, Vocabulaire juridique, 8ème édition, PUF, Paris, Novembre 2009, p. 309.

Litigium, Latin for lawsuit is often synonymous with the process or cause. More precisely, controversy, disagreement, conflict is said to be present the moment it explodes (lawsuit arises) like in the cases of a transaction, arbitration, compromise among other solution modes of disputes (renunciation), irrespective of all appeals to state justice⁷. It is worth mentioning that not all disputes lead to opening of a case. Doctrinal, theological or scientific controversies do not lead to opening of cases. Love quarrels⁸ or disputes cannot be considered to be a lawsuit. A married woman cannot solicit the judge to compel her husband to love her. There is need for the dispute to have legal basis, this to mean that the dispute should emanate from non application of rights and only the legal right can lead to the resolution of matter. It must be said here that between dispute and contentious issue, the solution is to set up a competent organ to solve the matter.

Indeed, contentious is the lawsuit submitted to an institution charged with dispensing law so as to give direction on the matter⁹. That is why Mr. GOHIN Olivier defined contentious as « *demand claim* ». According to him, contentious is attached to the processing of lawsuit to which it matters for the reestablishment of social peace and finding definite solutions¹⁰. Since it is an issue of studying how settlement of disputes is achieved within the OHADA law, it is important for us to clarify that the notion of *litigation* is that notion that qualifies for judicious analysis of this preoccupation which emphasizes the wording of the subject. It is the same when controversy is legal¹¹ in order for it to be susceptible to a settlement before a judge. It is not about any judge but the one who operates with the OHADA community jurisdiction.

Established on the 17th October 1993 and entered into force on the 18th October 1995, OHADA constitutes certainly an opportunity for this region that has been characterized with legal diversity. This is partly justified by the expansion of the geographical area from 14 States¹² to 16 states¹³, and then with the commitment of other member states¹⁴ to join the jurisdiction. We can therefore understand through this subject, the efficiency of methods of settlement of differences that arise in the legal system within the OHADA jurisdiction in general and particularly in Benin.

History has taught us that in the area of settlement of disputes, Africa has relatively remained behind because it had reconciliatory modalities of settling conflicts which occupied an important¹⁵ part in Africa's legal systems. But we find that these conflict resolution modalities have evolved especially with the attainment of independence by African countries. On this front, we experienced development of common laws for the countries sharing franc currency. This led to major overlaps in the legal system and the business people remained uncertain on the rule of the applicable law which had a major hindrance on the investments within the franc zone.

⁷ Gérard CORNU, op. Cit. , p. 555.

⁸ Loïc CADIET, Emmanuel JEULAND ; *Droit judiciaire privé*, Litec, 4^{ème} édition, Paris, 2004, p. 2, n° 4. « Love cases or love quarrels to be taken to the judge: case of break ups of fiancés (art. 118 of the people code and families of Benin), from the conjugal home (art. 156 du même Code) », Words of Joseph DJOGBENOU, op. cit.

⁹ Samson DOSSOUMON, *Administrative disputes in Benin*, Administrative Law courts, 2007, pp. 7-8.

¹⁰ Olivier GOHIN, *Administrative disputes*, 2nd edition Litec, Paris, 1999, p. 2.

¹¹ The case of a married woman appealing to the judge so as to compel her husband to contribute to household expenditures. (art. 160 of the people code and families of Benin)

¹² In the beginning, the participating states were Benin, Burkina-Faso, le Cameroun, Central Africa, Comoros, Congo (Brazzaville), Côte d'Ivoire, Gabon, equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

¹³ Extension was done with the inclusion of Guinea-Conakry and Guinea-Bissau.

¹⁴ The number of member states within OHADA will increase in the coming years and indeed in the coming months since the Republic of Congo has started the processes and Sao Tomé et Príncipe has announced her willingness to join next time. Finally, Madagascar and Ghana have expressed their interest in joining OHADA.

¹⁵ Under a tree at the level of traditional heads/leaders,... on the issue, see also Pierre MEYER, *OHADA :arbitration law*, Coll. Common African Law, Bruylant, Bruxelles, 2002, p.2

The objective here is to show the contribution of this new system of conflict solution and the existence of eventual bottle necks much in the franc zone in general as much as in Benin in particular. The following fundamental question comes in play: *Does the dispute settlement methods under the OHADA law respond to the imperative requirements of securing foreign investments in Benin and in the entire zone?*

This main question creates a lot of interest despite the fifteen years after the implementation the common legal system within the franc community. One would wonder if the expectations have truly been achieved. In fact, if we agree that the attractiveness of the law extends to trade facilitation that the legal system can bring, it will then be of paramount importance to identify and analyze the direct or indirect economic effects of OHADA by determining to what extent the effects of interventions of this new law has had as compared to the previous situation. By so doing, we shall be able to understand if the current scenario has made business operations possible, facilitated trade, reduced transaction cost of business operations; improved the legal security of the business people; improved uncertainty of member countries in the international trade; ensured evolution from the informal economy towards formal sector¹⁶. In other terms, has the legal dispute settlement system in Benin sufficiently providing serious guarantees? What are the fundamental principles such as right to a fair trial, due hearing of both parties, the principle of pronouncement and efficiency and imperativeness of the non transfer of disputes? What is the practical importance of the OHADA law in Benin? What are the effects of disputes resolution in Benin? What are the obstacles facing the companies? by the virtue that there are several methods of dispute resolution, it is necessary to put together the resolution methods especially the one that have been codified and apparently constituted to the real settlement of disputes and where practices have witnessed the efficiency of the OHADA law (*First chapter*) so as to break the barriers that might undermine the satisfaction of parties (*Second chapter*).

CHAPTER ONE: The practice of OHADA law in the settlement of disputes in Benin and within the Franc zone

There are various methods of dispute- resolution. For purposes of necessary promptness in business development, OHADA has instituted simplified procedures of recovery and ways of implementation through the common act on the implementation methods (*Section 1*) of which the implementation responsibility lies with the national jurisdictions¹⁷. In addition, the African legislator has integrated, in her actions, a fundamental data of the contemporary justice at universal level: development of « another justice »¹⁸ in relation to the state justice. This refers to the alternative methods of dispute settlement of which arbitration (*Section 2*) has had a real codification.

Section 1: Settlement of ligations through the speedy procedures and means of execution

This will be followed by a study of the jurisprudence of the national jurisdictions among which is that of Benin and CCJA (*paragraph 1*) as well as for the guarantees accorded to the protagonists (*paragraph 2*).

Paragraph: Jurisprudential trends for the settlement procedures of disputes

Contentious issues relating to interpretation and application of the common acts of OHADA

¹⁶ Paul-Gérard POUGOUE et Yvette Rachel KALIEU ELONGO, introduction critique à l'OHADA, Presse Universitaire d'Afrique, Yaoundé, Août 2008, pp. 177-178

¹⁷ The only possibility before the CCJA (community jurisdiction) after a judgment of the first degree followed by arrest executed on appeal if not satisfaction.

¹⁸ P. MEYER, OHADA, Arbitration Law, Collection Droit Uniforme Africain, Juriscope, Bruylant, Bruxelles, 2002, pp 1-2.

are undertaken beforehand by the national¹⁹. A statistical study of the jurisprudence of the national jurisdictions (A) followed by that of CCJA (B) will permit to appreciate the processing of disputes through application of common law.

A- Statistical study of the decisions of Benin in the application of the OHADA law

A study on different collection of decisions from the Cotonou and Parakou Courts of appeal revealed a disparity in the application of different common acts of OHADA²⁰. In this manner, out of about hundred decisions made in matters of summary proceedings, civil or commercial cases, the uniform law on the methods of execution comes first with more than eighty percent (80%), and on the second comes the common act pertaining to general commercial law with twelve percent (12%), and in the last position is the common law associated with commercial companies and economic interest groupings with around four percent (4%).

It is thus evident, with regard to the production of internal jurisdictions that the OHADA state parties are right in integrating in the domain of business laws, recovery and forced execution, through the common law, the act pertaining to the simplified procedures of recovery and means of execution. Development requires credit and mobility of debt²¹. Indeed, the common act on the means of execution is the one the most commonly used by the law practitioners in general, and by the business people in particular. This instrument is the one that assures most the visibility of standardization of law in Africa. Nevertheless, it is worth mentioning that this recourse to forced execution is not universal. When we look keenly on the decisions made, we easily realize that the recourse is firstly brought up by major companies such the banks and other commercial companies²² and the State. Individuals, natural persons, have recourse to forced execution and this observation seems not to vary when we consider the flow of disputes within each State. This relative lack of enthusiasm to the mandatory enforcement resides in the quality of the enforcement procedures. It is worth noting that the business people have perfectly integrated the existence of this legislation on the enforcement means. But we must immediately add that it only applies to the formal economy actors. Immense sections of business people from the informal sector are still cut off from this law and are not factored in by this law. In fact, in Benin and in majority of African states, the law is considered as an entirety of norms and institutions that wait for the people to go to and not vice versa. As for Professor J. DJOGBENOU, it is the law of the « other » instead of it being a law to « oneself ». The sacred character of human persons and the recent formation of laws that protect him have acted positively on the legislations relating to the mandatory enforcement. Benin has hardly escaped this trend: enforcement on a person is prohibited; the basic goods for survival are not seizable /distrainable; intimacy to private life has got permanent protection. But the competence of the national judge does not exclude that of the CCJA which forms part of the cassation jurisdiction within the community.

B- the place of Benin in the Jurisprudence study of CCJA

Statistics of the CCJA jurisprudence shows us an unequal distribution between the appeals made by different States who have however affirmed the same elements in the preamble of

¹⁹ Official Journal of OHADA, n°4 du 1st November 1997, p.1 and the following pages. In fact article 13 of the treaty of the 17th October 1993 relating to the harmonization of business laws in Africa attributes the competence to the national jurisdictions of the first instance and appeal..

²⁰ Alexandrine SAIZONOU BEDIE, Beninese Jurisprudence, Rights and law review.

²¹ Joseph DJOGBENOU, Mandatory enforcement , 2nd edition, Research and study centre on law and judicial institutions in Africa (CREDIJ), Cotonou, 2011, p. 5

²² Examples, we can mention : Ruling N°37 /2005 of 31/03/2005 made by the Cotonou Court of Appeal on the case of DANSOUVI SOSSOUVI c/ Company AEROFLOT on the seizure of goods; Judgment N°31/2005 of 31/03/2005 made by the Court of appeal of Cotonou in the case of ASSOUMA Amadou, ZETHA OIL BENIN- SA Company . c/LA BIBE on the seizure of goods on bank account through letter of credit

the OHADA treaty. They affirmed their will to enforce the legal and judicial security of the OHADA space; which should go through a regular submission of a case to the court which represents CCJA. The table below illustrates the share of each member state in general and Benin in particular as far as the appeals addressed to the CCJA are concerned and the subsequent decisions since the establishment of the higher community jurisdiction up to June 2010.

N°	COUNTRY	APPEALS RECEIVED BY CCJA	PERCENTAGE OF APPEALS	NUMBER OF JUDGEMENTS MADE	PERCENTAGE OF JUDGEMENTS
1	BENIN	15	1,64%	7	1,87%
2	BURKINA FASO	24	2,62%	8	2,14%
3	CAMEROON	128	13,94%	44	11,79%
4	CENTRAL AFRICA REPUBLIC	12	1,30%	3	0,80%
5	COMOROS	1	0,10%	0	0,00%
6	CONGO	22	2,39%	6	1,60%
7	COTE-D'IVOIRE	472	51,41%	232	62,19%
8	GABON	33	3,59%	13	3,48%
9	GUINEA	31	3,37%	11	2,94%
10	GUINEA-BISSAU	2	0,21%	1	0,26%
11	EQUATORIAL GUINEA	1	0,10%	0	0,00%
12	MALI	41	4,46%	17	4,45%
13	NIGER	37	4,03%	11	2,94%
14	SENEGAL	61	6,64%	8	2,14%
15	CHAD	18	1,96%	6	1,60%
16	TOGO	20	2,17%	6	2,60%
Total		918	100%	373	100%

Source : CCJA Clerk's office²³

Côte d'Ivoire occupies the 1st position due full establishment of the Court from 1997²⁴ to June 2010, 472 appeals were received among which 232 decisions and 31 orders were delivered. Followed by Cameroun with 128 appeals out of which 44 rulings and 07 orders

²³ Flora DALMEIDA MELE et Félix ONANA ETOUNDI « Tendances jurisprudentielles de la CCJA », in Les actes du colloque international d'évaluation de la jurisprudence de la CCJA, Edition spéciale, Revue de Droit Uniforme Africain N° 003/ 4ème trimestre 2010, pp. 39-61

²⁴ Mais octobre 2001 car c'est à ce moment que la cour à réceptionné le bâtiment devant abriter ses nouveaux bureaux.

were delivered. Senegal had 61 appeals of which 08 judgments and 03 orders were delivered. Our country Benin had 15 appeals out of which 07 were judgments²⁵ and 01 order thus occupying the 12th position out of the 16 member states of the organization. These statistics indicate almost a logical parallelism between the numbers of appeals received per country and the subsequent number of judgments made with disparity on the number of appeals per country thus putting Côte d'Ivoire largely at the top followed by Cameroun and far behind by Senegal. This is probably due to lack of or insufficiency of popularization or still due to training in OHADA law. Specifically to the supremacy of the appeals originating from Côte-d'Ivoire, this can be the reason as to why the headquarters is housed in Abidjan to the detriment of other member states. Besides the distance, there is high cost related to cases which makes certain parties, following an appeal, to prefer to carry out the transactions thus not submitting the cases to the CCJA. These different bottle necks are however not destructive in nature for the recognition of the powers of the state parties in the enforcement procedures in Benin.

Paragraph 2: Enforcement procedures in Benin: The impact of the powers to auction the creditor.

The powers to auction the creditor differ according to its unsecured nature (A) or preferential nature (B).

A- The place of unsecured creditor.

The distraining creditor is the holder of the right to seize. The right to seize belongs in principle to all the creditors, including the unsecured creditor as stated in article 28 of the AUVÉ. According to the provisions of this article, the right to seize is simply pegged on the quality of the creditor. The aspect of a creditor being unsecured or preferential is not considered. Its legal basis resides, obviously in the national provisions of different civil codes that are in force in the Member states in the OHADA treaty. These provisions confer to the creditor a right of general security on the assets of his debtor²⁶.

Article 28 of the common Act pertaining to the enforcement modes eventually sets out that « only if it is about mortgage credit or preferential credit, enforcement is firstly on movable assets and if they are not sufficient to cover the debt, they can proceed to the immovable ». It therefore indicates that the principle of the right to seize is comprised of two dispensations: the first dispensation pertains to the unsecured creditor. Indeed, the latter is now henceforth bound to seize firstly the movables of his defaulting debtor. In this manner, only when the movables are insufficient that the creditor can therefore recover the outstanding elements from the fixed assets.

This law limitation of the right to seize of the unsecured creditor seems nevertheless in tandem with data of the practice. Indeed, in most cases, the seizure of the debtor's liabilities surfaces most of the times for the unsecured creditor. It also happens that the creditor himself renounces mandatory enforcement on the debtor's assets in case of insufficiency on the debtor's²⁷ liabilities. The case of unsecured creditor's renouncement happens when they find themselves in competition with the mortgage or preferential creditor whose mortgage or preferential amount is higher or equal to the value of the seized assets. In this assumption, the unsecured creditor though the holder of the right to seize has got no interest in carrying out the seizure.

²⁵ Decision n° 45/2005/CCJA of 07 July t 2005 ; Aff. Etablissements SOULES & Cie C/Sté Négoce et Distribution et Continental Bank Bénin ;

²⁶ Articles 2092 and 2093 of the applicable civil code in Benin

²⁷ Anne-Marie ASSI-ESSO, et Ndiaw DIOUF, Op. Cit., p.37

By the way, it is not because the unsecured creditor doesn't have recovery security of his credit that he should incur the risk of undergoing all the vagaries of his debtor. The protection of the creditor is therefore recognized although it doesn't have guarantee and even in cases of death. But we find that this protection suffers from discriminatory distinction to the benefit of mortgage or preferential creditors.

B- Discriminatory considerations of the preferential creditor.

It is not superfluous to remind that the benefits of laws and freedoms recognized to individuals by the international treaties and conventions must be adhered to without any discrimination as clearly stated in article 26 of the International Covenant on Civil and Political Rights.

According to the continual jurisprudence, everything happens as if the provisions of the article 26 of the aforementioned covenant in non autonomous and non absolute character form an integral part of each of these diverse legislative provisions guaranteeing the rights and freedoms irrespective of their nature²⁸. However, in the case of *Belgium Linguistic* the European Court of Human Rights indicated that Article 14 of the European Convention on Human Rights did not exclude any treatment difference²⁹. The Court reminds the criteria that it uses and the methodology in order to determine if a measure is discriminatory or not. In this respect, the Court has always rightly judged that distinction is discriminatory if it lacks objective and reasonable justification, this is to mean, if it does not endeavor to achieve a legitimate goal or if there is no reasonable relationship of proportionality between the means employed and the targeted goal³⁰. With regard to this development, we can ask the question to know if the distinction between unsecured creditor and preferential creditor can be considered as a discriminatory or not.

At the end of 117 of the common Act pertaining to the security « mortgage is a real conventional or mandatory fixed asset security. It confers to the holder the right to the suite and right to preference». It comes out of these legal provisions that mortgage remains the only true fixed asset security, having deleted other notions³¹.

Apart from their right to suite and preferential right, mortgage or preferential creditors must, in the first instance, reach out to the collateral that is attached to their credit and in situations where this collateral is not sufficient, they can therefore proceed with mandatory acquisition of the other assets from the debtor. This has expressly been stated by article 251 of the same common Act which stipulates that in matters of assets seizure, the mortgage creditor cannot proceed with the sale of the non mortgaged assets only if the mortgaged assets are not sufficient to cover the credit advanced. The provisions of article 251 of the Common Act seems to insinuate that in case of insufficiency of the mortgaged assets to cover the total credit, the preferential creditor can directly undertake the seizure of other fixed assets that were not mortgaged without going through the initial seizure of assets as demanded for the unsecured creditor.

To the contrary, if at the time of getting the mortgage, the building / structure could not any more cover the principle credit, costs and interests taking into account future circumstances in the mortgage constitution, the mortgage creditor will be within the law to take seizure

²⁸ CEDH, *Belgium Linguistic case*, of 23 July 1968, serie A, n°6, P. 33-34, para 9.

²⁹ CEDH, *Case of Lithgow and others c. / United Kingdom*, 8 July 1986, Serie A, n°102, P.66-67, para 77.

³⁰ CEDH, *Case RASMUSSEN* of 28 November 1984, Serie A, n°87, P.13, para. 35 and P.14 para.38 ; *Case CHA'ARE Shalom, Ve Tsedek c. France* of June 27 2000, file n°27417/95, para.85-88 ; *Ruling Larkos c. / Chypre* of 18 February 1999, in *Recueil 1999-I*, para.22-32.

³¹ Voir *MESSANVI F.*, In *ANOUKAHA François et Alii*, *the Securities, African Common law Collection*, Brussels, Bruylant 2002, pp. 175 and ss.

of other debtor's assets even concomitantly to the seizure of fixed assets. If need be, he will have to respect naturally the principle of subsidiary as stated above.

In general, the preponderance of the rights of the mortgage creditor is categorically significant through not only its double right of suite and preference, but also to some extent the position it occupies.

Whatever the case, much importance is accorded to the rights and actions of the mortgage creditor. In our opinion, it is a discrimination situation against the unsecured creditor. In order to convince ourselves, the goal that is targeted here is to look for the equilibrium and humanization in the solution of disputes through the mandatory enforcement procedures; which is quite legitimate in our opinion. But the means to achieve this objective are lacking the reasonable relationship of proportionality due to strong preponderance of rights accorded to the mortgage creditors as compared to the unsecured creditors.

But beyond these preferences, investment attraction can be analyzed in its protection through the alternative methods of dispute settlement.

Section 2: Alternatives Methods of dispute settlement under OHADA law

The qualitative adjective alternative is of Latin origin *alternatum* which means « doing something now, doing something else later »³². In this manner, the alternative modes of dispute settlement are those modes that provide another option, another choice to the parties.

In his analysis on the modalities of processing litigation, Professor Pierre MEYER makes reference to the distinction criteria of the methods of litigation settlement by a third party. For him, if the parties have conferred the jurisdictional power to a third party, who, by exercising this power, will settle the disputes then we shall talk about arbitration. If it is to the contrary, the mission of the third party is not to statute but suggest a settlement which will have the buy-in of both parties. In such a case, we are settling differences amicably³³ which can be the transaction, conciliation, mediation or simulated procedure or « mini trial³⁴». But it is only the arbitration which is subject to codification through the Common Act relating to arbitration.

Under the OHADA jurisdiction, the parties can opt for *ad hoc* arbitration, according to the common Act on arbitration (*Paragraph 1*), given that certain provisions of the common Act will remain applicable but others will not be applicable if the parties choose to apply centre settlement. Besides the latter, there is institutional arbitration according to the treaty and settlement (*Paragraph 2*).

Paragraph 1 : Ad hoc arbitration

The Common Act has not limited its action to commercial disputes and any person can make reference to the Act; which opens free access to this type of arbitration (A). Despite this facility, the practice of this procedure in Benin is not yet a reference (B).

³² Gérard CORNU, op. Cit., p. 52

³³ Pierre MEYER, *OHADA, Arbitration Law*, Collection D.U.A, Juriscope, Bruylant Bruxelles, 2002, p.20

³⁴ Jean Claude NAJAR, *The mini trial, chimère ou panacée ?*, 3Law Practice of International Trade, 1988, p. 451 et s. ; M. DE BOISSESON, *The mini trial, a dummy process, Les petites affiches*, 1987, n° 126, p. 134 et s.

A- Access facility

Whether it is a basis of compromising clause³⁵ of compromise³⁶, the parties are free to choose one of the two arbitration systems. *Ad hoc* arbitration is that arbitration that takes place without the support of an arbitration centre in conformity with rules that the parties or the arbitral tribunal themselves can choose subject to the imperative application laws. It is about the Common Act, institutional settlement and certain provisions of the existing national laws on arbitration³⁷. Indeed, the Common law must be interpreted as being substituted to the national laws on arbitration, but subject to all national provisions that are not in contradiction³⁸.

The particularity of the common Act is not limited to the commercial or professional arbitration of cases. In this manner, any person can seek arbitration on the rights of which he or she has free provision³⁹. This means that all differences can be submitted to arbitration on condition that these differences do not relate to laws that require intervention of a public institution⁴⁰. This refers to provisions that encourage access to justice.

On the other side, the same article 2 provides for all people, companies to seek arbitration including State, territorial public authorities as well as public establishments. These entities cannot therefore invoke their right to contest arbitration of a dispute, their capacity to compromise, or the validity of the arbitration convention. This provision naturally intends to protect foreign investors in situations where it hinders state structures to call upon whatever immunity of the jurisdiction. However, the enforcement of an arbitral sentence in this situation does not seem to be an obvious reality since in case of a sentence that is against the State or one of its institutions could lead to the application of the immunity relating to the enforcement. Nevertheless, the practice of arbitration in Benin is still faced by several loopholes.

B-The practice of arbitration in Benin

It is apparent lethargy in the practice of arbitration in Benin as research and interviews are concerned. Indeed, initiated in 2003, the institution, responsible for the settlement of disputes by a third party (arbitrator)⁴¹ could not be installed in 2006. This is the Centre for Arbitration, Mediation and Conciliation (CAMEC), a ward of the Chamber of Commerce and Industry of Benin (CCIB). This relative delay is due to lack of means which led to the search for an institutional sponsorship, namely, that of the Millennium Challenge Account (MCA) which supports the center through the provision of premises and important facilities. This could initially be considered as an element that could deal a blow to the independence and credibility of the institution. But, given the objectives of the MCA, the area of access to justice is a priority at the point where the extreme “nonchalance” observed at the center is mainly due to various factors which include among others the “infancy” of the center, lack of extension, costs and referral procedures, etc...

³⁵ Compromise clause is the convention through which parties to a contract commit themselves to submit to the arbitration of disputes which could emanate from that contract. .

³⁶ Compromise is the convention through which parties to the litigation submits the dispute to arbitration by a person or several persons. This presumes the existence of dispute rights of which the parties have the free provisions (see art. 2059 du Code civil). Now henceforth, they cannot compromise on the matters that have got public interest.

³⁷ Advisory opinion of the C.C.J.A. n°001/2001/EP of 30 April 2001.

³⁸ Boris MARTOR et alii, *Droit uniforme africain des affaires issu de l'OHADA*, Paris, Litec, Juris-classeur, 2006, p.252.

³⁹ Art. 2 de l'Acte uniforme relatif à l'arbitrage.

⁴⁰ La détermination de ces droits dépend de la loi nationale applicable dans chaque Etat partie ; sont visés par exemple des droits sur le statut personnel.

⁴¹ This is about the arbitrator as he settles in liege emptying the litigation that makes a settlement.

Statistically, it should be noted that the CAMEC has all the same around fifty gripping gears referrals for mediation and arbitration including four without a clause CAMEC (compromise)⁴². Beyond the difficulties, the CAMEC has been transparent; on one hand it chooses arbitrators to the parties' satisfaction and will as a priority, secondly, it keeps the secret of their identity and the content of decisions. Apart from access to justice offered by the CAMEC, the parties' satisfaction also requires the intervention of the CCJA a dual function that continues to raise a few eyebrows.⁴³

Paragraph 2: Institutional arbitration: the dual mission of the CCJA

Although there are arbitration centers in some states, above is the arbitration held under the auspices of the CCJA which plays for the occasion, the role of an arbitration center. Its mission is to facilitate and monitor the progress of the procedure through two types of functions including: administrative functions (A) and the judicial functions (B).

A-The administrative role of the CCJA in arbitration: the solution to the potential bottlenecks of the procedure

CCJA administers arbitration proceedings under the Treaty and the Rules of Arbitration. This administrative function is seen as the opening in conduct with the arbitration award⁴⁴. First, it appoints or confirms the arbitrator. Indeed, the parties may appoint a single arbitrator or three arbitrators to be confirmed by the CCJA. They then have the preference in the selection of arbitrators. CCJA intervenes only in cases of deficiency that freedom of choice following a disagreement between the parties as the sole arbitrator or arbitrators between the two on the third. Moreover, in arbitration with three of them, it is the CCJA who appoints the third principle, unless agreed otherwise. Without agreement about the number of arbitrators, the CCJA appoint a single arbitrator, unless the complexity of the case seems to warrant the appointment of three arbitrators. The institution fixed the seat of arbitration in case of deficiency of the Convention on this point and on the amount of the provision could cover all expenses.

Then during the procedure, the CCJA has no mandate to resolve the dispute. It comes for replacement of an arbitrator prevented due to disqualification, resignation or death or other cause duly established. It rules, when notified, the decision of competence or incompetence made by the arbitrator.

Finally, the CCJA intervenes to consider and endorse the draft award before signing⁴⁵.

Thus, we can see a double protection of the parties because they both enjoy genuine freedom in the choice of arbitrators and the consideration of their situation through the criteria for appointment of arbitrators by the CCJA. Indeed, to appoint an arbitrator, the CCJA must consider the parties' nationality and place of residence and place of residence of the arbitrators and advisors of the parties, the language of the parties, the nature of the

⁴² According to information gathered currently at the Centre for Arbitration, Mediation and Conciliation in Cotonou in April 2011.

⁴³ The question arises whether the CCJA, public body in nature, can act as a center of dispute resolution for consideration. ; In this regard, see also Philippe LEBOULANGER, *arbitration and harmonization of business law in Africa*. - Philippe LEBOULANGER, *Overview of the acts on arbitration-Narcisse AKA, The practice of arbitration and arbitral institutions in Africa: The case of Ivory coast*, in the OHADA and the prospects of arbitration in Africa , Proceedings of the Centre René-Jean Dupuy for Law and development, Volume 1, p. 155.

⁴⁴ Art. 2-28 of the Rules of Arbitration CCJA.

⁴⁵ Jean-Pierre Ancel, the review of sentencing, in the OHADA and the prospects of arbitration in Africa, Yaoundé Symposium, 1999, p. 189. International University of French-language in Alexandria. Work center René-Jean Dupuy. Note of the symposium on "The OHADA and the prospects of arbitration in Africa", ed. Bruylant, Brussels, 2000.

issues in dispute and possibly laws chosen by the parties to govern their relations⁴⁶. But the powers of the CCJA in the arbitration proceedings are not only administrative, they are also jurisdictional⁴⁷.

B- The judicial functions of the CCJA in arbitration: the assurance of effective use of powers

The award is pre-eminently a judicial decision; the arbitral tribunal is a real court. The rights granted by such a decision must be enforced without major resistance. Thus it has been stipulated in the Regulation of automatic recognition of arbitral awards which acquire the force of *res judicata* and the granting of exequatur to allow their enforcement in all member states⁴⁸. This is a direct result of a judicial nature and supranational arbitration award. This arrangement gives maximum efficiency and obvious to the award when it subtracts the award to any state court and any appeal.

But the force of *res judicata* as of right in all the States Parties shall not give rise to an execution against the property or coercion on the people as a result of an enforcement exequatur⁴⁹ which is the sole jurisdiction of the CCJA. National jurisdiction of the OHADA area receives a request for enforcement should automatically decline jurisdiction the parties cannot derogate.

In addition, enforcement procedures will not be implemented on the basis of such an award after the issuance of an execution by the CCJA. The latter is automatically recognized in the State where the execution will continue. Even when necessary for case of execution it could be implemented only by decision of the CCJA due to the principle of parallelism.

But despite all these protections to the parties, the application of the various modes of disruption of litigation often encounters significant difficulties.

Chapter 2: The difficulties of application of the OHADA law in dispute resolution.

The failure or inability of use of property obviates its acquisition. The law would be moot if the law does not envisage mechanisms for its effective ownership and its final "utilization". Thus, to be effective, human substance, form or procedure need to take the path of "execution", hence the prediction of a real use of powers, whether in terms of simplified procedures, enforcement procedures or arbitration. If for its highly liberal enforcement of arbitration does not face major difficulties, injunction proceedings and enforcement face many barriers that may be right as per (Section 1) or (Section 2).

Section 1: The obstacles of law in settling disputes

Barriers of law are those which lead the legal procedures. This is the procedural barriers in this matter (*Paragraph 1*) and enforcement immunities (*paragraph 2*).

⁴⁶ Art. 3.3 of the Regulations of the CCJA. However, these criteria are only indicative because the decisions taken in this regard are administrative in nature and not appealable.

⁴⁷ Art. 29 to 33 of the Arbitration Rules of the CCJA.

⁴⁸ On this point, Article 25 paragraph 1 of the Treaty and Article 27 paragraph 1 of the Regulations provide: "The awards made pursuant to the provisions of this title have the final authority of *res judicata* in the territory of each State Party along with the decisions of the courts of the State "

⁴⁹ Art. 25 paragraph 3 of the Regulations.

Paragraph 1: Procedural Obstacles

The procedural difficulties are related to the proof of claim (A) and collective procedures for settlement of liabilities (B) that are likely to wean the creditor to the enjoyment of his right to recover debt.

A-Evidence of a material existence of certain debts

The proof, said Hiéring is the ransom of law⁵⁰. However, this principle has many exceptions that the burden of proof is on the defendant. For example, he is to prove that the debtor is released from his debt. Indeed, because we cannot prove a negative fact, it is necessarily the debtor of an obligation to pay to prove it.

But if we look closely, the condition relating to the certainty of a claim is somewhat surprising. Indeed, at the stage of the order for payment procedure, for example, it is difficult or impossible to dismiss the idea of a possibility of contesting the claim. It can thus be realized that if the legislature gives the alleged debtor the right to object, it is precisely to enable him to contest any court of competent jurisdiction the claim for which recovery is sought.

In any event, if judges were to apply the letter and spirit of Article 1 of the Common Act cited above, creditors would have little chance of their motion to order for payment declared admissible.

In light of the foregoing, it is noted that the claim cannot be mere opportunism but must be a real right acquired by its holder. For the OHADA legislator, some characters, amount and due a claim presupposes a material existence or embodied in a document, usually written. Yet we know that in practice in many business relationships, some commercial transactions, also the most numerous in Africa, are made on the basis of trust and good faith that the contractors recognize each other. Thus, some claims to the character, amount and due may sometimes exist on the basis of these two elements (trust and good faith) without a physical existence, or at least without being materialized in writing. Especially when we know that in commercial matters, any kind of evidence, whether oral, written, testimonial or otherwise are allowed.

From our perspective, any person, with the right, holds such a claim, should be allowed to obtain an injunction to pay. It would, where appropriate, the debtor to exercise the remedies of law which are recognized if it intends to contest the existence of such a claim.

This is especially desirable that the imposition of collective proceedings for wiping off debts is, in their character and goals, a different story, even a sword of Damocles for creditors.

B-Procedures for settlement of liabilities

The Common Act of OHADA on the organization of collective proceedings for wiping off debts establishes three procedures: the preventive settlement, bankruptcy and liquidation of assets. Traditionally, bankruptcy can be defined as procedures involving justice when the merchant, natural person or legal entity, is no longer able to pay its debts. These procedures are involved to secure the payment of creditors and, wherever possible, the rescue activity. It is about seeking payment of debts in the best possible conditions⁵¹, to save the company, even at the cost of a certain departure from the rights of creditors.

⁵⁰ Dorothe SOSSA, op. cit., p. 64

⁵¹ The best payment is one that gives the highest possible dividend within the shortest time possible.

On an overall plan, there may arise a problem of compatibility. This raises the question of whether these goals are not contradictory and prioritization of these objectives particularly as they pursue leading-edge to failure down the line. From this perspective, one notes that the rescue of the company has taken a prominent place in recent legislation because of the awareness of the importance of the company in terms of employment and «social peace», in terms of investment, trade balance, balance of payments and in terms of tax revenues. One possibility is that the Common Act of OHADA is in first place paying creditors as focusing on the priority in all the bankruptcy settlement of liabilities. This is explicitly stated not only of its title, but also of Articles 1 and 2. Nevertheless, the rescue of the business is not neglected as it constitutes the final principal of two of the three main procedures established by the Common Act.

In any event, whether the reorganization or liquidation of assets, the solution regarding the suspension of enforcement is the same. They cause serious difficulties in recovering the debt. It's worse, in liquidation, creditors, more often chirographers, are threatened never to return to their rights in case of insufficient assets. Even for secured creditors or mortgage, the fact of requiring them to await the outcome of the procedure constitutes a serious invasion of rights of preference and their rights of hot pursuit.

Besides these shortcomings in the protection of the creditor must be added those from immunity.

Paragraph 2: Immunity from execution

According to the Civil Code, "Whoever is obliged personally is bound to fulfill his commitment on all real and personal property present and future⁵²» Moreover, «The property of the debtor is the common pledge of his creditors ...»

Thus, a debtor must submit to the creditor's right to appeal through the commitment of all its movable and immovable property. Immunities are therefore exceptions to the principle of seizable property of the debtor. The enlargement of the beneficiaries of his immunities (A) finally leads to a need to distinguish between those beneficiaries (B).

A- An expanded immunity

Immunity from execution or immunities of seizure are the favors enjoyed by some people under which their goods may be subject to seizure. Because of this immunity, the property of these people becomes elusive. The seizure of property resulting from the immunity from execution is paradoxically the person of the debtor and not the nature of the property⁵³. These exceptions to the principle that a debtor may be seized set forth in Article 30 paragraph 1 of the AUVE. Without providing the list of beneficiaries of immunity from execution, this article simply refers to legal persons under public law and public enterprises.

Indeed, unanimously, the State has, in law, the immunity from execution because, it decides wrongly or rightly, of its public powers. The reason for this favorable treatment and even discriminative is that the State is a person presumed solvent. Yet in this time of global financial crisis, the traditional justification may be inaccurate.

Under article 30 of the AUVE «enforcement and precautionary measures are not applicable to persons who enjoy immunity from execution. However certain debts due and payable

⁵² Article 2092 of the Civil Code

⁵³ Anne-Marie-ASSI ESSO op.cit p.41

for legal persons under public law or public undertakings of whatever form and mission, give rise to compensation with debts also certain, liquid and payable which anyone will be held against them in condition of reciprocity. "But in truth, doctrine and jurisdiction are unanimous in recognizing that the latter is quickly emerged as a temperament inadequate and limited in scope⁵⁴.

Outside the State and its branches, the Common Act appears to extend the benefit of immunity from execution to public enterprises⁵⁵.

For public institutions, a distinction should, in principle, be made between the public administrative institutions and public institutions of industrial and commercial character.

B-The need to distinguish between beneficiaries of immunity from execution

In some places, like French law, public institutions of industrial and commercial character whose mission is to engage in business activities, like the corporate body of private law are rightly subject to force execution on their property. The choice made by the legislature OHADA make no distinction between public administration and industrial and commercial ones is therefore highly questionable.

Moreover, by establishing the principle of the prohibition of enforcement and precautionary measures against the persons enjoying immunity from execution without further specification, the Community legislature seems to refer the matter to national law for this distinction. But the Common Court of Justice and Arbitration, in a recent decision, seems to have another reading of Article 30 of the Common Act on enforcement. According to the CCJA, stating in its 1 paragraph the principle that there can be no enforcement or precautionary measures against persons receiving immunity from execution and considering in its paragraph 2 the possibility of 'set up compensation to legal persons under public law and public enterprises, Article 30 establishes the general principle of immunity from execution in favor of these persons, the compensation which is possible to oppose to them can only be analyzed as a qualification to the principle of the immunity they enjoy⁵⁶. Another faith, this position of the CCJA on the meaning and scope of Article 30 of the Common Act is cited and is strongly criticized on the one hand, inhibit the development of commercial relations and secondly, a breach in the principle of equality of persons before the judge.

Without going so far, the Common Act to enforcement has reduced the consequences of immunity from execution by allowing creditors of corporations under public law or public undertakings to use the compensation⁵⁷. The condition of this compensation is subject to the existence of both sides of certain receivables and payable reciprocal. The clearing solution still seems effective, but it must be recognized that his application poses, in practice, problems, in particular as to what form the recognition by such entities or their findings debt of compensation. But these difficulties are not the only ones to hinder the enjoyment of the rights to performance of the creditor. Other barriers, especially according to fact, require special attention.

⁵⁴ François ONANA ETOUNDI, *OHADA law, thematic, annotated and commented Common Court of Justice and Arbitration (1997-2008)*, al. Practice litigation and business law, second edition, 2009, p. 390 and following

⁵⁵ See article 30 paragraph 2 AUVE

⁵⁶ CCJA, Decision No. 043/2005 of 7 July 2005 Aziablévi and Togo Telecom Company, in *juriscop.org*.

⁵⁷ See Art. 30 paragraph 1 AUVE

Section 2: The obstacles of fact.

The *de facto* barriers are those arising out of or in the current situation of the parties. Some of these situations are related to the availability of goods (*paragraph 1*) while others are caused by the debtor (*paragraph 2*).

Paragraph 1: Obstacles to the availability of property

The asset subject to seizure must not only belong to the debtor, but must also be available between himself and the third owner. However, property is available when we may dispose it via gift, settlement or by will⁵⁸. The availability of good, prerequisite legally a binding attachment missing where the debtor is an undivided (A) or when it is in a situation of apparent insolvency (B).

A-The difficulty of seizing the undivided property

The question arises as to how a creditor may be able to put under legal property that do not belong exclusively to the debtor, as a property of an estate, to make their execution. From this perspective, the creditor of an undivided, that is to say an heir, cannot claim the undivided property as it may do to property belonging to a single debtor.

The AUVE did not include specific provisions governing the entry of undivided property. Only Article 249 of the Common Act deals with the aforementioned excluding undivided estate of undivided security. Under the provisions of this article, an undivided part of building cannot be marketed before the division or liquidation that may cause the creditors of an undivided property. It follows from these provisions that the creditors of the undivided property cannot seize or sell the property to an undivided share before even the claim of each result from the conservation of such undivided property. While this solution may be explained or justified by the uncertainty of the portions of the rights of each joint, so that sharing is not reached, it is not less true to realize that this requirement prior to sharing the responsibility of the creditor is undoubtedly likely to hinder the recovery of his debt.

This is even more obvious that the challenge of sharing undivided property seems completely out of the undivided interest of the debtor, let alone the other owners who, naturally, will be inclined to oppose the procedure of forced sharing.

Moreover, under Article 253 of the AUVE, the creditor must request the registration for the land. It follows from this paper that the creditor shall not under court building unregistered belonging to the debtor without having first carried out his registration in the name and on behalf of the debtor and without obtaining a court order authorizing them to do. It goes without saying that these requirements of prior registration, as the above-mentioned prior sharing, are not likely to facilitate the forced recovery of the debt.

Moreover, except in cases of joint ownership, the creditor may be facing a completely helpless debtor, that is to say, notorious insolvent when the debt is witnessed in an enforceable.

B-The situation of apparent insolvency of the debtor

An insolvent debtor is one who does not pay his creditors⁵⁹. This is a difficult situation for

⁵⁸ Raymond GUILLIEN and Jean Vincent, op. cit. p. 456

⁵⁹ Larousse, French dictionary, 2001, p. 224

the creditor. The debtor because he can be animated by a willingness to meet its debt, but cannot do it because his heritage shows very little attachable assets. He is obliged to the creditor, in that; he is unable to find the property of his debtor to be in police hands. Far from being regarded as a case study or mere myth, the apparent insolvency of the debtor is a daily reality experienced in most member states of OHADA where we see gaps even in basics for survival.

The old method of enforcement such as servitude, imprisonment for debt is now prohibited under human rights; the only possible outcome for the creditor to obtain recovery despite the debtor's insolvency is specific performance. To do so, it is also necessary to obtain the consent of the latter without which, such performance would be contrary to the requirements of human rights.

Under specific performance, the debtor in accordance with the request of the creditor may agree to perform work of any kind in payment of his debt, provided that this cannot constitute a constraint that may violate human rights. Anyway, the debtor's insolvency is in the state of a major obstacle to the enjoyment of the rights of the creditor recovery especially when it comes to the fact of the debtor.

Paragraph 2: The difficulties caused by the debtor

They come from a share of the bad faith of the debtor (A) and secondly the possibility to grant a grace period may be grossly unfair (B).

A-The bad faith of the debtor

Under Article 1134 of the Civil Code, "the agreements lawfully entered into take the place of law to those who made them ... They must be performed in good faith."

The results of these statutory provisions that parties have a contract are required to comply in good faith their contractual commitment. Transpose to matters of enforcement, this cardinal principle of law is secular and implicates too necessary cooperation in property of the debtor that the creditor in order to safeguard their rights and mutual interests. However, sometimes one or the other comes running out with the statutory duty of good faith performance of contractual obligations. With specific regard to the debtor, the pressure made against him by the creditor sometimes leads to develop behaviors for the purpose of organizing its own unacknowledged insolvency. It can multiply the procedures and remedies in order to extend the deadline for enforcement of the creditor. It may also, pursuant to section 140 of the AUVE, which states: "The debtor may request the nullity of the seizure of a property that is not his" improperly seek the nullity of the seizure on the ground pernicious as the property seized does not belong. It may even encourage others to seek distraction of seized property that has fraudulently taken from his property in order to escape capture.

All these assumptions are sadly eloquent illustrations of the bad faith of the debtor which reduce further the chances of the creditor to the image of an improper granting of a grace period.

B-The application of the grace period

Taking into account the situation of debtor and creditor interests, the Common Act establishes enforcement procedures for the debtor through measures contained in Article 39.

Delivery of these measures that suspend the enforcement procedure is undertaken subject to conditions. The granting of a pardon becomes subject first in the sovereign discretion of the trial judge. Therefore, this mentioned above both take into account the debtor's situation and needs of the creditor in the disposition of these pardoning measures. Then, the grace period is limited to one year. Finally perishables and food debts are excluded from the scope of pardons.

Yet, with a text as clear and unequivocal as that of article 39 of the Common Act of OHADA on simplified procedures for debt collection and enforcement procedures, it happens that some courts will grant grace periods bill of exchange on the pretext, could not be more misleading, that the debtor "has shown good faith by continuing to pay the debt despite its difficulties."⁶⁰ Sometimes even against all odds, that judges have a broad interpretation of the concept of debt of food. Thus, a Court held, obviously wrongly and in flagrant violation of the uniform legislation, such as debt of food, the sum to ensure the satisfaction of basic needs «of a person such as specialized health care which must be administered urgently in Europe."⁶¹ These considerations constitute abuse in the granting of the grace period.

Clearly, Article 39 of the Common Act on enforcement seems to have in its application, missed its objective of balance in the litigation that its drafters had wanted more equitable by considering both the situation of the debtor and that of the creditor to grant or deny the grace period. This objective of the OHADA legislator is not universally shared in that it must be at the end of the procedure and not upstream to appreciate the principle of equity and reaffirm the several decisions of the European Court of Human Rights⁶².

CONCLUSION

Innovations, both in terms of swift execution means that the protection of the CCJA in arbitration are definite assets to a solution of disputes with fairness both in Benin as well as in other member states.

One realizes that the objectives of balance between strengthening the rights of the creditor and debtor protection have not been met. Protection of creditor appears insufficient to promote foreign investment in Benin despite the clear desire of OHADA legislation to protect it.

Indeed, several obstacles exist to the enjoyment of the rights to recover for the creditor. These are collective proceedings, in their characters and their goals; undermine the right of preference and the resale rights. Then, the immunities of the State, whose consequences are compounded by the creditor to extend their enterprises without distinction between legal entity and public administrative law, corporation-owned industrial and commercial, thus undermining the equality of parties before the law.

On the other hand the creditor's rights to recovery are fraught with situations of unavailability of goods that can even be caused by the debtor in bad faith, although some situations are beyond their control.

It will thus be found that in several respects the rights of the creditor, investor, domestic or foreign, seem to have been sacrificed on the altar of debtor protection and humane law enforcement in OHADA, although this humanization is ultimately a necessity.

⁶⁰ TGI, Ouagadougou, judgment No. 002 of January 14, 2003, Ouedraogo B. c / Burkinabe's funding company, in ohada .com / ohadataj. 04-04.

⁶¹ TPI Bangante (Cameroon), interim Ordinance No. 10/ord. From May 6, 2004, SAAR. SA. C / TEIXA Pascal, in ohada.com / ohadataj. 05-164.

⁶² ECHR, X. c. Norway, July 4, 1970, DR 14, p.241; Court of Appeal of Paris, Ch. Conc, April 26, 1994, Juris Data, No. 005642)

It is time for the Community legislature to revise its law on uniform procedures for debt collection and enforcement. Therefore, we propose that the legislature amends to correct all the provisions of the AOVE, interpreted easily as a breach of the principle of balance between protections of the debtor and guarantee the rights of creditor.

We must still recognize that arbitration to the parties presents benefits of ease and security especially when it comes to institutional arbitration. Indeed, the ease results from the simplification of the arbitration agreement. A mere reference to the arbitration institution is sufficient. Some institutions even offer a model clause. Security comes as the existence of a regulation rather than institutional support and equipment. We hope that efforts will continue in the direction of improved methods of dispute resolution in the OHADA jurisdiction in the form of the recent amendment to the Treaty of Port Louis adopted in Lomé on 15 December 2010.

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GUARANTEE MECHANISMS FOR THE JUDICIAL INDEPENDENCE IN BENIN AND THE ISSUES OF REFORM

By Baï Irène Aimée KOOVI*

The independence of the judiciary is governed by standards⁶³ and reading them we realize that *“there is no universally accepted definition of this concept of judicial independence, but it is about an ideal to which all nations of the world desire.”*⁶⁴

The International Commission of Jurists came up with criteria of independent judiciary in 1959 that was revised in 1981 by proposing a definition of the concept which emphasizes the idea that *“every judge is free to take a position on the matters referred to him by forming his firm conviction based on facts and law presented to him, without any unwarranted influences in the form of various pressures or injunctions, whether direct or indirect and whatever the source.”*⁶⁵

The independence of the judiciary comes from the theory of separation of powers developed by Montesquieu in his book *De l'Esprit des lois* (The Spirit of Laws), where he distinguishes between three powers (executive, legislative and judicial), which should in his view be independent of each other to prevent any possibility of arbitrary political power and ensure the freedom of citizens.

The critical point to the effective safeguarding of citizens' freedom is less in their differentiation rather than in their independence to each other.

That is why in the Law we emphasize particularly on independence, mainly as regards the judiciary⁶⁶ in dealing with the other two branches. According to Philippe Ardant *“the judge should not have to take orders either from parliament or from government (...). Its independence is a fundamental safeguard for citizens. For them, in their daily lives, it is the largest of the three powers; it is their most concerned as long as it is not subject to the other two. Its independence and authority are even more essential in periods whereby (...) the legislative and executive branches are controlled by the same majority (the “majority rule”).”*⁶⁷

The independence of the judiciary must be a real guarantee because justice is the cornerstone of the democratic state, characterized by the rule of law. The rule of law is defined as an institutionalized political power in which different bodies act under the law, and only thus,

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⁶³ African Charter on Human Rights and Peoples of 28 June 1981 and entered into force October 21, 1986. - French Community of Belgium and Agency for Cultural and Technical, Fundamental Human Rights, Reports of international and national documents, by VERWILGHEN (Mr. Michel), HUBERTY-ROLLS (Anny) and Vandenplas-Cardon (Rita), Brussels 1993, 3390 pages. - Declaration of the Rights of Man and Citizen (1789) - Universal Declarations of Human Rights of 10 December 1948 - The European Convention on Human Rights, From the handy directory of Belgian law. Supplement, Volume VI, 1990, by VELU (Jacques) and ERGEC (Rusen), Ed. Bruylant, Brussels 1990, 219 pages. - International Covenant on Civil and Political Rights (1966), relating to the International Covenant on Economic, Social and Cultural Rights (1966)-Basic Principles on the Independence of the Judiciary, Adopted by the GA / United Nations by resolution No. A / RES/40/46 of 13 December 1985. - Draft Declaration on the Independence of the Judiciary (Singhvi Declaration), adopted by the Commission of the Economic and Social Council at its fortieth session (1988).

⁶⁴ YONIBA (Salif), *independence of justice and human rights: The case of Burkina Faso*, ed. PLOOM, 1997, Netherlands, p. 2 and following.

⁶⁵ MOORE (John Gaston), *criminal responsibilities within the company*, Gazette du Palais, special issue of 26-27 March, Paris, 1999, p. 6.

⁶⁶ This is in fact commonly regarded as the defender of freedom of citizens. Thus, Article 91 of the Senegalese Constitution provides that *“The judiciary is the guardian of rights and freedoms defined by the Constitution and the law”* as well, in France, Article 66 of the Constitution refers to the Authority Assistance in terms of *“guardian of individual liberty.”*

⁶⁷ ARDANT (Philippe), *Political Institutions and Constitutional Law*, Paris, LGDJ, 12th edition, 2000, p.52. Note that this control of the legislature and the executive by the same party or parties of same coalition, a situation in which the independence of the judiciary is of vital importance to the rights and freedoms of citizens, has always been that of Senegal since independence in 1960.

ensuring compliance by the public on basic individual and collective human rights. The rule of law is opposed to the arbitrary power of men.

But the judiciary cannot guarantee citizens against arbitrariness and ensure the protection and safeguarding of their rights and freedoms of individuals and groups to the extent that it is truly independent.

It is clear that judicial independence is institutional because there is only judicial independence if the judiciary itself and its branches are independent. This involves the provision of justice with sufficient resources and an administrative and financial autonomy, without pressure or interference in its functioning.

The independence of the judiciary must also be guaranteed from an individual point of view because it cannot exist without job stability, security of tenure, appointment based on strict criteria, promotion criteria based solely on merit and competence of people as well as adequate and fair remuneration.

The historic conference of Forces Vives of the Nation from 19th to 28th February 1990 has enabled Benin to move smoothly from Marxist Leninist dictatorship to a democratic regime. It allowed the return to constitutional dispensation marked by the separation of powers through the consecration of the Constitution of 11 December 1990, which states clearly *the independence of the judiciary as an essential pillar of democracy*⁶⁸.

The justice sector in Benin is built on a solid constitutional basis⁶⁹. *“The judiciary is independent of the legislative and executive branches. It is exercised by the Supreme Court, Courts and Tribunals created under this Constitution⁷⁰.”* Thus, *“justice is done on behalf of the people of Benin. The judges are subject, in the execution of their functions, to the rule of law. Judges are irremovable⁷¹.”*

Justice is an edifice which, in Benin, is still in its initial construction phase. After 20 years of democratic renewal, the finding is not satisfying: ordinary Benin justice responds insufficiently to the ideal of developing and building the rule of law in Benin⁷². To date, no major initiative substantive reform has affected more specifically⁷³ the legal system.

In Benin, the issue of judicial independence arises mainly with the role of the Higher Judicial Council in managing the careers of judges and functions assigned to this institution and its composition. As it is established in Benin by section 127 of the Constitution of 11 December 1990, it is modeled on the Superior Council of French Magistracy, which is dominated by the executive in both its composition and its operation. Law provides that to maintain its independence, functions of a member of SCM *“are incompatible with the execution of a parliamentary mandate, the professions of lawyers or public or ministerial officials⁷⁴.”* Councils for the Judiciary are generally suspected of conspiracy with the powers and do not show in

⁶⁸ Article 127 of the Constitution of Benin of 11 December 1990.

⁶⁹ *“The judicial system established by Articles 114-138 of the Constitution of the Republic of Benin on 11 December 1990, Law No. 21 PR 26 April 1966 on the composition, organization and allocation of the supreme court, and articles 13 to 26 (Title III and IV) of the Treaty on the Harmonization of Business Law in Africa, signed in Port Louis (Mauritius) October 17, 1993 (Treaty of the Organization of African Business Law, OHADA Treaty) ”.*

⁷⁰ Article 125 of the Constitution of Benin of 11 December 1990.

⁷¹ Article 126 of the Constitution of Benin of 11 December 1990. In Mali, it is Article 81 of the Constitution of 25 February 1992. Article 75 of the construction of the Central African Republic. See DE GAUDUSSON (J. -B), NACC (G.) and DESOUCHES (Ch), *African constitutions published in French*, Volume 1, Bruylant, Brussels, 1998, 452 pages.

⁷² DJOGBENOU (Joseph), *Benin, the justice sector and rule of law, a study of AfriMAP and the Open Society Initiative for West Africa*, Publishing Network OPEN SOCIETY INSTITUTE, Dakar, 2010, p. 1.

⁷³ DJOGBENOU (Joseph), *Benin, the justice sector and rule of law*, Op., P. 1.

⁷⁴ Article 4 of the Organic Law No. 94-027 of 12 February 1999 on the Superior Council of Magistrates in Judicial Institutions: organic laws and statutes of professionals, p. 51.

most cases, any credibility, both within the judiciary itself and as well among the increasing scrutiny of the public.

Magistrates in Benin continue to report malfunctions, both regarding the appointments and the level of sanctions taken against them in disciplinary proceedings. The operation of the Higher Judicial Council is strongly criticized by the judges in the appointment and promotion “*that would not be based on objective criteria.*”⁷⁵ Due to inadequate number of judges, there is a backlog of cases in the courts. Benin has only one judge for 35,000 every inhabitants⁷⁶. Thus, many hearings are held with only one judge and one clerk, thus diluting the credibility of the decisions made. Aware of the safeguards and broad protections they enjoy; some judges have abused this freedom contradicting the requirements of their function: for example an applicant waited for 14 years before being heard⁷⁷.

After the analysis of mechanisms guaranteeing the independence of judiciary in Benin today (I), the paper proposes to revisit the sections of the Independence requiring reform (II).

1. STATE OF THE INDEPENDENCE OF THE JUDICIARY IN BENIN

1.1. Manifestations of the independence of the judiciary in the jurisdictions

1.1.1. The guarantee of the principle of appeal

There is a court of appeal in Benin divided into three chambers (Civil, commercial and social chamber) to determine appeals by courts of first instance, and second instance courts of appeal⁷⁸.

Citizens of Benin are equal before the law⁷⁹, and as such enjoy the same guarantees for their defense⁸⁰.

The hierarchy in the courts is intended to make a better quality of justice by allowing the dissatisfied applicant with the decision at first instance to execute appeals by entering the higher court. If in this case, the court makes a decision contrary to that of the first instance, this would not constitute a violation of the autonomy of the decision of the lower court as each jurisdiction is free to decide as they wish and whatever its place is in the hierarchy. The principle of appeal strengthens the independence of the judiciary.

1.1.2. The influence of the bench on the independence of the court

The type of judgment training has an impact on the independence and impartiality of the

⁷⁵ SY (D.), “*The condition of Justice in Africa: the example of Senegal*”, in Challenges of Fundamental Rights, Proceedings of the Second day of scientific network, Fundamental Rights of the Francophone University Agency (FUA), held in Quebec City from September 29 to October 2, 1999, Aupelf-Uref, ed. Bruylant / AUF, 2000, p. 354.

⁷⁶ The special status of judges and the judicial system in Benin, Juriscope, 1997, p. 2.

⁷⁷ MONTCHO (Eric), Contribution to the study of a concept of variable content: the reasonable time in private law, UAC, UNESCO Chair, 2009. This thesis clarifies the issue and draws the attention of policy in the sub region to address this breach of the right to be tried within a reasonable time.

⁷⁸ The courts of the second degree are hearing appeals. The Court of Appeal, on application by the party aggrieved by the judgment of the trial judge, shall review the case. It may set aside the first judgment. It makes a stop. The Court of Cassation is the highest court. In Benin, it is called the Supreme Court. Seized by an appeal, it rules on the legality of the court decision ultimately submitted to it. Supreme Court or Court of Appeals judge is right, not a judge of fact. If the law was properly applied, it dismissed the appeal. If the law was incorrectly applied, it breaks the previous decision and refers the case to a court of the same degree as that which ruled, for it considers the merits again. If this second decision is again the subject of an appeal is that it reveals a problem of interpretation of the rule by the trial judges, when the Supreme Court or Court of Appeals decides in plenary session.

⁷⁹ Equality before the law is ensured by the state as required by Article 26 of the Constitution of Benin, “the State guarantees everyone equality before the law without distinction of origin, race, sex, religion, political opinion and social position. The man and woman have equal rights ...”.

⁸⁰ Article 9 of Law No. 2001-37 of 27 August 2002 on judicial organization in the Republic of Benin.

court or judge? At what level is the best guarantee for judges as well as for the defendant? According to Pierre DRAI⁸¹, “a single judge or bench of judges, we never talk enough.”⁸² Indeed, these two types of judgment have advantages and disadvantages.

The collegiate courts are considered to be those with the guarantee of righteousness, because they provide opportunities for discussion and exchange of ideas among their members all the time on the bench. In addition, they support the training of young judges who make up colleges of judgment. In addition, they offer the guarantee of independence and impartiality, to the extent that they ensure the anonymity of members and a mutual control within them. Therefore, it is said that the single judge is unjust judge⁸³.

However, the collegiate verdicts are sometimes illusory in practice, for various reasons that may find their sources in the organization of the court or the judges of personality (lack of humility, shyness ...). Under these conditions, can we still talk of independence and impartiality of the collegiate courts? Moreover, in terms of the cost of justice and efficiency of courts, collegiality is less favorable because it requires more manpower than the single judge and is slower in making decisions.

1.2. Manifestations of the independence of the judiciary by judges

1.2.1. The guarantee of judicial impartiality

According to the Strasbourg Court, the court's impartiality is determined not only by the subjective test (subjective impartiality of the judge), but also by the objective test or organic (organic or objective impartiality of the court). The court of law, must give all the appearance of organic guarantee to exclude any legitimate doubt in the public mind. In a judgment of 1996, the European Court of Human Rights ruled that a jury in a court of general goal delivery was not impartial because of racist remarks and witnessed by one of the jurors⁸⁴. The credibility of the judiciary is well indexed. According to Philippe Jestaz, “not only the right reflects the prevailing ideology, but it translates it into action.” Thus the judge's decision cannot be a philosophical work because according to Jestaz, while the writings of a philosopher committed a priori that its intellectual responsibility, our laws are made to involve the entire society. The law acts as a speaker⁸⁵. But beyond the rules and principles and material resources, independence and impartiality are questions of mind, personality and individual will. A judge or court of law is impartial when it is neutral vis-à-vis the parties and gives them all along procedures which carry equal or balanced treatment. According to the Strasbourg Court, there is doubt about the impartiality of a tribunal when in national law, in the composition of that court of law, *a judge may order the continued detention and committal proceedings and then preside the criminal court which will try the accused*⁸⁶. *It is the same whether a prosecutor has exercised in the same case of functions of investigation and prosecution*⁸⁷.

⁸¹ He is the first President of the French Court of Cassation. , In the preface to a book published on the subject, prefaced with the Collective, The single judges, reorganization or dispersion of litigation.

⁸² CADIET (Loïc), Gridel (Jean-Pierre), HERON (Jacques), LAMBERT (Christian), MESTRE (Jacques), NORMAND (Jacques), PAILLET (Michel), PUTMAN (Emmanuel), Renoux (Thierry), VIDEL (Dominique) and VITU (André), The single judges, reorganization or dispersion of litigation? (With the coordination of Bolze (Christian) and PEDROT (Philippe) ed. Dalloz, Paris 1996, p.128 p. VIII.

⁸³ Taisne (Jean-Jacques), Judiciary, 4th Ed Dalloz, Paris 1994, 172 pages: p. 14.

⁸⁴ ECHR. decision Remliy c / France, April 23, 1996, <http://www.enm.justice.fr>.

⁸⁵ JESTAZ (Philippe), “The Law” 3rd edition Dalloz, Paris, 1996, p. 37.

⁸⁶ Ben Yaacoub c / Belgium, judgment of 27 November In 1987. See Vincent (Jean), GUINCHARD (Serge), Montagnier (Gabriel) and LARINARD (Andre), justice and its institutions, 4th Ed Dalloz, Paris 1996, 867 pages, p. 59 and the following.

⁸⁷ Hubert case, judgment of 23 October 1990; Pauwels Case, 26 May 1988 (Belgium), justice and its institutions. Ibid. p. 59 and the following.

The procedure guarantees impartiality as long as it defines objectively the precise rules. A procedure would be just without the parties subject to the will of the judge, who would admit the use of one another and declare inadmissible according to his mood.

The scope of the principle of tenure turns indirectly on the regulations relating to the progress and discipline.

As par civil servants, recruitment is a "requirement", even if it is "agreed", it transforms the state agents into "government agents"⁸⁸. This unilateral nature of recruitment does not imply an authoritarian: the candidates for the judiciary in a democratic state know that once recruited, they will benefit a priori sufficient safeguards to practice their profession independently. Indeed, in this case, it is protected through their status, containing structural safeguards related to the organization of the judiciary, and formal guarantees of a matter allowing them to execute their profession free from any dependence.

In a system where the execution of the judicial function is a profession, young practitioner devotes his working life until retirement age; it is natural that the career spans through from lower to higher grades in the hierarchy.

The achievement in Benin made the magistrates to be classified in the Class A level 1. According to the status of permanent officers of the State, the magistrate's careers take place in twelve levels divided into five grades, three of which are normal, one which is exceptional and the other one off grade.

The initial, intermediate and final grades have three levels each, the exceptional and off grades have a single level each. The time required to pass a level is two years until the index of 1020 of three years beyond⁸⁹.

The judge's prerogative to execute "*juridictio et l'impérium*"⁹⁰, that is to say, has the right to settle disputes and make a reasoned decision after a debate between the parties. The parties are forced to execute the solution enacted by the judge, if necessary by force, as provided by the enforcement.

Under the authority of the judge, he has the ability to choose and retain authority for a workable solution that is imposed on litigants. The election of judge is not a method of selecting who can inspire confidence in Africa to litigants, as it happens in countries of Anglo-Saxon law, including the U.S., Canada and the United Kingdom?

The impartiality of the judiciary and the judge himself result into judicial independence.

1.2.2. The principle of security of tenure of judges

1.2.2.1. Objectives sought

"The tenure of the magistrates is essentially a guarantee of the proper administration of justice, and especially a guarantee of the independence of judges towards the central government. Because it should be essential that individuals may rely on the independence and impartiality of the judiciary"⁹¹.

⁸⁸ This is the conception of Public Service in France that the doctrine (André and Georges Hauriou BURDEAU) has long advocated and which is found in the civil service of most French-speaking African states.

⁸⁹ Article 36 of Law 2001-35 of 21 February 2003 on the status of the judiciary.

⁹⁰ Cabrillac (Remy), *Dictionary of legal vocabulary*, Paris, Litec, second edition, pages 231 and 209. JURISDICTI = power to decide a dispute. Imperium = power of decision.

⁹¹ *Support Defenders of human rights in Central Africa*. Report of a program of Legal Cooperation of the 9 to 16 January 1996, p. 241/45.

As it is well said by Professor Loïc Cadiet, the “*rights of the judge ensures those of the litigant.*”

⁹² There is no shadow of a doubt that the principle of tenure protects the judge against arbitrary powers of the President of the Republic, who has the power to appoint judges, to be the Attorney General, Minister of Justice and other various positions. While the Council of the Judiciary plays a considerable buffer opinions that are generally consistent with advice binding vis-à-vis the executive, in African countries, the composition of this body is prominent as more members are appointed by the executive. It is in this case foreign dignitaries get into the body of the judiciary. However, the tenure of the magistrates is still a guarantee justice in that it provides the serenity from the magistrate seat, which in principle should not fear any reprisals from the executive through its allocation. The rule of tenure, according to Professor Loïc Cadiet, is absolute.

From our perspective, the absolute nature of the rule of tenure is that, even in progress, the magistrate seat cannot receive an assignment against his will. The absolute nature of the rule also comes from the fact that it benefits all the magistrates, whatever position they hold.

1.2.2.2. Statement of principle

1.2.2.2.1. Consent required of the magistrate in case of reassigning

Consecrated in Francophone African constitutions⁹³, guaranteeing security of tenure of judges is taken up and reiterated in all the texts of laws on the statute of the magistracy of West African Francophone countries⁹⁴. Under this security of tenure, a judge may be assigned to a position without his consent. Say that a judge is irremovable means that it can be any one individual measure taken against him by the government (revocation, suspension, moving, setting a retired prematurely), outside conditions provided by law. *We measure easily the importance of such a principle which guarantees right justice*⁹⁵. Justice is thus normally protected against the influences of games and political interests, financial and others. The tenure of the magistrates thus reinforces the independence of the judiciary.

Under the principle of tenure, a judge cannot be transferred if he objects; however, in cases of misconduct, a judge may be a shifted to a new office at the end of regular disciplinary proceedings.

The Constitutional Court of Benin strongly affirmed the need to respect the principle of independence of justice in cases where political power was trying to contain the judiciary.

On basis of the provisions of the Constitution and the Statute for Judges whose contents are essentially the same from one country to another, the Constitutional Court of Benin, by Decision DCC 06-063 of 20 June 2006, decided “before being appointed to another position, the magistrate seat must give consent.” The new assignment of a magistrate against his will,

⁹² CADIET (Loïc), *Discovering Justice*, Dalloz, Paris, 1997, p. 182.

⁹³ Examples: - Article 82, paragraph 2, of the Constitution of Mali, “*the judges are irremovable.*” - Article 998, paragraph 3, of the Constitution of Niger, “*the judges are irremovable.*”

⁹⁴ Other examples: - Status of the Judiciary of the Ivory Coast, Article 6: “The judges are irremovable. They can therefore receive without their consent, a new assignment even in progress. - Status of the Judiciary of Burkina Faso, Article 5: “The judges are irremovable.” They can not receive new assignment, even as a promotion, without their consent unless disciplinary measures. Unless, when the exigencies of service so require, they can be moved by the appointing authority, after due notice and reasons of the Supreme Council of Magistracy (CSM) . In this case, when the judge is appointed to a function corresponding to a lower grade than his own, the appointment accurate travel time which shall not exceed two years. “- Status of the Judiciary of Benin, Article 23” judges are irremovable. Consequently, the sitting judge can not receive an assignment without new consent, even in progress. The tenure of the sitting judge is not a personal privilege to the judge. It aims to ensure the independence of justice. “ Article 24: “The allocation of the sitting judge is subject to its consultation on both the new position offered to him and where he is called to exercise the one hand, and his prior consent of the other. “

⁹⁵ Perrot (Roger), *Judicial institutions*, 12th edition, Montchrestien, Paris, 2006, p. 300.

and without obligation of regular disciplinary proceedings is unconstitutional.

Moreover, in an emergency, the Constitutional Court may suspend the execution of a decree of the assignment from the magistrate seat.

By Decision DCC 06-018 of 6 February 2006 issued on application of 03 February 2006, the Constitutional Court of Benin has ordered a stay of execution of a decree appointing a judge to the Court of Appeal on the grounds that the Cotonou investigative measures have been ordered. This decision confirms the principle that without the agreement of the judge, only a shift of office as a punishment is possible, by decision of the Higher Judicial Council before a disciplinary case against the person by Minister of Justice. As a constitutional principle, the constitutional court, in case of referral, exercises control and censorship as necessary.

1.2.2.2. Procedural rules governing the assignment of a magistrate

According to the status of the Judiciary of Benin, *the judge called upon to be assigned must be consulted by the Minister of Justice, both on the new role offered to him and where he is to perform this new function*⁹⁶. This consultation must be written, as well as the response.

The legal requirements regarding the assignment of a judge were inspired by a principle of law made by the Constitutional Court of Benin at the end of the Decision DCC 97-033 of 10 June 1997. Received two applications for review of constitutionality of two decrees reassignment of judges, the constitutional court affirmed that *“the principle of tenure requires the magistrate seat to have been individually consulted both on new functions that are proposed and the exact places where they are called to exercise them; that the elements of this consultation are the minimum requirements of the procedure required to guarantee the independence of the magistrates, that the aforementioned letter of Attorney General, Minister of Justice, Legislation and Human Rights since only the place of employment does not satisfy the principle of tenure of judges, and accordingly, the Trust brought decrees do not comply to the Constitution.”*⁹⁷ This decision illustrates the importance of the role of constitutional courts in the effectiveness of the guarantees of independence, impartiality and immovability.

1.2.2.3. Limitations on the principle of tenure of judges

There are two limitations on the principle of security of tenure of judges: the absolute security of tenure is mitigated on the one hand, by the possibility of moving the office of judges on the bench as punishment, by decision of the Disciplinary Board. On the other hand, under the rule that rule does not preclude the judiciary magistrate, on his decision to the head of the court, changed functions within the jurisdiction, or receiving delegations of functions .

However, unlike other countries, the legislator in Benin has not spent the rule of the appointment of a magistrate against his will for “need service” as a derogation from the principle of tenure, perhaps because of the ambiguity surrounding this concept.

1.2.3. The hierarchical powers of the Executive

It may seem strange and paradoxical to evoke the notion of hierarchy in terms of justice since it implies an idea of subordination which it is difficult to conceive in a field like that of

⁹⁶ Article No. 24 of Law No. 2001-35 of 21 February 2003 on the status of the Judiciary in Benin.

⁹⁷ Constitutional Court of Benin, Reports of Decisions and opinions, 1997. ed. CNPMS Porto-Novo, p. 137-141.

justice. We must accept the idea that “justice, as a public service, is also affected by the hierarchy.”⁹⁸

The hierarchical structure allows not only the judiciary, but it protects the citizen against arbitrary decisions through which he could possibly exercise when the subject of a court does not give satisfaction.

This principle of hierarchy affects both the judges and courts and is used to locate responsibilities to ensure the cohesion of the judiciary. The judge’s seat remains master of its decision and no one can accuse him of having ruled in favor of one litigant rather than another. The peculiarity of the judicial hierarchy is the fact that the sitting judge is not under the direct authority of his superiors or jurisdiction, contrary to public prosecutors.

The judiciary has two branches: the judges, whose main function is⁹⁹ to judge and public prosecutors¹⁰⁰, whose mission is to defend society.

It is necessary first to recognize the fundamental distinction between the magistrates and public prosecutors to better understand the issue of whether the judiciary and the judicial bench standing receive the same degree of independence.

1.2.3.1. The absence of formal hierarchical authority of the Executive on the judges’ seat

The hierarchy between people creates more complex reports and raises more questions about the independence of the magistrate. First, it has no application to hierarchical decision making, it is the sole conscience of every judge who is not accountable to his or head of neither the court, nor whatsoever. The sitting judge is master of its decision and no one may accuse him of having ruled in favor of one litigant rather than another. The judicial function involves an irreducible element of autonomy that is the sole conscience of every judge.

However, the heads of courts are vested with administrative powers that may constitute threats to judicial independence if they are not limited to operational requirements. It is their job, because the power to regulate the conduct of hearings, to provide for assignments and evaluate the professional activity of judges is under their authority (important for advancement)¹⁰¹.

1.2.3.2. The execution of hierarchical powers of the executive members of the prosecution

The situation is quite different for the public prosecutors who are in a genuine relationship of dependence vis-à-vis their hierarchical authorities, even in their decision making, as opposed to the magistrates¹⁰². Indeed, in Benin as in France, for example, “the public prosecutors are under the direction and control of their superiors and under the authority of the Keeper of the Seals, Minister for

⁹⁸ PERROT (Roger), *Judiciary*, 12th edition, Montchrestien, Paris, 2006, p. 76.

⁹⁹ Head office functions exercised by magistrates: they educate and settle disputes by making judgments or orders. They are said to form the bench or seat because they judge on the bench.

¹⁰⁰ These are the agents of the executive, the courts and representing the interests of the state and society. The functions of the prosecutor or prosecution shall be exercised by general magistrates, prosecutors and their deputies. Their role in criminal cases, initiate and prosecute, and in civil or commercial, to demand what they consider to be consistent with the proper law enforcement by presenting about each case of representations to the court that it is never forced to follow. Thus, their mission is to defend society, to be lawyers, and ask the sitting judges to enforce laws. They are said to form the standing judiciary because they speak to the audience standing.

¹⁰¹ PERROT (Roger), *Judiciary*, 12th edition, Montchrestien, Paris, 2006, p. 79. Even if, safeguards surrounding these powers to prevent arbitrary on their part, the judge is not immune to pressures or sanctions from his superiors, if the reports that link them in the service are not of perfect serenity.

¹⁰² Certainly there are improvements ...

Justice.¹⁰³ "The prosecutor receives complaints and denunciations and appreciates the action to be taken¹⁰⁴»: this principle establishes the rule of prosecutorial discretion. Thus, the prosecutor, who returns to the execution of public action, always has the option either to prosecute or to operate a "no further action", that is to say not to sue the perpetrator of an offense under the criminal law, even if the offense seems to be established. It is hierarchically subordinate to the Prosecutor at the Court of Appeal to always give instructions that charges be brought. The prosecution staff may be assigned without promotion by decree of the Council of Ministers, a post to another if they so request or *ex officio* in the interest of service with the assent of the Higher Judicial Council¹⁰⁵. This hierarchical subordination of Prosecutors is explained by the fact that only its subordination to a politically accountable authority at the national level can promote a consistent enforcement policy and give legitimacy to its initiatives¹⁰⁶

This provision, taken by most African countries has generated much controversy and criticism. It remains in effect in the heart of current concerns about the independence of the judiciary, some wanting a complete break between the prosecution and the government. Public opinion does not always understand this provision allowing the Minister for Justice to give instructions to a magistrate, especially when politicians are mixed with the public affairs revealed by the media. A suspicion quickly born in public opinion when the minister, referring to the principle of discretionary prosecution, asked the prosecution of "no further action" to the cases. The dependence of a magistrate seems to be a thing against nature.

However, there is a fix to the power pulse of the Prosecutor of the Republic: in fact, the victim of the offense may, if not exercised, at least to public action in a civil plaintiff, which is i.e. by entering the jurisdiction of a claim for compensation. It can overrule the refusal of the prosecutor to prosecute, so at least the victim can claim personal injury. However, these patches are very inadequate.

Upon observation of texts relating to the status of judges in almost all countries studied¹⁰⁷, it appears that judges are not completely in control of direct or indirect political authorities. Almost everywhere, the judge is under the control of the Higher Judicial Council, chaired by the Head of State. The main function of this Board is to ensure compliance with the rules of the public service of justice and protection of judges against any pressure from political powers. It is in this spirit that the independence of judges and their tenure are principles that have been recognized as a guarantee for the proper administration of justice. However, observers are unanimous in observing the existence of dysfunction in this important organ that continues to generate debate and reform projects.

2. THE NEED FOR A JUDICIAL REFORM

Consolidating the rule of law and freedoms excluded any subordination of form and substance of the judiciary to the executive. The current system recognizes "the accessorisation" of the judiciary to the executive. The fact that the Head of State chairs the Higher Judicial Council is symbolic of the attack on the independence of justice¹⁰⁸.

Judicial independence is proclaimed profusely, constantly violated by the introduction of the Higher Judicial Council and insufficiently protected by the legislature of Benin¹⁰⁹. To correct this state of

¹⁰³ Article 6 of Law No. 2001-35 of February 21, 2003, *Judiciary: organic laws and statutes of professionals*, Reports, p.86. See Article 5 of Ordinance No. 58-1270 of 22 December 1958.

¹⁰⁴ Article 40 of the Code of Criminal Procedure

¹⁰⁵ Article 6 of Law No. 2001-35 of February 21, 2003, on the status of the judiciary.

¹⁰⁶ JEOL (Michel), *The new prosecutor has arrived*, Gazette du Palais, 1994.2, doctrine. P. In 1363.

¹⁰⁷ This is the case in Benin, Burkina Faso, Cameroon, Egypt, France, Gabon, Guinea, Madagascar, Mali, Niger and Niger or Senegal.

¹⁰⁸ DJOGBENOU (Joseph), *Benin, the justice sector and rule of law*, Op., P. 7.

¹⁰⁹ DEGNI-SEGUI (Rene), *The Human Rights in Francophone Black Africa: Theories and Realities*, Imprimob, Abidjan, 1997, p. 196.

affairs, it seems appropriate to remove the supervisory powers of the Executive (A) and lead an active fight against corruption (B).

2.1. Deletion of the supervisory powers of the Executive

2.1.1. At the Council of the Judiciary: disconnection by the executive

Benin is still governed by the French model of a Superior Council of Magistracy (SCM) dominated by the executive in its composition as well as in its operation. The law provides that to ensure its independence, functions of a member of SCM “are incompatible with the execution of a parliamentary mandate, the professions of lawyers or public or ministerial officials¹¹⁰.” It appoints the members of the executive¹¹¹ as a member of the Higher Judicial Council, which hinders its goal. The Superior Council of Magistracy shall consist of nine members of law and 3 other members. Established in Benin by section 127 of the Constitution of 11 December 1990, its membership includes two classes namely members of law¹¹² and other members¹¹³. The term of office of the three persons other than members of law is four years renewable once¹¹⁴.

The most important is that the executive controls the administration of the Council of the Judiciary through *the appointment of the person responsible for daily management and the definition of its agenda. The Executive shall appoint a Secretary General of the Higher Judicial Council who is responsible for the daily management. This must be a judge at least 10 years of career, his duties boil down to manage the documentation and the archives of the Higher Judicial Council, ensure the updating and maintenance of personal files of judges and ensure close attention to their career¹¹⁵. It should be noted that apart from the functions of the Secretary General of the Higher Judicial Council, the Act provides that it is the President of the Republic who convenes the meetings of the Higher Judicial Council and shall determine the agenda of the day¹¹⁶, although it is recognized in any other member of the Higher Judicial Council the right to request a meeting of the Council and, if so, to inform the Secretary General to draft agenda¹¹⁷.*

By controlling its operation, *the executive supervision ensures even more obvious in the SCM. The Council funding for the Judiciary is provided on a budget that is passed in Parliament under the budget of the Presidency of the Republic¹¹⁸.*

The functions of the Higher Judicial Council other than those performed in disciplinary body makes this a secretariat or a consultancy serving the Executive, rather than autonomous decision-making authority. The Constitution sworn by the President of the Republic guarantees the independence of the judiciary, the law states that the Council of the Judiciary “shall assist the President of the Republic in its role as guarantor of the independence of the judiciary” and it is for this reason that the Council of the Judiciary “is consulted on all matters concerning the independence of the judiciary and the security of judges.” The Higher

¹¹⁰ Article 4 of the Organic Law No. 94-027 of 12 February 1999 on the Superior Council of Magistrates in Judicial Institutions: organic laws and statutes of professionals, p. 51.

¹¹¹ This is about the President of the Republic and Minister of Justice.

¹¹² Members of law are: the President of the Republic as President, President of the Supreme Court as first vice president; the keeper of the seals as the second vice president; the Presidents of Chambers of the Supreme Court, the Attorney General at the Supreme Court, member; the President of the Court of Appeal, and the Attorney General at the Court of Appeal.

¹¹³ This is an external member to the bench known for its intellectual and moral qualities, member and two judges whom prosecutors, members. Members, other than those of law, are appointed by decree of President of the Republic. In cases of multiple appellate courts, the appointment of the President of the Court of Appeal, as well as the Attorney General at that court, as in points 6 and 7 of this article, is done in the ballot.

¹¹⁴ Article 2 paragraph 4 of Law No. 94-027 of 12 February 1999, p.50.

¹¹⁵ Article 7 of Law No. 946027, p. 53.

¹¹⁶ Article 10.2 of Law No. 94-027, p. 53.

¹¹⁷ Article 10.2 of Law No. 94-027, p. 53.

¹¹⁸ Article 9 of Law No. 94-027, p. 53.

Judicial Council is the President of the Republic “any proposal to guarantee the magistrates of good working conditions.¹¹⁹” The executive hands over management of the careers of judges. When a magistrate to perform duties or extra-judicial activities, the Justice Minister who decides whether such functions or activities, or not, likely to undermine the independence and dignity of the magistrate and, where appropriate, authority in the execution with the assent of the Higher Judicial Council¹²⁰. Similarly, it is the minister of justice who allows participation of a judge in organizations or special commissions¹²¹. The activity of each officer leads each year to establish an individual record containing a numerical score of 20, a general assessment and all information on his professional and moral which are addressed to the minister of justice¹²². Decisions for advancement in rank are taken on this basis. The process of advancing through the ranks of the judiciary is not capable of guaranteeing the independence of the judiciary due to the strong involvement of the executive. The Minister of Justice shall forward the individual notes of a commission of judges who plans for an annual progress and prepares the first advancement proposals before submission to the Higher Judicial Council. The Promotions Committee is composed of 12 members; of which 2 represent the Minister of Public Finance and his counterpart¹²³. This committee is chaired by the Minister of Justice who determines the mode of operation of this institution. After this process of analysis and proposals by the Superior Council of Magistracy, promotions in rank judges are issued by the President of the Republic on a proposal before the Council by the Promotions Committee¹²⁴. Insofar as the Higher Judicial Council, through the method of selecting its members and the phenomenon of recovery policy which is the subject does not guarantee the independence of the judiciary, there is no doubt that the personal involvement of President of the Republic in the process of promotion of judges would have a negative impact on the independence of the judiciary. As such, it seems appropriate to cut the link between the judiciary and the executive in Africa.

The Constitution of 11 December 1990 sworn by the President of the Republic the guarantor of the judiciary and thus provides a legal cover that serves to justify the submission of justice to the executive. Such submission is manifested in several ways. The Higher Judicial Council is the supreme authority of the judiciary, but it is itself under the authority of the President of the Republic. The latter appoints and dismisses judges. We consider it important to remove all organic manifestations of the submission of justice to the executive.

- The representatives of the executive¹²⁵ should cease to be part of the Higher Judicial Council, which should be composed solely of judges;

The Higher Judicial Council should be composed and conducted only by magistrates and by independent members of the government. Such was the suggestion of the APRM report on the state of governance in Benin. And the Chair of the Higher Judicial Council should be the President of the Supreme Court among the measures needed to strengthen the justice to give it «*independence and autonomy of decision*¹²⁶.»

- The appointment and dismissal of judges should also be reviewed.
- The intervention of the President of the Republic should be limited to the appointment of court presidents. These should appoint other judges and determine their place in the system, in agreement with the Superior Council of Magistracy.

¹¹⁹ Article 11 of Law No. 94-027, p. 54.

¹²⁰ Article 11 status of the judiciary.

¹²¹ Article 20 status of the judiciary.

¹²² Article 50 status of the judiciary.

¹²³ Article 56 status of the judiciary.

¹²⁴ Article 55 status of the judiciary.

¹²⁵ This is about the President of the Republic and the Minister of Justice, Keeper of the Seals, legislation and human rights.

¹²⁶ African Mechanism on Peer Review (AMPR), Evaluation of Governance: Republic of Benin, in November, 2007, p. 102.

2.1.2. Courts Level: the assurance of autonomy management

Courts are headed by a president, who is one of the magistrate's courts which carries a full office. *The hierarchy is a reality and every president is responsible for court orders that are given. The presiding judge is the guarantor of all decisions made within its jurisdiction. He orders the expenses of the tribunal, is responsible for discipline in the jurisdiction, and oversees the operation of the Registry and staff, working under the direction and supervision*¹²⁷.

It should be noted that this autonomy is purely superficial since it does not include the management of financial and human resources. This is managed by the minister of justice who "manages" the heritage and court resources. The Ministry of Justice manages the career of the administrative staff and is consulted about the judges. It is the authorizing real property administration and financial disbursement. Reform is necessary.

2.1.3. Judges level: reflection on how best to recruit

2.1.3.1. Cost / benefit of the appointment of judges

The effectiveness of judicial independence depends on reports of the judge with political powers. The Superior Council of Magistrates should be given the power to execute powers vested in the Minister of Justice in managing the careers of judges.

Just like in France and in francophone Africa, where the system of appointing judges by the executive is continuing scrutiny of the Council of the Judiciary in the appointment of judges. Despite all that two risks are to reveal.

The first is the risk of government interference in the judiciary through the choice of magistrates to a particular function. This risk is particularly striking that often in Francophone Africa, the change in government in the Minister of Justice, is often followed by the change of personnel officer positions assigned to the most sensitive (Prosecutors at the Courts of Appeal, Presidents Courts of Appeals, Chairman of the courts, prosecutor in the largest cities of the country, some judicial positions such as positions of Dean of investigating judges, the judge in charge of business affairs, etc ...).

The second risk in relation to the appointment system is based on the contradiction between the two roles of the President of the Republic: he represents the executive powers, appoints judges, while guaranteeing the independence of the judiciary. How possible in a regime of separation of powers, the head of one of these separate powers can be the guarantor of another power?

This paradox does not end to intrigue critics. So the only solution would the appointment of judges by judges? And at that time, isn't there a risk to achieve what might be called the government of the judges? Finally, it does amount to litigants in general, that is to say the entire population, to choose the system of appointing their judges because of their culture and their needs? And in which way?

2.1.3.2. Cost / benefit of the election of magistrates

As par Cyril Noblot and Françoise Labarthe, we believe that every system of appointing judges, election, or appointment, or even the aldermen or mixing, have their weaknesses.

¹²⁷ Article 39 of Law No. 2001-37 of August 27, 2002, *Judiciary: organic laws and statutes of professionals*, p. 71.

In countries governed by common law, the concept of the judiciary involving judges and prosecutors is unknown, constitutional guarantees are only benefiting the sole judges. France, Africa western francophone, Germany, Italy, Spain, Belgium, and Switzerland, the magistrates and prosecutors are formed by a single body. In countries of common law, judges are often elected from the former most experienced and brightest lawyers; however there are three major concerns.

The first is the wish of judges to see how to renew their mandates which lead them to be biased in some cases, and therefore no longer be independent.

The second is the lack of enough skills and experiences to guarantee the independence and impartiality of judges. In the election system as a system of appointment, what matters is the freedom of conscience and the mindset of staff judges.

The third is the system of electing judges which induces a risk of politicization of the appointment of persons to these functions, which may be reflected in the performance of duties.

The essence is in our opinion at two levels so as to guarantee the independence and impartiality of the judge. On the one hand, there are at the first level, constitutional guarantees and their effectiveness in practice. On the other hand, there are personal guarantees based on the personality of each individual judge may be inclined to servility or independence, apart from all kinds of collateral. Therefore, it should follow objective criteria and rigorous recruitment.

2.1.3.3. The influence of the legitimacy of the judge's independence

Reflection on the conditions most favorable to the judge's independence, may finally lead to questions about the source of its legitimacy.

Where does the judge draw his legitimacy? The source of that legitimacy does it confer a lesser or greater independence?

From our point of view, the elected judges derive their legitimacy from their election, their mandate, and constitutional and legislative which form the basis of those mandates.

As par the appointees, their legitimacy comes from the Constitution and other laws of their countries which establishes their designation and appointment of administrative acts that see these appointments.

But beyond all manner of appointment, the legitimacy of judges is, we believe in the efficiency with which they perform their missions. Similarly, the legitimacy of judges is a measure of credibility they have with people and the satisfaction that people derive from their duties. These functions, we recall, are essentially to regulate and maintain order and social peace, without which there can be no prosperity and development in a country.

Under these conditions, what matters most to the independence and impartiality of judges, is not the source of their legitimacy, but rather the efficient accomplishment of their mission which is to say the right and rightly humanely. The more the magistrates will approximate this ideal of natural justice, the more independence and impartiality will increase the benefit of their societies.

2.2. The fight against corruption in the judiciary

Several situations hamper the independence of the judiciary in black francophone Africa. Among these is corruption. In Benin, a decision of the Superior Council of Magistrates, a judge serving in a court in the north of the country which has received money in a case before it was canceled. Before him, a president of a court of South West was also removed for being corrupt in a case he tried. There was also the case of another judge of the court of Porto-Novo in Benin, which has been removed for corruption denounced by a police captain in a murder case. The trainee judges are amenable to the Higher Judicial Council. A listener of justice, having started early to defraud many litigants and other citizens with whom he had various relations, was simply removed by decision of the disciplinary body. Even senior judges have not been spared. Indeed, some years ago, the Attorney General of the Court of Appeal of Cotonou has been removed for having misappropriated money they had had in his possession in a proceeding. In addition, twenty-eight judges in Benin had been prosecuted and put in custody in proceedings of forgery and falsification of public and misappropriation of public funds from costs of criminal justice, in complicity with fifteen public accountants' recipients of Finance and tax collectors. Referred to the Court of general goal delivery, most of them were convicted¹²⁸. Parallel criminal proceedings, the applicants have passed a disciplinary council for failing to develop false memories and collected taxes at the counters of the Treasury for costs of criminal justice.

The economic development of States appears to be considerably slowed, if not severely compromised by the lack of transparency of judicial acts intervening in financial transactions or market transactions. In these areas, there is generally a crucial lack of professional ethics in the private commercial sector. Judges specifically do not have laws and regulations sufficiently accurate and adequate or appropriate, hence their inability to give confidence to foreign investors hold sufficient capital and only likely to invest in sustainable development projects¹²⁹. And where such texts exist, corruption or other misconduct lead to the texts to remain inert. The imperatives of globalization on African countries impose a certain moralization of the judiciary, without which, the embezzlement, misappropriation of public funds and corruption would find no short term solution. At this level, there are other factors as decisive as the previous ones: poor physical working conditions, lack of judicial personnel etc...

2.2.1. The fight against corruption by incompatible functions and limitations of mandates

The concern of Benin's legislature's , through these regulations, is to protect the best legal and judicial functions, by taking preventive measures sooner or removal of the courts, or layoff, or resignation, either an observation period of two years before a possible return to the jurisdiction of the magistrate who left freshly political activities.

To retain more concrete duties with dignity and independence, prohibition is made to the magistrate to exercise any other public office, to engage in any gainful activity, or professional employee, and a very special way, to exercise any political activity¹³⁰.

Strict rules of incompatibility are enacted to protect the court against the risk of bias. First, *no judge may become the buyer or transferee, even through an intermediary, whose knowledge of disputed rights, courts within whose jurisdiction performs his duties, or property, rights and claims that it should continue or permit the sale or receive them as collateral. Likewise, no judge may make*

¹²⁸ Court sentence No. 15/2004 of 04 June 2004 Court of the justices of assize in Benin in Cotonou.

¹²⁹ FRISON-ROCK (Mary Anne), *Critical Issues of Economic Law, Introduction and documents*, PUF, Paris, 2005, 448 pages: p. 72.

¹³⁰ Article 12, paragraph 1, of Law No. 2001-35 of 21 February 2003 on the status of the Judiciary; DJOGBENOU (Joseph), Benin, the justice sector and rule of law, Op.cit., P. 61.

an act relating to his duties for a case involving his own interests, those of his spouse, relatives and lineal or collateral line to the second degree or interests a person who is the legal representative or agent¹³¹. Secondly, parents or relatives in direct or collateral line to the second degree may not hold simultaneously as a judge, magistrate or clerk in the same court or even a Court of Appeal, where both a court and a Court of Appeal¹³². In the same vein, the magistrate may hear a case in which one party is represented by a lawyer who is related or allied direct line or in a collateral line of the magistrate to the second degree¹³³.

Thus, it seems necessary to determine the responsibility of members of the Constitutional Court and President of the Supreme Court, a period of inability, post mandature, during which the Chief Executive may appoint persons concerned to any public function. Such action should be taken cumulatively to the transformation of office of members of the Constitutional Court and the President of the Supreme Court in a single term of 10 years. The requirement of this limitation finds its meaning in the famous formula of Olivier Duhamel "power corrupts, absolute power corrupts absolutely"¹³⁴.» From our perspective, this statement would be the advantage of reinforcing the independence of members of the High Courts, to aggregate the experience and set the precedent in the life and intellectual continuity.

The effect is to prevent the pathological subordination of these individuals to executive mandate. However, this system makes members vulnerable to these institutions whose mandate can be renewed. This vulnerability stems from the hope of their recovery by the executive for their assignment to other duties by appointment at the expiration of their mandates. *This hope ruins the independence and impartiality of these institutions. This creates a mandarin or a political patronage which was illustrated in the appointment of a former member of the Constitutional Court to the high authority of the authority of the audiovisual and communication from the expiry of his term*¹³⁵.

African judges find themselves in a situation of dependence vis-à-vis the High Authority. Even in the absence of the President of the Republic or the Minister of Justice as Vice-President, the Judicial Council seems to keep its influence over the judiciary¹³⁶. It is not excluded that this is the case in countries where this body was the subject of reforms likely to reduce the excessive presence of the highest authorities of the State Council. In Benin, President of the Supreme Court has replaced the Minister of Justice as the Vice-President. These changes are minor and do not seem to affect decisively the direct or indirect influence of political power over the administration of justice, independence or the career of judges through the Supreme Council of Magistracy. It would not be an exaggeration to think that the appointment or recruitment of these magistrates is under the control of politicians who want to make sure above all that these men settled in their positions would be acquired or not manifest any hostility towards them. In this regard, transparency is not the norm in the African jurisdictions about the notation, appointments and promotions of judges.

2.2.2. Fight of corruption by the increase in salaries of judges

Judges are paid from public funds or by bank transfer to the national budget as well as government officials. The salaries of judges include the salary subject to superannuation for board and its accessories.

¹³¹ Article 16 and 17 of the status of the judiciary.

¹³² Article 14 of the Statute of the Judiciary.

¹³³ Article 128 of the Constitution of Benin of 11 December 1990. It is the same in the Organic Law No. 94-027 of 15 June 1999 on the Higher Judicial Council.

¹³⁴ This formula is nothing other than the restatement of the idea of Montesquieu by Olivier Duhamel.

¹³⁵ DJOGBENOU (Joseph), Benin, the justice sector and rule of law, Op. cit., P. 61.

¹³⁶ The Constitutional Court by its numerous decisions on the content of the principle of tenure said the assignment of a judge even promotion is subject to written consent.

This compensation varies by grade and step of each judge, and following clues that are affected¹³⁷. In addition to the treatments allocated to officials of public administration in general, judges receive premiums and allowances. These are the benefits of the first installation of judicature, library and research and Housing if the state does not house the magistrate decently. They also receive bonuses for qualification, and performance incentives.

Generally, a judge at the beginning of his career earns about 200 000 (€ 305) to 300 000 FCFA (€ 457) inclusive of all allowances, and a judge nearing retirement and have climbed all grades and steps, earns about 700 000 (€ 1067) to 800 000 FCFA (€ 1,220).

Judicial salaries are appropriate for the judicial office, and are higher than those received by officials of the same rank as judges. Nevertheless, *the State should make available decent wages to magistrates. Judges should also be assured of an adequate retirement pension that would enable them to live independently and according to their condition¹³⁸.*

2.2.3. Fight corruption by empowering judges

Most judges do their job well. However, in the absence of penalties for offending judges, people lose confidence in the justice system. Responsibility of judges will be able to be questioned in cases of misconduct or personal negligence¹³⁹. The shortage of judges is the basis of shortcomings in the handling of cases, but also pressure on the working conditions. Responsibility of judges can be invoked and successful, since the offenses committed by them in exercising their profession and those functions are traceable to their personal faults attributable to them. As written by Professor Philippe Letourneau, the judge's personal faults are distinct "*the misjudged*" but are "*linked to its judicial role.*"¹⁴⁰ The facts reprehensible judges and related functions that are likely to commit criminal responsibility because of their nature may be committed in the execution of their functions. This term is generally used in the provisions and codes of criminal procedure and in the texts of statutes governing the judicial privilege of jurisdiction of judges.¹⁴¹

A magistrate may be subject to disciplinary action if he commits a foul, a breach of the propriety of his status, honor, delicacy or dignity¹⁴² or a serious breach of professional duty. In all cases, these faults are appreciated by the Council. Disciplinary sanctions may be the first or second degree.¹⁴³ A solution to corruption is promoting a «judicial governance» that would aim to reduce corruption through effective promotion of ethics in the country and in all sectors, improvement of procurement procedures, the simplification of administrative procedures, the establishment of an integrity pact between users and the public sector, rationalization of public expenditure chain, the involvement of civil society and especially the creation of an Observatory on the fight against corruption¹⁴⁴. This concern is far from theoretical since corruption affects all areas of state activities in Africa, including justice itself.

¹³⁷ Article 44 of Law No. 2001-37 of August 22, 2002 on judicial organization in the Republic of Benin.

¹³⁸ Plan to strengthen the independence and accountability of judges (December 2007), p. 44.

¹³⁹ It must be remembered that delayed procedures had last several months, the disregard of reasonable time.

¹⁴⁰ LETOURNEAU (Philippe), *General Report on the Panamanian days responsibility, new aspects*, Works of Henri Capitant Association, Friends of French legal culture, Tom. The LGDJ, Paris, 1999, p. 417 and following.

¹⁴¹ Code of Criminal Procedure, Code of Military Justice in France, Dalloz, Paris, 1981-1982. - Criminal Procedure Codes of the various countries of francophone West Africa. Ex., Codes and Laws of Burkina Faso, Volume VII, Code of Criminal Procedure, June 1997-New Criminal Procedure Code Annotated of Senegal, EDJA, 2000 - Act No. 01-080 of 20 August 2001 on the Criminal Procedure Code in Mali. - The statutes of the Judiciary of the country. Ex, Organic Law No 036-2001/AN on Statutes of the body of the Judiciary of Burkina Faso - Law No. 78-662 of 4 August 1978 on the Statute for Judges in Ivory Coast, as amended by Acts No. 94 -437 of 16 August 1994 and 94-498 dated September 06, 1994. - Organic Law No. 92-27 of 30 May 1992 on the status of Magistrates in Senegal.

¹⁴² Article 57 of Law No. 2001-35 of February 21, 2003, on the status of the judiciary in Benin.

¹⁴³ Article 58 of Law No. 2001-35 of February 21, 2003, on the status of the judiciary in Benin.

¹⁴⁴ www.ahjucaf.org / heading FALL (A.-B.), *Internal threats to judicial independence*, p. 2.

To strengthen the independence of the judiciary, and improve the quality, it should change the current legal system of justice by incorporating the following:

- The Higher Judicial Council should be chaired by the elected president of the Supreme Court
- The prosecuting should now be placed under the control of the Superior Council of Judges who appoint members according to the criteria of competence
- The heads of courts should be elected by their peers in their respective jurisdictions.

The plan to strengthen the independence and accountability of judges in December 2007 developed plans to provide the judiciary with financial autonomy, and to allocate courts of appeal sufficient funds so as to give them autonomy desired¹⁴⁵. It is appropriate to call with all our hearts, the implementation of this plan. The status of judges in Benin is the result of a fundamental institutional contradiction greatly reducing their independence. It is therefore seems appropriate to address revision of the Constitution under sections 125 and 128.

¹⁴⁵ *Plan to strengthen the independence and accountability of judges*, in December 2007, p. 36. To date, this reform is not effective.

THE ROLE OF THE JUDICIARY IN THE IMPLEMENTATION OF THE CONVENTIONS ON THE RIGHT OF THE CHILD IN BENIN¹⁴⁶

By Sakinatou BELLO*

The State by its commitments to international conventions is free to choose to implement these standards and impose an obligation not only to respect them in its dealings with other parties but also implement them in its own territory¹⁴⁷. International Convention on the Rights of the Child, despite its special nature¹⁴⁸, is no exception to these general rules of international law. These Conventions, because they essentially place obligations on the State for the benefit of its people, they have no real value unless they are implemented on the territory of the State Party¹⁴⁹. Thus, the actual introduction of the Conventions on the Rights of the Child appears as an important first step towards the realization of rights promoted and protected by the beneficiaries.

Today, the doctrine and State practice teach us two important trends regarding the introduction of international standards into domestic law: the dualistic and the monistic method. If Sciotti-Lam¹⁵⁰ rightly considers that dualism makes it difficult for the validity of international conventions on human rights in domestic law, there is no doubt that the monistic method¹⁵¹ facilitates the effectiveness of the Conventions on human rights in general but even more those relating to child rights¹⁵².

The monistic theory of the introduction of international standards into domestic law, which advocates for, among others, Krabbe, Leon Duguit, but above all the Austrian school of jurists whose master was Hans Kelsen and torchbearer¹⁵³, affirms the unity between the international legal order and domestic legal order. In the monist, these two orders will be subject to a subordinate relationship to one another. Thus stated, the monistic theory raises two possibilities: either the municipal standard is essential to the international standard. In this case, we are in presence of monism with the primacy of the internal standard on the international standard, be the international standard which imposes on the municipal standard and as we find ourselves in this case, in the presence of monism with the primacy International Standard on the municipal standard¹⁵⁴.

Here we focus on a case of monism with the primacy of international standard on the municipal standard. According to this theory, international law appears to be superior to domestic law. Therefore, in case of contradiction between the international standard and

¹⁴⁶ We extend our sincere thanks to Prof. Dr. Hartmut Hamann, for having encouraged us to make this contribution, and Prof. Ibrahim Salami for the time spent proofreading the first draft and relevant observations that have helped improve the final version.

¹⁴⁷ Articles 26, 27 and 29 of the Vienna Convention on the Law of Treaties.

¹⁴⁸ See Karel Vasak, "International Law of Human Rights", in *Collected Courses of the Academy of International Law*, 1974, Volume 140, p 429., P. 335-415; Keba Mbaye, "HUMAN RIGHTS IN AFRICA", ed. A. Pedone, Paris, 2002, p 385; Claudia Sciotti-Lam, "The applicability of international treaties on human rights in domestic law," Bruylant, Brussels, 2004.

¹⁴⁹ idem

¹⁵⁰ Claudia Sciotti-Lam, "The applicability of international treaties on human rights in domestic law", op.cit.

¹⁵¹ It is practiced by most states, including states of Francophone Africa; V. Pierre-François Gonidec, "International law and domestic law in Africa", in *Penant Series (Law Journal of African countries)*, The Vesinet, Editéa, 1996, No. 820, p 354., Pp.241-257

¹⁵² Indeed, the content of the Conventions on the Rights of the Child, shows the importance of administrative, social and other measures for their effectiveness.

¹⁵³ See Heinrich Triepel, "Relationship between domestic law and international law", RCADI, 1923 op.cit, p.84

¹⁵⁴ See Hans Kelsen, "The system reports" the second part, "Internal law and international law", *Collected Courses*, 1926, Volume 14, 1927, 670 p., P. 263-320. See also Claudia Sciotti-Lam, "The applicability of international treaties on human rights in domestic law," Bruylant, Brussels, 2004, 704 p., P.118

the municipal standard it is the international standard that should prevail¹⁵⁵. Thus, when the domestic court would face such a situation, the rule of monism with the primacy of international standard on municipal standard is recommended to take into account the international standard. But such is the choice made by most state constitutions in Francophone Africa, including the Republic of Benin, who are actually aligned with the French model, in particular Article 55 of the 1958¹⁵⁶ French Constitution.

Through section 147 of the Constitution, Benin has clearly opted for monism¹⁵⁷ but more specifically, monism with the primacy of international standard on municipal standard. A priori, internally, this option should be an asset to the effectiveness of international norms on human rights, particularly those relating to child's rights at the domestic level. And for good reason. Monism is seen as favoring the direct application of international standards into domestic law¹⁵⁸. But in practice, the judge's position is not as internally consistent, and you can even take in some cases, a reluctance of judges to the direct application of municipal standards for children's rights, while the introduction method is favorable.

Despite the option of monism with the primacy of international standard by the Benin Constitution, there is now, despite some progress made by the Government of Benin on the legislative framework to protect children¹⁵⁹, the discomfort persists. It persists under the weight attached by the domestic court, the Convention on the Right of the Child ratified by the Benin government¹⁶⁰. To date, no decision for violation of the Convention has been made by the domestic court of Benin. Faced with this situation you might think that the Republic of Benin, who since his historic National Conference of Active Forces of Nations in 1990, proudly wears the mantle of "model of democracy in Africa", has succeeded in Protection of the Rights of the Child on its territory. Unfortunately, this is not what emerges from multiple surveys conducted by the Benin government and international organizations involved in the protection of children in Benin, namely UNICEF¹⁶¹ and ILO¹⁶². Indeed, a national survey on child labor in Benin made by the ILO¹⁶³ and INSAE¹⁶⁴ in 2008 noted at the time that about 501,531 children ages 5 to 17 years (approximately 25% of this population group) are excluded from school and economically exploited¹⁶⁵. On the other hand, a report on the national study on child trafficking in Benin led by the United Nations Fund for Children and the Department of Family and Child (Benin) in 2007¹⁶⁶, reported approximately 40,317 children trafficked in Benin.

¹⁵⁵ Note however that most constitutions rule a priori, the question of conflict between the international standard and the internal standard. To this end, we can refer to Article 54 of the French Constitution which states "If the Constitutional Council, [...] said that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question can only occur after revision of the Constitution. "This provision is taken up by items: 146 Constitution Benin, Niger 131 Constitution, 150 Constitution Burkina Faso, etc.. and it is therefore right that Prof. Gonidec noted that French-speaking states have adopted the French solution of conflict resolution between the internal standard and the international standard, which is to revise the Constitution before ratifying any international agreement which did not comply. See Pierre-François Gonidec, "INTERNATIONAL LAW AND LAW IN AFRICA" magazine in Penant, No. 820 January-April 1996, ÉDITÉA, The Vésinet, pp.241-257.

¹⁵⁶ Indeed, Article 55 of the French Constitution of 1958, has "Treaties or agreements duly ratified or approved shall, upon publication, an authority superior to that of laws, subject to each agreement or treaty, its application by the other party. ". We find this provision is virtually identical, in the articles: 147 of the Constitution of Benin on 11 December 1990 art. 116 of Mali's Constitution of 1992 art. 132 of the Constitution of Niger, 18 July 1999 art. 151 of the Constitution of Burkina Faso, January 27, 1997, etc..

¹⁵⁷ Article 147 of the Constitution of Benin "Treaties or agreements duly ratified, upon publication, an authority superior to that of laws [...]"

¹⁵⁸ Claudia Sciotti-Lam, "The applicability of international treaties on human rights in domestic law," Bruylant, Brussels, 2004, 704 p.

¹⁵⁹ We note in this regard that the Republic of Benin, outside of the Conventions on the Rights of the Child, adopted at the domestic standards to strengthen protection of children. One can for example cite the case of the law n° 2006-04 of 05 April 2006 on travel conditions of minors and suppression of trafficking in children in Benin Republic, the law prohibiting female genital mutilation, on the Act of sexual harassment etc..

¹⁶⁰ Note that Benin has ratified almost all of the Conventions on the Rights of the Child, among which: the United Nations Convention on the Rights of the Child, ratified August 3, 1990, the Optional Protocol to the Convention against Crime commonly called Palermo Protocol, ratified August 30, 2004, the Convention 138 of ILO Minimum Age of Child Labour, ratified June 11, 2001, Convention No. 182 on Worst Forms of Child Labour, ratified Nov. 6, 2001, the African Charter on the Rights and Welfare of the Child, ratified April 17, 1997.

¹⁶¹ United Nations Fund for Children.

¹⁶² International Labour Organisation

¹⁶³ International Labour Office

¹⁶⁴ National Institute of Statistics and Economic Analysis (Benin)

¹⁶⁵ ILO-IPEC and INSAE, National Survey of Child Labour in Benin, 2008, 155 p.

¹⁶⁶ UNICEF, Ministry of Family and Children, Report of analysis of the National Study on trafficking, in November 2007, 135 p. pp.18-24

The obligation to protect requires not only by states to prevent individuals or groups of individuals to obstruct the execution of these rights¹⁶⁷, but it requires them to adopt appropriate measures to give them results¹⁶⁸. In Benin, the standards are taken against private rights violators¹⁶⁹, the question of state responsibility in the absence of measures, including social measures to protect children against practices as serious as trafficking in children remains. Therefore, one can question the responsibility of the state internally.

The very existence of these thousands of children in Benin suffer violations of their rights on the national territory requires us to recognize that the State of Benin has breached its duty of protection contained in the Conventions the least with regard to child victims. Consequently, victims are not entitled to claim against the state for the enjoyment of their rights? Are they not entitled to compensation? And who else apart from the domestic court could effectively serve their cause?

One thing is certain: to get there, the domestic court will need to apply the Conventions on the Rights of the Child ratified by Benin. Such is the interest of this contribution.

To understand the position of that the judge in Benin face with the Conventions, we have put to use not only the works of doctrines, domestic and international law protecting the rights, the precedent of the Constitutional Court of Benin, but also the result of interviews with judges at the trial courts, Courts of Appeals, the Supreme Court and authorities of the Ministry of Justice legislation and human rights¹⁷⁰.

In the Benin context, one cannot talk about the role of domestic courts in the application of international conventions on child rights in Benin without addressing the constitutional court which is the guarantor of human rights¹⁷¹. So let us first discuss in this paper, the role of the constitutional court of Benin in the protection of human rights (I), and then review the position of the common law judge faced with the application of the Conventions on the Rights of the child (II).

I-The role of a judge in the Constitutional protection of human rights in Benin

"[...] Is protection of human rights with any system, in connection with an allegation of one or more violations of a principle or rule relating to human rights and enacted to a person or group of persons, the possibility for interested parties to submit a claim to trigger consideration of this claim and possibly cause a measure to stop the violations or to ensure that victims or compensation is just."¹⁷²

In Benin, it is the constitutional court that the grantor of 1990 imposes a duty to protect human rights elevated to constitutional level, via sections 114, 117, 120, 121 and 122 of the Constitution of 11 December 1990. Even if at the end of Article 125 of the Constitution the Constitutional Court is not part of the judicial organization of Benin¹⁷³, the fact remains that it is so far the main court, if not only to make decisions for human rights violations. Because the consecration in the preamble of the Constitution of human rights as defined by international and regional standards, and integration with the Constitution of all rights and

¹⁶⁷ Barbara Wilson, "Some Thoughts on the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," Quarterly Review of Human Rights, 77 January 2009, Brussels, Bruylant, pp.295-317, p.302

¹⁶⁸ Idem

¹⁶⁹ One can for example refer to the laws of the illegal movement and trafficking of children on female genital mutilation and sexual harassment.

¹⁷⁰ These interviews were conducted between July 2010 and January 2011, during a fieldwork in Benin.

¹⁷¹ Art. 114 of the Constitution of 11 December 1990.

¹⁷² Keba Mbaye, "HUMAN RIGHTS IN AFRICA", Paris, A. Pedone, 1992, 312 p., P.76

¹⁷³ In Benin, the judicial power is exercised by the Supreme Court, Courts and Tribunals. Art.125 paragraph 2, Constitution in 1990.

duties proclaimed and guaranteed by the African Charter on Human and Peoples Rights.¹⁷⁴ Hence the pervasive role of the constitutional courts in protecting human rights and its importance for this contribution.

Thus, the constitutional judge will be discussed as the main guarantor of human rights in Benin. In the course of first point, we will see how the judge may participate in a constitutional protection of the rights of the child, and then will we be forced to admit the limits of its action.

1 - The constitutional judge, guaranteeing the rights of the child?

The Constitutional judge of Benin has no specific powers in guaranteeing the rights of the child. However, as we have already mentioned, the protection of children's rights which he could ensure its effectiveness, comes from his role as guarantor of human rights in general, including those recognized by the African Charter on Human and Peoples Rights. Indeed, the Charter requires States "[...] to protect the rights of women and children as stipulated in international declarations and conventions."¹⁷⁵ Thus, the constitutional judge, effectively protecting the human rights recognized by the Constitution, may participate in an effective protection of children's rights under international conventions on the Right of the Child which the Republic of Benin is a party.

This point will initially focus on the functions of constitutional judge in protecting human rights in general and then on his practice in protecting those rights, including those relating to child protection.

1.1-The duties of the constitutional Judge

*"The Constitutional Court is the highest court of the State in constitutional matters. It decides on the constitutionality of the law and guarantees the fundamental rights of the individual and public freedoms [...]."*¹⁷⁶

It must decide on:

*"[...] - The constitutionality of laws and regulatory acts intended to undermine the fundamental rights of human and civil liberties in general, on the violation of human rights, [...]."*¹⁷⁷

Apart from the above two provisions, the Constitutional Court also derives its powers in terms of section 121 which provides that "[Constitutional Court] shall decide *ex officio* on the constitutionality of legislation and any statutory supposed to affect the fundamental rights of the individual and public freedoms [...]."¹⁷⁸

Through these powers, the constitutional judge has an obligation not only to ensure compliance with internal standards on rights and freedoms guaranteed under the African Charter on Human and Peoples' Rights, but also to ensure that the breach of those rights are punished regardless of the perpetrators. The mission of the judge will be enhanced by direct and indirect referral given to every citizen in Article 122 of the Constitution which states "Every citizen may apply to the Constitutional Court on the constitutionality of laws, either directly or by the procedure of exception of unconstitutionality invoked in a case which concerns a

¹⁷⁴ Article 7 of the Constitution

¹⁷⁵ V. arts. 18 (3) of the ACHPR

¹⁷⁶ Article 114 of the Constitution.

¹⁷⁷ Article 117 of the Constitution of 11 December 1990.

¹⁷⁸ Article 121 paragraph 2

court. [...]” Thus, the Constitution gives the judge the means to make human rights a reality, and by extension the rights of the child in Benin.

In practice, we note that the citizen of Benin warned not to remain indifferent to this ‘fundamental right’¹⁷⁹ of direct referral on him by section 122 of the Constitution. He uses plenty of fact requiring certain dynamism to the constitutional judge in the field human rights.

1.2- A Constitutional Court’s active role in the field of human rights

The constitutional court may be seen as the judicial institution which has the competence to deal with the ultimate authority¹⁸⁰ of *res judicata*, disputes in accordance with the Constitution¹⁸¹. In Benin, it is the Constitutional Court which plays this role. Of the privileged position given to the protection of human rights in the Constitution by the framers of Benin’s Constitution, the constitutional court appears as one of the linchpins of the system of protection of human rights in Benin¹⁸². Indeed, already in the preamble of the Constitution, constituent refers to the attachment of the people of Benin “[...] *the principles of democracy and human rights, as they were defined by the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples’ Rights adopted in 1981 by the Organization of African Unity and ratified by Benin on 20 January 1986, and whose provisions are an integral part of this Constitution and Benin law and are superior to the domestic law.*”¹⁸³ Thus, from the preamble, the constituent states its willingness to endorse the whole of the African Charter on Human and Peoples Rights. Even if Article 7 is clearly referring to the “rights and duties proclaimed and guaranteed by the Charter.”¹⁸⁴ That said, the constituent in Benin constitutionalize all rights recognized and guaranteed by the African Charter on Human and Peoples Rights. In addition, we also note that the constituent in Benin has strengthened the rights of so-called second generation (that is to say the social, economic and cultural rights), proclaiming the right to education, health and to work.

The entrenchment of all human rights and the right of direct appeal recognized for all citizens, by a very simple form of referral¹⁸⁵, will promote the enjoyment of citizens to constitutional justice. What’s more, unlike the lengthy procedures that we note at the law courts, the constituent in Benin requires the Court to issue its decisions within fifteen (15) days in case of referral of a complaint in violation of human rights and civil liberties¹⁸⁶. All these conditions have resulted in the proliferation of successful applications made by individuals in the highest court in constitutional matters resulting *de facto*, the development of constitutional precedent. Hence the apparent manifest the dynamism of the constitutional court of Benin.

¹⁷⁹ The Constitution of 11 December 1990, is indeed one of the few constitutions in the world that gives direct access to the constitutional court.

¹⁸⁰ Recall that in constitutional matters, decisions of the Constitutional Court are final. On this point the Article 124 states that “A provision declared unconstitutional may not be promulgated or implemented. The decisions of the Constitutional Court are not subject to appeal. They are binding on governments and all civil authorities, military and judicial. “

¹⁸¹ Communication of Benin “Constitutional Justice and Public Opinion” at the Sixth Conference of Heads of institutions, Niamey, 3-4 November 2011. Online at: www.accpuf.org

¹⁸² Frederic Joel Aivo, “the constitutional court and the rule of law in Africa. The example of Benin Model “, Paris, Harmattan, 2006, 222 p., P. 67

¹⁸³ Firmin Medenouvo, “Constitution of the Republic of Benin”, Cotonou, Benin Presence, 2004, 170 p. p. 10, paragraph 7 of the preamble to the Act n° 90-32 of 11 December 1990 on the Constitution of the Republic of Benin.

¹⁸⁴ Article 7 states “*The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples’ Rights, adopted in 1981 by the Organization of African Unity and ratified by Benin on 20 January 1986 integral part of this Constitution and Benin law.* “

¹⁸⁵ Indeed, any application to the Constitutional Court, must only contain the name and surname of the applicant, complete address and signature or a fingerprint, with respect to natural persons.

¹⁸⁶ Article 120 of the Constitution of 11 December 1990. However, perceived decisions made by the Court leads us to note that in practice the decisions are not made within the time established.

Indeed, since it was installed in June 7, 1993¹⁸⁷ the Constitutional Court has issued approximately two thousand three hundred eighty-nine (2389) decisions out of which one thousand seven hundred and seventeen (1717) were on constitutional review¹⁸⁸.

In terms of human right, the court gave for example¹⁸⁹:

- 67 decisions on the cruel, inhuman and degrading treatment
- 49 decisions on the principle of equality
- 30 decisions on respecting human rights
- 14 decisions on violations of human rights «nonspecific»
- and 06 decisions on violations of human rights

However, we must recognize that the enthusiasm of citizens in the constitutional justice is also due to a certain satisfaction that comes with the decisions of the Constitutional Court. However, if the effectiveness of the constitutional court decisions on internal standards declared unconstitutional has no doubt¹⁹⁰, it is not the same decisions on the violation of which individuals are victims. Indeed, as noted by Adjalohoun¹⁹¹, the constitutional court are generally content to rule on the violation of human rights which individuals are victims, just as it proceeds with respect to the conformity of laws. That is to say it finds the compliance status of the Constitution and made the decision then notifies interested parties. Thus we can see from the DCC 01-1 decision of 17 May 2001 on the request of Mrs. Jocelyne TINGBO and others, to denounce *“the conditions of arrest of their brother René TINGBO and the treatment he has received from his employer Sebastian AJAVON.”* The judge made his decision in two articles:

“Article 1-The abuse torture and cruel, inhuman and degrading treatment to Mr. René TINGBO by Sebastian ADJAVON, Director of Global Trading Company Desk (COMON), violates the Constitution.

Article 2 - This Decision shall be notified to the appointed Charles TINGBO, Leonard TINGBO, Fidele TINGBO and Jocelyne TINGBO by the Attorney General at the Court of Appeals, to Mr. Sebastian ADJAVON and then gazetted.”

In another decision, the DCC 02-014 of 19 February 2002 on a motion by Mr. Boris Gbaguidi against the royal power of the Sub-Prefecture of Dassa-Zoumè *“physical abuse and violation of the human right,”* the judge decided:

“Article 1-The conduct of his “Majesty” King EGBAKOTAN II and his court are in violation of the Constitution.

Article 2 - This Decision shall be notified to Mr. Boris Gbaguidi, the King of EGBAKOTAN II of Dassa- Zoumè and then gazetted.”

However, Constitutional Court has repeatedly shown its independence vis-à-vis the executive and its commitment to respect human rights. In this sense, several decisions of

¹⁸⁷ See the Presentation of the President of the Constitutional Court of Benin *“The Constitutional Court of Benin: The influence of its jurisprudence on constitutionalism and human rights”* World Summit on Constitutional Justice in Cape Town from 23 to January 24, 2009, p.3

¹⁸⁸ Ibid, p.12

¹⁸⁹ This point was made from data posted on the website of the Constitutional Court of Benin: <http://www.cour-constitutionnelle-benin.org/>, accessed in July 2011.

¹⁹⁰ Let us recall that according to the provisions of Article 124 of the Constitution, a provision declared unconstitutional may not be promulgated or implemented and binding on the government and wholes civil authorities, military and judicial.

¹⁹¹ Horace Adjalohoun, *“Human Rights and Constitutional Justice in Africa: Benin model”*, Paris, L’Harmattan, 2011.193 p. p.103.

the Constitutional Court recognized the non-conformity with the Constitution, conduct and acts of public authorities, including law enforcement, who for years (especially during the revolutionary period) were used to act in violation of human rights with impunity. Two landmark cases support this: One is DCC 02-052 of 31 May 2002 and the other is DCC 02-058 of 04 June 2002.

In the first case (DCC 02-052 of 31 May 2002), Mr. Fanou Lawrence, seized the High Court for “unlawful arrest and arbitrary detention” and “cruel, inhuman and degrading orchestrated by a group of four policemen.” In its judgment the Constitutional Court held:

Article 1 that “The violence inflicted on the person of Mr. Lawrence Fanou by police officers (...) constitute inhuman and degrading treatment within the meaning of Article 18 paragraph 1 of the Constitution”

Article 2 that “The detention of Mr. Lawrence Fanou in the premises of National Security from 22 to 28 August 2001, beyond forty-eight (48) hours is unreasonable and violates Article 18 paragraph 4 of the Constitution.”

Article 3 that “The violations cited in items 1 and 2 of this decision open rights to compensation for the benefit of Mr. Lawrence Fanou.”

In the second case, (DCC 02-058 of 04 June 2002), Lady Adele Favi before the Constitutional Court filed a complaint against the bodyguards of the President of the Republic for “inhuman and barbaric treatment”. In this case, lady Favi who was returning from her workplace Feb. 6, 2002 at about 8:00 p.m., was arrested by soldiers of the presidential guard, when she wanted to cross the road. They then “came with her, kicking her even without the hold forth of the arrival of the head of state.” And having fled, she was pursued and caught and she “suffered beatings, ranger kicking, and chicotes and dragged along the ground for about 50 meters, before being left without unconscious”.

The Court decided:

Article 1 “The abuse and cruel, inhuman and degrading treatment of Mrs. Adele Favi Wednesday, February 6, 2002 by a team of bodyguards of President of the Republic, is a violation of the Constitution”;

Article 2 “Madame Adele Favi entitled to compensation for damages she had suffered.”

Holistically and in relation to the decisions of the Constitutional Court to date, we note that the Constitutional Court of Benin remains faithful to the finding of a violation of the Constitution or not the act of infringement of human rights. However, once the violation of human rights is found under the Constitution, or the recipient (s) of that decision, may rely on other jurisdictions in which the decision is binding¹⁹². Within this framework, we can distinguish two techniques. That, the violation of human rights within the jurisdiction of the court of law which should determine the type of relief. And that, the violation is an administrative act, and it has the responsibility of the administrative courts. In Benin, you must enter the Administrative Chamber of the Supreme Court¹⁹³ which shall, through the

¹⁹² Let us recall that the decisions of the Constitutional Court are final. See Art. 124 of the Constitution.

¹⁹³ Since the reform effected by Act No. 2001-37 of August 27, 2001 on judicial organization in the Republic of Benin, the trial court should be the ordinary courts of first instance in administrative and appellate courts, courts of last resort. But until 2010, the administrative divisions of these courts were not yet installed. Therefore, the Administrative Chamber of the Supreme Court continues its former role in the matter. V. Communication from the Administrative Chamber of the Supreme Court “The review of administrative acts by the courts and tribunals,” 10th Congress of the International Association of Supreme Administrative Jurisdictions (IASAJ), Sydney, March 2010.

use of abuse of power, nullify the act declared unconstitutional in order to comply with section 124 of the Constitution.

The case of Lady Favi is instructive in many ways, since she has used the decision of the Constitutional Court for the condemnation of the state by the common law judge. Indeed, on the basis of Decision DCC 02-058 of 04 June 2002 of the Constitutional Court, lady Adele Favi has assigned the State of Benin, and has claimed payment of FCFA 25 million for “all causes of injury”. The judge will ultimately condemn the Government of Benin in judgment No. 007/04/4e Civil Chamber of the February 9, 2004, to pay the sum of five million (5,000,000) FCFA. Subsequently, this judgment will be enforced by the State of Benin represented by the Judicial Officer of the Treasury (AJT), which by the Memorandum of Understanding No. 285/AJT/BGC/SA, agrees to pay the sum of five million (5,000,000) FCFA to lady Adele Favi, for «all causes of injury combined under the judgment No. 007/04/4e Civil Chamber of the February 9, 2004”¹⁹⁴

But the role of the constitutional court of Benin in the protection of human rights, limited rights under the Constitution of 11 December 1990, involving the rights and duties proclaimed and guaranteed by African Charter on Human and Peoples Rights. So, one might wonder about the jurisdiction of the Constitutional court of Benin regarding the violation of the rights of the child. Fortunately, the child as a human being enjoys the rights guaranteed under the ACHPR¹⁹⁵. Also, the ACHPR in Article 18 (3) requires the State “[...] to protect the rights of women and children as stipulated in international declarations and conventions.” Thus, these obligations under the Charter to States Parties are the responsibility of the Constitutional Court of Benin because of the entrenchment of the rights and duties guaranteed by the ACHPR by the settler of 1990. Therefore, we can afford to argue that the constitutional court of Benin has the burden of ensuring the protection of children rights through international conventions ratified by Benin.

2 - The limits of human rights protection by the constitutional court

Despite the important role it plays in protecting human rights, it is argued that there is still lack of effectiveness and efficiency by the constitutional on matters relating to the protection of children rights in Benin. It has limited its powers, to providing an effective response to violations of human rights. However, we will note that in practice, the Constitutional court in one of its decisions, will dare to go beyond its powers to overcome some difficulties.

2.1- limits of the constitutional court in protecting children rights

First, the effectiveness of the Constitutional Court in protecting civil and political rights known as “immediate execution” embodied in the Constitution of Benin, is well established, for the Court’s precedent enlightens us on this point. Therefore, one can state without fear of contradiction, that the enjoyment of those rights is effective in Benin. But the situation is far from satisfactory when considering the rights called “programmed” that are most relevant to children protection. Indeed, there is no need to over-emphasize the secondary nature of civil and political rights for children because due to their minority age, they are not entitled to the enjoyment of most of these rights. Indeed, in one of its decisions, that of July 8, 2006, the Court disregarded the constitutional violation in a case involving the rights

¹⁹⁴ Art. 2 of the MoU between Lady Adele Favi and the state of Benin, February 25, 2005

¹⁹⁵ More specifically, the obligations of the State relating to Articles 5 (protection against exploitation and trafficking), article 17 (the right to education), and article 18 (protection of the family ...) Even if we have to recognize most of these rights are not very useful for children who have more specific needs. This is what justifies the adoption of specific standards for certain categories. Like women, children and minorities.

called “programmed”. This decision has been based, the character ‘progressive realization’ rights violated¹⁹⁶. The decision of the Court, which has also been criticized¹⁹⁷, not only recognizes the rights violation known as “programmed” as a violation of the Constitution, despite the fact that those rights are embodied in the Constitution itself. It follows therefore that the Constitutional Court of Benin is not conducive to the enjoyment of social rights and economic, as we know, in the Conventions, are packaged. Therefore, it appears that the constitutional court to some extent inhibits the enjoyment of children rights. Similarly, the non-publication of the UN Convention in the Official Gazette of Benin was considered grounds for the Constitutional Court to declare that the Convention was not part of the law in Benin¹⁹⁸. Then, another weakness of the constitutional court action for the protection of human rights arises because it is confined to a part of finding of the violation.

But the constitutional court, through one of its decisions under the chairmanship of Mrs. Conceptia Ouinsou, overcame this weakness by opening a right to compensation.

2.2- Some of the advanced role of the Constitutional Court in its decisions

Although the Constitution of Benin does not allow explicitly the fact that the decisions of the Constitutional Court should be entitled to remedy violated rights, the Constitutional Court of Benin asked for reparation in one of its decisions dated May 31, 2002¹⁹⁹. Indeed, the Court acknowledged that the complainant was subjected to inhuman and degrading treatment (Article 1 of the decision) and his wrongful detention (Article 2 of Decision), specified in Article 3 that: “The violations cited in articles 1 and 2 of this Decision entitlement to compensation for the benefit of Mr. Lawrence Fanou.” Through this constitutional precedent, the constitutional court has made a significant development in the field of protection of human rights in general. Thus, it is for the victim to enter the court of general law, for it to determine-the extent and nature of the reparation. It must be emphasized that the judge, on the basis of this decision, will rule in favour of the victim.

That said, what about the role of the judge in general law for the protection of children rights in Benin?

II-The role of the Judge in general law in the application of Conventions

The judge’s role is to enforce the law and punish its violation. This implies that citizens must be able to seek redress of an injury on the basis of existing laws at the domestic level. That said, when considering the monistic method introducing international standards adopted by Benin, the application of the Conventions on the Rights of the Child ratified by the Republic of Benin should not be a problem for the judge in general law. But this is not always the case in practice.

We will look at first on the judge’s obligation to apply the Conventions on the Rights of the Child operative in Benin and in second step; we would observe that the Judge in general law is reluctant to the application of these conventions.

¹⁹⁶ See Ahonagnon Christmas Gbaguidi and William Kodjoh-Kpakpassou, “Introduction to Legal and Judicial System of Benin,” March-April 2009.

¹⁹⁷ See analysis of Prof. Martin Bléou in his inaugural lecture of the solemn Back to the UNESCO as Chair in Cotonou, December 3, 2007, Issue KAS 2008. Reported by Prof. A. N. Gbaguidi and W. Kodjoh Kpakpassou-op. cit.

¹⁹⁸ Indeed, in its Decision DCC 03-009 of 19 February 2003, the constitutional court in the second “Considering” of its decision, stated that the plea alleging breach of the UN Convention on the Rights of the Child of 1989 and ratified by Benin on 30 August 1990 was inoperative because of its non-publication in the Official Gazette of Benin.

¹⁹⁹ See DCC 02-052 of 31 May 2002, concerning the arbitrary arrest and illegal detention of Mr. Lawrence Fanou.

1. The judge's obligation to apply the operative Conventions

"The judiciary is independent of the legislative and executive powers²⁰⁰.", and "The judges are subject, in the execution of their function, to the authority of the law. (...)"²⁰¹.

These two provisions of sections 125 1st paragraph and 126 2nd paragraph of the Constitution of Benin from December 11, 1990 immediately asserts the independence of the judiciary from the other two powers (executive and legislative) and authority of the judge to decide independently. It appears therefore that the judge, in exercising his functions, should not be influenced by other powers, including the Executive. At the same time, the Constitution requires him to obey the law and enforce it. This means that the judge in Benin has the obligation to apply International Conventions on the Right of the Child operative in Benin. Thus, when considering the fact that Benin has ratified most of the Conventions on the protection of children such as the United Nations Convention on the Rights of the Child 1989 (CRC) and its two Optional Protocols (on the one hand, the trafficking of children, child prostitution and pornography of children, and secondly, the involvement of children in armed conflict on 31 January 2005), Convention 138 of the International Labour Organization (ILO) on Minimum Age for Admission to Employment in June 11, 2001, Convention 182 on Worst Forms of Child Labour in November 6, 2001, the African Charter and Welfare of the Child in February 1997; etc., we should expect to see legitimacy via the Judge in general law, refer to these Conventions to punish their violation. In rare cases, it is noted that the judge, including the juvenile judge²⁰², refers to these Conventions to rule on cases requiring consideration of the interests of the child. Unfortunately, in general, the application of the Conventions on the Rights of the Child operative in Benin is not yet in practice via the Judge in general law.

2. The reluctance of the Judge in general law to the application of the Conventions on the Rights of the Child

In the absence of case law as the basis of analysis, this point will be based on the results of field research conducted in Benin. Thus, it appears from interviews with the judges interviewed, two reasons that they believe justify their position of 'non-direct application' of the Conventions on the Rights of the Child. This is partly due to, lack of implementing regulations in the Conventions and secondly, the nature of "programmed rights", from which the "non-justiciability" of the rights contained in the Conventions on Rights of the Child.

2.1- The absence of implementing regulations for Conventions

The order may be defined as *"a text of the executive, in general or individual, signed by the President of the Republic or the Prime Minister."*²⁰³ The implementing decree which should allow the application, according to some judges in Benin is a text issued by the executive, which must determine the conditions of application of the Conventions on the Rights of the Child. Normally the implementing decree making law is determined by the law itself, that is to say that when drafting the law, the legislature stated that the law enforcement or certain of its contents will be determined by decree. This is the case, for example, article 7, 11 and

²⁰⁰ Article 125 first paragraph, Constitution of Benin

²⁰¹ Art. 126 Second paragraph

²⁰² Note here that until late 2010, Benin had no juvenile judges itself. It was the judge (usually the oldest in the jurisdiction) who played this role concurrently with its role as judge. But this situation was resolved in late 2010 by the appointment of judges of minors by the executive. Note also that the juvenile judge in Benin deals with criminal cases.

²⁰³ Sebastien Bissardon, "Legal Language Guide, Paris, LexisNexis, 2009, p.209, see also: Glossary of Legal Terms 2010, Paris, Dalloz, 17th ed, p 769., P.230, for more details on the concept.

12 of Law No. 2006-04 of 05 April 2006 on the travel conditions of minors and suppression of trafficking in children in the Republic of Benin.

Therefore, the question arises whether the Conventions on the Rights of the Child is in need of implementing decree to be enforceable by the judge in Benin. Through our readings, nothing in the Constitution of Benin, which governs the conditions of validity of international conventions in Benin, is going in this direction. Similarly, we have not identified in the content of the Conventions on the Rights of the Child, the requirement of the adoption of an order internally to their validity. This is not surprising when one considers that international law allows freedom of choice of means for States to introduce the conventions ratified. Precisely, we have seen through section 147 of the Constitution of Benin that Benin has the option of monism as means of introduction of international conventions into domestic law.

It follows therefore, that in the absence of internal rules establishing the need for implementing regulations for the validity of the Conventions ratified by Benin in general and those relating to child rights in particular, the judge in Benin should opt for the direct application of these Conventions. Thus it is left for him to determine ways to state the law. That said, now what about the character of “programmed rights” and “non-justiciability” of children’s rights?

2.2- The Nature of programmed and non-justiciable rights of the child

First on the character programmed rights contained in the Conventions on the Rights of the Child, it would be based on the formulation that arises for example in Article 4 of the New York Convention on the Rights of the Child. Indeed, one can read in this article that: *“States Parties shall take all appropriate legislative, administrative and other measures to implement the rights recognized in this Convention. In the case of economic, social and cultural rights, States Parties shall undertake such measures to the limits of available resources and, where appropriate, through international cooperation.”* The second sentence of this article, which appears to leave a margin of freedom to the States in the implementation of economic, social and cultural rights, such rights therefore are considered programmed and therefore not immediately achievable. So from that, can it be said that the “programmed rights” are synonymous with “impractical rights”, especially in the African context?

There is no doubt that the draftsmanship “(...) in the case of economic, social and cultural rights, States Parties shall undertake such measures to the limits of available resources (...)” does not facilitate the determination of the existence of violation of the rights concerned. Especially since it is observed that the Convention has remained silent on how to determine that a State has done everything in “the limits of its available resources”. It is therefore clear that we appeal in the good faith of States Parties.

In this context, it is therefore for the national judge to use his skills to interpret the Convention to determine if the State does not respect these rights in good faith or not.

Then the second argument for the non-application of the Conventions on the Rights of the Child is the “non-justiciability” of economic and social rights.

The issue of “non-justiciability” of rights is rooted in the two Covenants in 1966 that of the Civil and Political Rights and the social, economic and cultural. The doctrine has often noted the voluntary nature of the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the obligatory rights contained in the International

Covenant on Civil and Political Rights (ICCPR). What made the first non-justiciable or not easily amenable and second defendants? But this issue of non-justiciability of the ICESCR has been questioned by the Economic and Social Council and the Committee on the Rights of the Child of United Nations. Indeed, in 2008 the adoption of the Optional Protocol to the ICESCR is in line with the justiciability of ESCR. With regard to the Conventions on the Rights of the Child, the issue was resolved by the Committee on the Rights of the Child²⁰⁴, through general measures of implementation of the CRC at its thirty-third session in 2003²⁰⁵. Thus, in paragraph 6 of that document, the Committee re-emphasizes the inseparability and indivisibility of human rights in general and at the same time asserts that economic, social and cultural rights contained in the UN Convention on children's rights are justiciable.

Below are excerpts of paragraphs 6, 7, and 25 of that document.

*"While outlining the general obligations of States parties in the application, section 4 shows, in its second sentence, a distinction between Civil and Political Rights and on Economic, Social and Cultural Rights." In the cases of economic, social and cultural, they [States Parties] undertake such measures to the maximum extent of available resources and, where appropriate, through international cooperation. ". There is no simple or authoritative division into these two categories of human rights in general or the rights enshrined in the Convention. The Committee's guidelines for reporting group articles 7, 8, 13 to 17 and 37 a), under "Civil rights and freedoms", but it appears from the context that these provisions do not contain the only civil rights and policies enshrined in the Convention. It is clear, indeed, many other articles, including Articles 2, 3, 6 and 12 of the Convention, contain elements that constitute civil / political, which highlights the interdependence and indivisibility of all human rights. The enjoyment of economic, social and cultural rights is inextricably linked to the enjoyment of civil and political rights. As indicated in paragraph 25 below, the Committee believes that both the civil and political rights and economic, social and cultural rights must be regarded as justiciable."*²⁰⁶

"The second sentence of Article 4 reflects a realistic acceptance that lack of financial resources and others - can hamper the full implementation of economic, social and cultural rights in some states, hence the concept of « progressive realization » of these rights: States must prove that they apply these rights « to the maximum of their available resources » and that they have, if any, called for international cooperation. When States ratify the Convention, they assume not only the obligation to implement it in their territory, but also to contribute, through international cooperation, its implementation on a global scale (see paragraph 60 below). «²⁰⁷

«The wording of the second sentence of Article 4 is similar to that contained in the International Covenant on Economic, Social and Cultural Rights and the Committee entirely concurs with the Committee on Economic, Social and Cultural Rights (...) . Whatever their economic situation, states are required to take all possible measures to implement children's rights by giving special attention to disadvantaged groups. «²⁰⁸

«The Committee wishes to emphasize, as has been noted in paragraph 6 above, that both the civil and political rights and economic, social and cultural rights must be regarded as justiciable. It is essential that domestic legislation sets out entitlements in sufficient detail to enable remedies for

²⁰⁴ General measures of applications have indeed clarified the contents of Article 4 of the CRC, including its second sentence that seemed to distinguish between civil and political rights and social, economic and cultural. Art. 4 CDE "States Parties shall take all appropriate legislative, administrative and other measures to implement the rights recognized in this Convention. In the case of economic, social and cultural rights, States Parties shall undertake such measures to the limits of available resources and, where appropriate, through international cooperation. "

²⁰⁵ See document: CRC/GC/2003/5 27 November 2003 the Committee on the Rights of the Child of United Nations.

²⁰⁶ Paragraph 6 CRC/GC/2003/5 27 November 2003

²⁰⁷ Paragraph 7 CRC/GC/2003/5 27 November 2003

²⁰⁸ Paragraph 8 CRC/GC/2003/5 27 November 2003

non-compliance to be effective. «²⁰⁹

In the foregoing, it therefore appears that the reasons given by the Judge in Benin, to justify the non-application of the Conventions on the Rights of the Child, have seriously no legal basis. This suggests certain ignorance of the functioning of international law in general, but particularly of the purpose of human rights as an international standard.

But beyond this weakness of the judge, one might wonder if other factors do not determine the attitude of the judge in Benin. Indeed, we know that the rulers are the largest debtors of the rights contained in the Conventions of Human Rights in general and those relating to child rights in particular. Therefore, the application of the Convention does not return to engage the responsibility of the state and its components for breach of rights? In other words, is it not to engage the responsibility of the executive?

If this is the case, the judge cannot effectively play its role only if it is effectively independent. But to better understand this aspect of the question, we must show that the judge in Benin practice is independent or not from the executive powers.

The Constitution of Benin established the separation of powers in Benin. Indeed, as already noted above, the independence of the judiciary is clearly stated in Article 125 of the Constitution. But, paradoxically, the Constitution through Article 129 provides:

“Judges are appointed by the President of the Republic on the proposal of Minister of Justice, after consulting the Higher Judicial Council.” At the same time, we note that “The Council of the Judiciary Disciplinary Board shall act as judges. The composition, powers, organization and functioning of the Superior Council of Magistracy shall be established by organic law”²¹⁰

Thus, the Constitution allows the composition and powers of the Superior Council of Magistracy (CSM), the legislator. If already in section 129 of the Constitution might bother, we will note that the real discomfort comes from the composition and functions of the CSM. Indeed, the Supreme Judicial Council, which is the most important body of the judiciary, is composed of:

- The head of state who is the president of CSM,
- President of the Supreme Court who is the first Vice President, (he was appointed to his post by the President of the Republic. Art. 133 Constitution.²¹¹)
- Minister of Justice who is the second vice president, (appointed to his post by the head of state)
- Presidents of the Chambers of the Supreme Court, the President of the Court of Appeal (who were appointed to their posts by the Head of State. Art. 134 of the Constitution.²¹²)
- The Attorney General of the Court of Appeals of two judges of which one is a prosecutor, (appointed by the Head of State)
- And a non-magistrate'' personality'' known for his moral and intellectual qualities.

²⁰⁹ Paragraph 25 CRC/GC/2003/5 27 November 2003

²¹⁰ Article 128 Constitution of Benin

²¹¹ Article 133 *“The President of the Supreme Court is appointed for a term of five years by the President of the Republic, after consultation with the Chairman of the National Assembly, among judges and lawyers of high level, with fifteen years at least- work experience by decree of the Council of Ministers. Can not be removed during his term that is renewable only once. The functions of the President of the Supreme Court is incompatible with membership of government, the exercise of any elective office, any public employment, civil or military, of any other occupation and any function of national representation. “*

²¹² Article 134 *“Presiding Judges and Advisors are appointed from among judges and lawyers of high level, with fifteen years of professional experience-less, by decree of the Council of Ministers by the President of the Republic on the proposal of President of the Supreme Court and the opinion of the Supreme Council of Magistracy. The law determines the status of judges of the Supreme Court. “*

To sum up, the President of the Republic appoints judges, on a proposal by Minister of Justice after consulting the Council of Magistracy (CSM) of which he is the President. Other members of the SCM are also persons previously appointed to their posts. This means that in reality, justice is controlled, indirectly by the executive and that its independence required by the Constitution, is far from a reality. Therefore, it is the executive who keeps “the upper hand in managing the careers of judges.”²¹³

Given this situation, one might wonder whether such a grip of the executive does not affect the judge’s attitude to liability on his “master”. Especially as regards the non-compliance with its commitments to children’s rights? Certainly, the issue of training of judges in human rights remains, but it cannot justify alone the “bottlenecks” of the Judge in general law on the application of the Conventions on the Rights of the Child for implementation of state responsibility internally.

Ultimately, the judiciary has a role to play in the implementation of the Conventions on the Rights of the Child at the domestic level. In the Benin context, despite the dynamism of the Constitutional Court for protection of human rights in general, its actions remain limited because it is not a trial court and only finds a violation of rights under the constitution. Certainly, it is trying, but it is still limited to the recognition of civil and political rights. As for the ordinary courts, despite an assertive independence, frankly, by the Constitution of 11 December 1990, they remain in practice, under the influence of an executive who, in some way, affect its action. The judge must take the full measure of its responsibility for ensuring compliance with all applicable standards within the national territory, whether internal or international. He must not lose sight of the governed as much as rulers must be subject to compliance with standards of which he is the guarantor.

²¹³ Djogbenou Joseph, “*The justice sector and rule of law,*” A study AfriMAP and the Open Society for West Africa Initiative, Open Society Institute, 2010, p.52 and SVTS.

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RIGHTS TO DEFENSE BEFORE A COURT OF ASSIZE

By Bachard Accorédé LIAMIDI*

INTRODUCTION

The process of punishment must be in conformity with the rules of procedure which shall depend on a determined legal process and the punishment for an offense in line with its nature. Furthermore, an offence which involves an infringement of the law shall be heard before a police court while an offence which constitutes a misdemeanor shall be punished before a criminal court. Only the court of assize will hear any offence which is referred to as a crime.

In this regard, a number of guarantees to which the accused person is entitled, serve as a safety net against «*the threat which constitutes for him/her a process*»²¹⁴. It pertains among other guiding principles of a criminal process, the respect to the presumption of innocence and exercise of the rights of defense.

In the scale of sentences applicable to offences, commission of a crime requires the heaviest and the most constraining sentence. The accused person, whose guilt is yet to be established, deserves to be given the necessary opportunities, useful for the demonstration of the truth. Efficient exercise of the rights to defense in the court of assize would offer the benefit of an adversarial proceedings and would give the accused person the means to refute the bases of his/her incrimination in order to prove his innocence.

The expression «*rights of defense*» denotes «*all prerogatives which guarantee the accused person the possibility to effectively ensure his/her defense in a criminal process and whose non observance constitute a cause for nullity of the procedure*»²¹⁵. According to Jean PRADEL, the rights to defense would rather be analyzed as «*all prerogatives accorded to a person to enable him/her to ensure protection of his/her interests during the entire process*»²¹⁶.

For reasons of clarification, it would be important, on the one hand, to note that the rights of defense are not exclusively for criminal matters and that they can take a civil or administrative dimension and that on the other hand, there is need to distinguish between the concept of the rights to defense to some related notions such as the freedom to defense and the right to defense.

Indeed, the freedom to defense carry, not only, for those on trial, the right to choose at his/her discretion his/her advocate but also the methods and the means to defend himself/herself in a court process. Inversely, the notion of right to defense denotes the general framework in which the rights to defense are recorded. By analogy, we can affirm that if the right to defense is the container, the rights of defense would be the content, meaning, in this

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²¹⁴ FRISON-ROCHE (M-A), « Les droits de la défense en matière pénale » in Droits et libertés fondamentaux (sous la direction de CABRILLAC (R), FRISON-ROCHE (M-A), REVET (T)), Paris, 4ème édition, Dalloz, 1997, p. 387.

²¹⁵ CORNU (G), Vocabulaire juridique, Paris, 8ème édition, PUF, 2007, p. 335.

²¹⁶ PRADEL (J), Procédure pénale, 13ème édition, Paris, CUJAS, 2007, p. 352. This definition has the advantage of being very wide and more complete as compared to the one proposed by Gérard CORNU.

regard, the same material reality²¹⁷.

Without demonstrating lack of interest as pertains to the question relating to the origins of these rights²¹⁸, which are similar to the origins of human rights especially those of the first generation, it would perhaps be important to state that the rights of defense enjoy high legal recognition at domestic²¹⁹, regional²²⁰ and international²²¹ levels.

As pertains the expression « court of assize », it denotes the competent jurisdiction to hear the most serious offences. It pertains to a temporary jurisdiction which meets every (6) six months in the Court of Appeal or in the High Court when circumstances demand²²², « *to hear and determine matters on individuals brought before it through an indictment* »²²³.

Indeed, certain particulars distinguish this court from the others. It pertains on the one hand, the composition which characterizes the hybrid composition of the court, made of ordinary citizens and professional judges. In other words, this court is a good mix between lay people and insiders, lay people meaning the jury and the insiders denoting the court²²⁴. On the other hand, it functions under the initiative of the president of assize who has real discretionary power, the accusation being represented by « the prosecutor ». The procedure is oral, formal and solemn, the jury and the assessors can only rely on the evidence produced during the hearing to form its opinion, while the president is the only one allowed to refer to the file.

As such, after examining the terminological clarifications, it appears adequate to verify if the exercise of the rights of defense before the court of assize does not face challenges, which Professor Ibrahim SALAMI referred to as « *institutional challenges* »²²⁵.

In reality, the Criminal Procedure Code of Benin organizes the procedure before the court of assize, recognizing, both for the defense and the civil party, important prerogatives which protect their interests. In a concrete manner, it pertains to the right to be represented by an advocate and the possibility for the accused person to be informed on the progress of the procedure. Better still, the adherence to the principle of adversarial proceedings and the right to cross examine the witnesses are affirmed, the right to freedom of expression and the right to make final submissions are assured. In short, the requisites of a fairly conducted are proven.

²¹⁷ LIAMIDI (B-A), *L'exercice des droits de la défense devant le juge d'instruction au Bénin*, Mémoire DEA, Chaire UNESCO/ FADESP/ Université d'Abomey-Calavi, 2008-2009, p11.

²¹⁸ Déjà, en 1215 la Magna Carta used to state that in these terms : « No free man shall be taken or imprisoned, nor dispossessed, nor exiled, nor ruined in whatever manner, nor put to death or executed, safe after a fair judgment by his peers and under the laws of the country (article 39) ». Even if the enunciation of the rights of defense were not clearly stated in this text the idea « of a fair judgment » already carried the germ. The rights of defense like human rights were reproduced in 1628 in "Petition of Right" at the initiative of Edward Coke Esquire then in the '*Habeas Corpus Act* (1676), declaration in relation to judicial safety, according to which any person suspected of having committed an offense must enjoy a certain number of judicial and procedural guarantees. In the same perspective, the Declaration of the Rights of Man and of the Citizen of 1789, proclaims it in Article 7 : « No man can be accused, nor arrested nor detained except under cases determined by the law and in accordance with the forms prescribed by it » Emphasis is put here on procedural guarantees without which the rights of defense would not prosper. Moreover, the *Bill of Rights* affirms it clearly with a big description in its sixth amendment. It provides as follows : « In all criminal trials, the accused will have the right to have been judged promptly and publicly by an impartial jury of the state and the district where the crime will have been committed (the district had earlier been demarcated by the law), to be investigated by the nature and the cause of the cause, to be confronted with witnesses, required by legal means the appearance of the defense witnesses, and to be assisted by a defense counsel of his choice. »

²¹⁹ At the internal scale, the rights of defense are based on the quality of constitutional guarantees and are sanctioned by Article 17 para 1 of the constitution of 11 December 1990.

²²⁰ At the regional level, the CADHP of 1986, state the principle of the rights of defense in Article 7.

²²¹ At the international level the DUDH of 1948 mentions it in Article 11 par 1 in the following terms : « any person accused of a felony is presumed innocent until his/her is legally established in court in a public trial where all the necessary guarantees to his/her defense will have been ensured. » while the PIDCP proclaims it in article 14.

²²² Art 208 du CPPB.

²²³ Art 207 du CPPB.

²²⁴ The president of the court of assize is a magistrate of the court of appeal. Beside him, there are two assessors who are magistrates of the court of appeal or of the high court.

²²⁵ SALAMI (I), « Les obstacles institutionnels aux droits de la défense », *Droits et Lois* (RTIJJ), n°16, juillet-août-septembre 2008, 25-35pp.

In the light of these elements, we would believe on the face of it that the exercise of the rights of defense before the court of assize in Benin does not suffer from any ambiguity. Deep inside, the reality is different since the guarantees offered by the punishment system of Benin to the accused person have become obsolete.

Within the framework of criminal process, in other instances freedom spaces are fought for, irrefutable proof that human rights in the proceedings tend to revolutionize the archetype of criminal proceedings.

The European Court of Human Rights sustains daily this crave for freedom through its big volume of court cases. The fair process, a new concept, born from the ingenuity of the European Court, puts into question our knowledge and proposes new perspectives. It is in the light of that we noticed inadequacy of some procedural safeguards (*1st part*) the reason for our interest in the reorganization of the court of assize, in so far as these structural guarantees appeared fragile (*2nd part*).

1st PART: INADEQUATE PROCEDURAL SAFEGUARDS

The order for indictment kicks off criminal proceedings; the accused person through indictment is invited to move from the preparatory stage to join court sessions. Hearing is the moment when the protagonists meet to examine together, in an open court and within the framework of adversarial proceedings, evidence produced by the prosecution, the complainant, the accused person and his/her advocate, in order demonstrate all the arguments necessary for the judges to make their decision.

So that the proceedings are fairly conducted, the accused person enjoys all prerogatives, which can be analyzed as procedural safeguards and whose finality is to ensure efficient exercise of the rights of defense. These guarantees are of two types: they affect not only prerogatives relating to representation by an advocate before and during the proceedings, but they pervade also, the requirement of the accused person to participate in his/her own trial.

However, even if these guarantees seem to be established, we are afraid of their inadequacies, since they are on the hand victims of ambivalence of certain legal rules (I) and on the other hand disrupted by the significance of difficulties of fact (II).

I- AMBIVALENCE OF LEGAL RULES

The rules of procedure to be examined within this framework touch on two fundamental pillars of the rights of defense. It pertains to the right to legal representation and the right to participate in one's trial namely to counter the evidence produced by the prosecution.

If the right to legal representation seems to somewhat honored (A), the right to participate in one's trial is on the contrary highly celebrated (B) which explains the ambivalence of the rules of procedure which we denounce.

A- RIGHT TO LEGAL REPRESENTATION SOMEWHAT HONORED

Upstream, the accused person enjoys the informal right, which translates the necessity to inform and notify the latter, according to whether he/she is detained or not, an indictment before the court of assize²²⁶. He/she will also receive according to the requirements of the procedure, list of witnesses, experts and the panel of jurors in session.

²²⁶ Art. 234 du CPPB.

Downstream, the accused person enjoys the right of representation by an advocate. This right is recognized for any accused person and enables him/her to enjoy the presence of an advocate, consult him and exercise with him the rights of defense, during legal proceedings. Consequently, we would not talk of a fair process if the accused person does not have the right to an advocate to inform him fully and defend his/her interests in the best way possible. The implementation of this right before the court of assize experiences various fortunes according to whether it is an ordinary proceedings (1) or default proceedings (2).

1) *During ordinary proceedings*

It is important to underline **the tolerated absence of the advocate** during interrogation furnishing the formalities of investigation. Indeed, the interrogation of the accused person before the hearing is a compulsory act. According to the senior judge PRADEL J. it is the most important act before the hearing to the extent where the jurisprudence sees therein a substantial formality whose omission or irregularities can vitiate the whole of the subsequent procedure²²⁷. The legislator in Benin requires that this formality i.e. interrogation be done immediately the accused person is put into detention²²⁸. Inversely the French legislator affirms that this interrogation cannot be done less than five (5) days before the hearing, so that the accused person had the time to prepare his/her defense²²⁹, the legislator in Benin restricted himself to state that the judge shall give notice on the date of the audience.

There is also need to state that this interrogation «*is an act of administration not of investigation*»²³⁰. This act has the objective of interrogating «*the accused person on his/her identity and whether he/she received the indictment notice*»²³¹. Better still, this act enables the prosecution to verify whether the accused person shall be represented by an advocate, failure to which the president of the court shall allocate him/her an in-house advocate²³². In relation to the commission of an in-house advocate, there are some challenges in the implementation of legal representation. It has appeared to very badly organized, the proceedings files are often given to the in-house advocates a day before the hearing and not at the beginning of the trial²³³.

During the accomplishment of this formality the presence of the advocate is not admitted, this for the simple reason that the president of the court of assize «*must not interrogate the accused person on the merits of the trial*»²³⁴. It is feared that the president does not comply and the presence of a counsel would have given assurance on the same

2) *During default proceedings*

The situation of the accused person being absent because he ran away after being indicted²³⁵ or escaped after the being notified of the indictment²³⁶, is very special. This situation somehow departs from the ordinary proceedings and to some extent adversely affects the rights of defense.

²²⁷ PRADEL (J), *Manuel de procédure pénale*, Paris, CUJAS, 2007, p.821.

²²⁸ Art 237 du CPPB.

²²⁹ Art 277 du CPPF.

²³⁰ PRADEL (J), op cit. p.822.

²³¹ BORRICAND (J), *Droit pénal procédure pénale*, Paris, Editions SIREY, 1998, p.349.

²³² FOURMENT (F), *Procédure pénale*, Paris, Editions Paradigmes, 2006. P.266

²³³ LIAMIDI (B-A), *L'exercice des droits de la défense devant le juge d'instruction au Bénin*, Mémoire DEA, Chaire UNESCO/ FADESP/ Université d'Abomey-Calavi, 2008-2009, p.47.

²³⁴ BORRICAND (J), op cit.

²³⁵ Art. 335 du CPPB.

²³⁶ Art. 336 du CPPB.

According to Professor PRADEL J²³⁷, this default procedure in its entirety has two disadvantages:

- ✓ On the one hand, it is obsolete especially with the sequestration and confiscation of the property of the accused person, together with automatic deprivation of his/her civil rights.
- ✓ On the other hand, it is not in any way in conformity with the jurisprudence of CEDH which provides that the accused person, even if absent can be represented by an advocate.

From the analysis, it means that this procedure deserves to be reformed so as to be in conformity with the new procedural requirements which call for holding of a truly fair hearing.

The French statute of 9th March 2004 therefore appreciated the full import of the situation by opting for outright deletion of this procedure «*by replacing it with a system close to the one which prevails in correctional matters*»²³⁸.

B- RIGHT TO PARTICIPATE IN THE PROCEEDINGS

If the preparatory stage of the criminal process, in this particular case the investigation stage «*is a machine which can produce the truth in the absence of the accused person*»²³⁹ due to its inquisitorial character, relying primarily on the initiative of the presiding judge, the decision stage of a criminal case on the contrary is differentiated by its adversarial model²⁴⁰. It indeed pertains to a model which claims to be democratic to the extent where it poses an equality of principle between the parties during their presentation before the judge whose major role is primarily limited to that of the direction of the proceedings. The accusatorial system thus put in place, is identified by its oral²⁴¹, public²⁴² and adversarial²⁴³ characters.

Adversarial principle, as espoused hereinabove, refers to the idea of equality of principle between the parties in the trial²⁴⁴; it is this reality which the EDH Court wanted to apprehend by instituting the principle of «equality of arms»²⁴⁵.

It is evident that inquisitorial dominance of Romano-Germanic legal systems makes the parties not to have one identity of prerogatives²⁴⁶, the most important being the cause of the accused person is heard, that he/she participates actively in the proceedings, both in the search for evidence (1) and in the discussion of the same (2).

1) During search for evidences

The search for evidence in all fairness and impartiality provides that the examination of

²³⁷ PRADEL (J), op cit. p.846.

²³⁸ PRADEL (J), op cit, p.846.

²³⁹ TULKENS (F), « La procédure pénale : Grandes lignes de comparaison entre systèmes nationaux » in *Procès pénal et droits de l'homme, vers une conscience européenne*, DELMAS-MARTY (M), (sous la direction de), Paris, PUF, 1992, p. 39.

²⁴⁰ Cornu G, (sous la direction de) : « Vocabulaire Juridique ». Association H Capitant, Paris, Dalloz, 2008.

²⁴¹ Article 270 of CPPB ; article 14 of the law on the organization of the judiciary in the Republic of Benin.

²⁴² VITU A., *Le principe de la publicité dans la procédure pénale*, Annales de la faculté de droit de Toulouse 1968, t. 16, fasc 1, p. 293.

²⁴³ BOCCARA B., *La procédure dans le désordre, le désert du contradictoire*, JCP 1981, I, 3004.

²⁴⁴ PRADEL (J), *Manuel de procédure pénale*, op cit, p.353 n° 400. According to an analysis by Professeur PRADEL, « the concept of equality of arm sis disputable since it involves an identity of prerogatives between the attorney general and the accused person while the first search of the truth to eventually deduced from it the application of a sentence while the second search of his truth so as to avoid condemnation. The former defends general interest while the latter fights for the safeguard of his personal interests »

²⁴⁵ The expression would have been invoked for the first time in the opinion of the European Court of Human Rights of 30 June 1959, Szabowicz/Suède, req 434/58, annuaire II, p. 515, cité par GUINCHARD S. BUISSON J. Criminal procedure, Litec, Paris, 1ère éd., 2000, n°385, p. 267.

²⁴⁶ CEDH 17 janvier 1970, Delcourt, série A, n°11, Rec. P. 15 §28. Similarly, the principle was cited but declared inapplicable in the decision of the ECHR of 27 June 1968 Neumeister, série A, n°8, Rec. p. 43, §22. This principle « requires that each party is offered a reasonable possibility of presenting his case in conditions which do not put in a disadvantageous position as compared to his adversary ».

the accused during the hearing, be done in conditions which preserve his/her interests. In this regard, the accused person and his/her advocate are entitled to a certain number of prerogatives.

Pertaining to the accused person, it is indicated that he/she must attend all stages of oral proceedings, otherwise they would be null and void since the presence of the counsel alone, is not enough to make the proceedings adversarial. From this we conclude that the accused person cannot be represented given that the court of assize never makes a ruling by default subject to cases of absence provided by the criminal procedure code²⁴⁷. Even in these cases, for the sake of adherence to the adversarial principle, the accused person must be informed of what happened during the hearing and possibly, if requisitions were taken or if an order was issued in his/her absence, they must be notified to him/her²⁴⁸.

The exercise of the rights to defense is a material right whose violation nullifies radically the proceedings, it therefore gives the accused person and his/her counsel, a big number of initiatives. Indeed, the accused person through his/her counsel, has in the same capacity as the prosecutor, the option of bringing witnesses in the proceedings, even if they were not lodged at the investigation stage, or they were not mentioned, on condition that their names were notified in accordance with the provisions of Article 247 of the CPCB²⁴⁹.

Moreover, under the same conditions, subject to the peculiarities of the proceedings²⁵⁰, the prosecutor and the parties in this particular case the defense counsel, can not only, examine the witnesses and the co-accused²⁵¹, they are also empowered to ask the presiding judge to withdraw a witness from the court room after his/her testimony²⁵² and finally oppose hearing of some witnesses whose names would not have been notified to them beforehand²⁵³.

Through an application by the prosecutor or by the parties, the presiding judge can ask the court clerk to prepare a report of additions, changes and variations which exist between the testimony of a witness and his/her previous statements. This report is attached to the proceedings report²⁵⁴.

After all, until the closure of the proceedings, the accused person through his/her counsel can make written arguments on merit and oblige the court, to make a ruling on the questions raised before it.

In the same vein, the defense through its final submission, can ask for a finding, that is to say notify and mention officially an irregularity, a remark which the court required to take into account²⁵⁵. And, to the extent that the accused person feels that there was an omission or violation of a legal guarantee during the proceedings, he/she is required to ask the court to make a finding on the same, so as follow it up.

²⁴⁷ The case of absence referred here is the refusal to enter appearance (Art 282 du CPPB), expulsion for trouble caused (Art 284 du CPPB) it brief withdraw on the order of the president during the hearing of a witness or one of his co-accused (art 283 of CPCB).

²⁴⁸ Art 283 par 2 of the CPCB.

²⁴⁹ Art 247 du CPPB « The Le ministère public et la partie civile notifient à l'accusé, l'accusé notifie au ministère public et, s'il y a lieu, à la partie civile avant l'ouverture de débats, la liste des personnes qu'ils désirent faire entendre en qualité de témoins, en précisant leurs nom, prénoms, profession et résidence. Les noms des experts appelés à rendre compte des travaux dont ils ont été chargés au cours de l'information doivent être signifiés dans les mêmes conditions. Les citations faites à la requête des parties sont à leurs frais, ainsi que les indemnités des témoins cités, s'ils en requièrent ; sauf au ministère public à faire citer, à sa requête, les témoins qui lui sont indiqués par l'accusé, dans la cas où il juge que leur déclaration peut être utile pour la découverte de la vérité".

²⁵⁰ On s'interroge bien sur la pertinence et l'intérêt pratique de la logique selon laquelle, en principe le ministère public peut poser directement les questions à l'accusé alors que la défense et la partie civile doivent le faire par l'intermédiaire du président des assises.

²⁵¹ Art. 275 du CPPB.

²⁵² Art. 300 du CPPB.

²⁵³ Art. 292 du CPPB.

²⁵⁴ Art. 295 du CPPB.

²⁵⁵ BRIERE de l'ISLE et P. COGNIART : procédure pénale, T. Paris-Armand Colin 1071, p.204.

2) *During examination of the evidence*

At this stage of the conduct of proceedings, various evidences are examined by each party who announces the conclusions drawn from them, and fixes the final position to adopt on all aspects of the proceedings.

Once the investigation is complete, the order in which different protagonists take part in the proceedings is indicated. First, the civil party presents its pleadings, then the prosecutor makes his submissions and finally the defense counsel makes his pleadings.

If rejoinders from one party to the other are admitted, they must however preserve the right enjoyed by the accused person to make the final submissions²⁵⁶.

The examination of evidences is noticed through different submissions and pleadings, but in this scope we shall pay attention to the pleadings of the defense counsel.

Through his pleadings, the defense counsel proceeds to the discussion of facts, evidences, documents and reasoning which forms the basis of the prosecution. In this regard, we can observe a real oral game where the defense counsel in his role, tries to fight or destroy the charges brought against his client, to show contradictions of the witnesses and the flimsiness of the testimonies, discussing the character of the witnesses, show credibility gaps of the prosecution and the doubt arising from the circumstances of the matter, assert morality elements of which are in favor of the accused person or the facts which reduce his/her liability.

In respect to this, one cannot therefore underestimate the importance of defense counsel's pleadings, for they appear as the crowning of the adversarial principle.

In the name of principle of defense, while making his submissions the defense counsel can not only, read investigation documents, but also produce new elements ; if their communication is required by a constant use, it is not required by the law.

Even after the pleading and address from the floor, the parties also have the option of replying their adversaries. This reply shall not be new pleadings or a new submission neither contain new developments, the reply always being organized by the provisions of ARTICLE 306 of the CPCB.

However, certain professional requirements and procedural realities can be of limits to pleadings in the interest of public order and justice in itself.

Pertaining to professional requirements, subject to disciplinary sanctions, the defense counsel shall not say anything contrary to the law, rules, good morals, state security, public peace and order and shall not divert from the respect accorded to the courts and public authorities²⁵⁷.

Concerning procedural realities, the presiding judge, on the basis of Article 272 par.2 of the CPCB, can interrupt the defense counsel or make observations to him in case of excessive and useless extension of proceedings; however this shall be done without adversely affecting the rights of defense²⁵⁸ . The presiding judge shall also, without affecting the freedom of

²⁵⁶ Art 306 du CPPB.

²⁵⁷ The Law instituting the Bar of Benin.

²⁵⁸ Crim. 8. JUILLET 1988-B.C. 246.

defense, prevent the advocate from discussing certain presumptions of guilt to which the prosecutor has alluded²⁵⁹.

If all procedural guarantees aims at promoting a better expression of rights of defense, implementation of these guarantees often face factual contingencies.

II- SIGNIFICANCE OF DIFFICULTIES OF FACT

Impact of difficulties of fact in a criminal case provides information on the human dimension of the justice rendered (A) and temporary contingencies which affect it (B).

A- HUMAN REALITIES

Under this perspective, the attitude of the professionals of the justice system (1), and the attitude of the accused person in relation his/her situation (2).

1) *Attitude of professionals of the justice system*

a- **Suspicious of dependency and unfairness in the Court of Assize**

Independence and fairness are inherent qualities to the function of a judge. It would be of no use for the accused person to enjoy the prerogatives of defense, if they must be exercised before a partial judge and unfair rules.

Independence means the situation of a public body in which its status ensures the possibility of taking decisions freely and free from all sorts of pressure. Independence of judges and jurors in the court of assize will be analyzed in two ways: it will pertain on the one hand, appreciating the judge in his ascending reports with the Minister of Justice and on the other hand, the jurors in their ascending reports with the president of assize.

On the other hand, fairness means absence of party taken, prejudice, preconceived idea, preference whose objective is to split up the adversaries in all fairness and equity²⁶⁰. In this case, it is rather in the relations with the justifiable that impartiality of judges and jurors shall be appreciated.

After all, the more judges and the jurors are creditors of independence, the more they are debtors of impartiality.

- *Independence debt*

In a study conducted by Professor Joseph Djogbenou on the justice sector and the state of law in Benin, he denounces that fact that legislation in Benin inadequately guarantees the independence of the judiciary²⁶¹. Indeed, the latter is the creditor of independence vis-à-vis the executive power which must avoid any interference in judicial affairs in progress and the operations of justice itself.

²⁵⁹ Idem.

²⁶⁰ Affaire Piersack c/ Belgique du 1er Octobre 1982. « si l'impartialité se définit d'ordinaire par l'absence de préjugé() elle peut s'apprécier de diverses manières. On peut distinguer entre une démarche subjective, essayant de déterminer ce que tel juge pensait dans son for intérieur en telle circonstance, et une démarche objective amenant à rechercher s'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime ».

²⁶¹ DJOGBENOU (J), « Bénin, le secteur de la justice et l'Etat de droit », Document de réflexion , Une publication du Réseau Open Society Institute, 2010, p.4.

Paradoxically, prosecutors (embodied in assize by the Attorney General) are hierarchically submitted to the executive authority through the Minister of Justice, they can in this regard, be committed to dirty works.

As pertains to judges of the head office, the category to which the presidents of assize belong, nonetheless enjoy protection accorded by the security of tenure, but this principle only has reduced incidence. Indeed, the politicization of the Higher Council of the Judiciary, justified by the presence of the President of the Republic, as the President of the institution, with the Attorney General, Minister of Justice as a member, induce that « *head office judges are by fact submitted to organic authority and to political influence of the executive power* »²⁶². On the question of organization of the Higher Council of the Italian Judiciary is an example to be followed²⁶³.

The hypothesis of a trial in the court of assize, seriously affecting the executive power, would therefore present serious risks to the extent where the Attorney General shall take requisitions dictated by the political power, the president of the court of assize shall direct the proceedings in this direction and the defense would be hard pressed, issue of the trial being decided in advance.

Concerning the question of independence of the jurors, it shall be appreciated on the one hand, in terms of rules of procedure, governing their mode of nomination and on the other hand we shall underline the possible influence of the president of the court of assize on the jurors.

First, the rules of procedure provide that «*at least fifteen days before the opening of the proceedings before the court of assize the President of the Court of Appeal, or the president of the court of the town in which the Court of assize must sit, selects at random, before an open court, on the annual list, names of fifteen jurors who form the list of the quorum. He also draws at random on the said annual list names of three assistant jurors living in the town where the Court of Assize is supposed to sit (...)*»²⁶⁴.

We realize that the mode of nomination is done in a certain guarantee of independence given that the jurors are chosen at random and that all citizens of the two sexes, aged more than thirty years, fluent in the working language and enjoying their political, civil and family rights, are the ones who can qualify as jurors²⁶⁵.

However, it is possible to fear that the jurors can somehow be influenced by the president of the president of the court of assize in instances where they are known 15 days in advance. Moreover, it is established that for each court the annual list is drawn in alphabetical order by the president of the Court of Appeal assisted by two advisors after the opinion of the attorney general. Furthermore, this list becomes final after approval by the Keeper of Seals, Minister of Justice.²⁶⁶ This is enough proof that the executive power has the means of making the jurors to owe allegiance to it.

²⁶² DJOGBENOU (J), Bénin, le secteur de la justice et l'Etat de droit, op cit, p.4.

²⁶³ Le Conseil Supérieur de la Magistrature italien est présidé par le Président de la République et composé de 2 membres de droit, que sont le Président de la Cour de Cassation ainsi que son Procureur Général et de 30 membres élus dont 20 élus par les magistrats en leur sein, 10 élus par le Parlement parmi les professeurs de droit et les avocats. Les membres du CSM ont un mandat d'une durée de 4 ans. Le CSM est divisé en diverses commissions qui se voient attribuer des compétences précises (attribution des fonctions, promotions, nomination et révocation des « magistrats honoraires », application de sanctions disciplinaires à la suite d'une procédure spécifique. La section disciplinaire du Conseil Supérieur de la Magistrature est composée du vice-président du CSM qui la préside, de deux membres élus par le parlement, d'un magistrat de la Cour de Cassation et de cinq magistrats. Elle peut être saisie par le Procureur Général près la Cour de Cassation dans un délai d'un an à compter du jour où celui-ci a eu connaissance du fait constitutif d'une faute disciplinaire.

²⁶⁴ Article 231 du CPPB

²⁶⁵ Article 222 du CPPB.

²⁶⁶ Article 229 du CPPB.

- *The debt of impartiality*

Judges and jurors are debtors of impartiality vis-à-vis the parties in the trial, in this particular case the civil party and the accused person. « *if factors of objective partiality resulting from the inadequacy of guarantees offered, justifying an objective and a serious doubt on the impartiality of the judge, factors of subjective partiality on the other hand, enjoys the bastion which their very being offers to express themselves and escape from this fact at any control* »²⁶⁷, It therefore follows that subjective impartiality is very fragile for it can be easily corrupted by strong mediation of the affairs²⁶⁸, the desire of professional ascension of a judge²⁶⁹ and popular opinions.

Pertaining to the jurors, it is not by chance if the provisions of Article 268 of the Criminal Procedure Code of Benin recommend the pronouncement of this oath : « *You swear and promise before God and before all men to examine with the most scrupulous attention the charges will be brought against the accused person (the accused persons), not to trust the interests of the defense, neither those of the society, not to listen neither hatred nor viciousness, nor fear or affection, to decide upon you on the charges and means of defense following your conscience and your intimate conviction with impartiality and firmness which are suited to an ethical man after the cessation of your functions* ».

Although it is more than a profession of faith, this oath is the foundation of the requirement of impartiality which is incumbent upon jurors, but it is important to acknowledge that it is subjective and very hard to appreciate given the big number of rules of procedure (secret vote, private conviction, the secret of deliberations, etc.) do not enable taking the measure of degree of impartiality which they demonstrate. Consequently, preserving the jurors' vote from any external influence must be mandatory, to the extent that « *it is not enough that justice be done, it must also be seen to be done in the eyes of the other* »²⁷⁰.

Impartiality of the judges of the court of assize can be compromised by acts of corruption. It is widely known in that, the matter of fees of criminal justice²⁷¹ where the image of the judiciary has been dented by allegations of corruption²⁷². Better still, Mrs Marie Elise GBEDO Advocate, Keeper of the Seals, Minister of Justice under the Government of YAYI II, affirmed before television cameras that the whole judiciary in Benin is corrupt²⁷³. It may be possible to put such a statement into perspective but it all the same gives information on the extent of the scourge in the judiciary, it is far from being cured.

The participation experts in the court of assize are another issue which deserves our attention, in so far as it can affect the impartiality of the judgment rendered. Indeed, expertise is « *a measure of investigation consisting for the technician committed by the judge, the expert, to examiner a question of fact which requires his input and on which observations or simple consultation would not be enough to inform the judge and to give a purely technical opinion without appreciating the legal order* »²⁷⁴.

Practically, it is a paradox that this simple technical opinion whose probative value is seriously contested, can suffice to make up for the private conviction of the judges and the

²⁶⁷ LIAMIDI (B), op cit, p. 42.

²⁶⁸ Décision DCC 07-155 du 22 Novembre 2007 de la Cour Constitutionnelle du Bénin ; Décision DCC 07-142 du 20 Novembre 2007 de la Cour Constitutionnelle du Bénin.

²⁶⁹ L'avancement et les promotions dans le corps des magistrats ne sont pas automatiques : elles sont décidées au vu du mérite. Ici, le mérite étant dévoyé, seuls les magistrats qui ne font pas de difficulté au pouvoir en ont. Du coup, l'impartialité subjective peut être mise à mal.

²⁷⁰ QUILLERE-MAJZOUB (F), *La défense au droit à un procès équitable*, Bruxelles, Bruylant, 1999, p. 54.

²⁷¹ Voir " Frais de justice criminelle: le verdict de la honte" in *Le Matinal* 08 Juin 2004 et « les loups ne se mangent pas entre eux » in *L'araignée* du 8 Juin 2004.

²⁷² Djogbenou (J), op cit, p. 2.

²⁷³ Voir " les magistrats invitent Gbedo à démissionner" in *Le Matinal* n°3748 du Mercredi 14 Décembre 2011.

²⁷⁴ CORNU (G), op. cit., p. 391.

jurors while we know how uncertain these opinions can be²⁷⁵.

As an illustration, it is easy to note that in criminal matters, quite often an expert is called to establish whether the accused person, was affected or not, at the time of the offense (brought against him), by a physical or neuropsychiatric problem which abolished or altered his/her judgment. To the extent where the expert report invalidates or validates the fact, the judge will rely on the same to form his private conviction while it was only to depend on « (...) *evidence produced against the accused person, and the means of his/her defense (..)*»²⁷⁶.

b- Weaknesses of the defense counsel

The non adherence to the law of defense does not lie exclusively on the judicial authorities, but also on the defense counsel.

We quite often notice lack of energy and enthusiasm to truly defend the client. It is true that within the framework of legal representation, files are generally given to the defense counsel on the eve of the hearing, but also, we sometimes have to reckon with young people appointed by the court, who are newly admitted to the bar, without much experience, who accept to do their first arms in the court of assize.

Most of the time « old » experienced lawyers decline the offer from the word go, for the simple and good reason that appointment by the court is poorly remunerated, ; by acting as such, they betray their oath, that of defending the rich and the poor.

It happens that some counsels appointed by the court meet their client for the first time in the court room, without prior agreement on defense strategies to apply.

So as to put an end to these different situations, we call for the reorganization of legal assistance, in this particular case the appointment of advocates by the court. It would be of importance to encourage the counsels appointed so that they feel motivated and provided for sanctions each time the counsel appointed would deviate from the ethical rules of his/her profession.

2) Attitude of the accused person in relation to his/her situation

a- Social standing of the accused person

- Legal fees

The social standing of the accused person constitutes in most cases, a major obstacle in the exercise of the rights of defense.

Indeed, poverty of the accused person, can permanently seal his/her chance, since the proceedings supposed to be conducted before the court of assize are not always free, they call for payment of fees which are to be borne by the accused person. For example, «*it is not*

²⁷⁵ GIBAULT (F), « L'expertise en matière pénale et les droits de la défense », Communication prononcée en séance publique devant l'Académie des sciences morales et politiques le lundi 27 mars 2006. Source en ligne : <http://www.canalacademie.com/L-expertise-en-matiere-penale-et.html>.

²⁷⁶ instructions données aux jurés des Cours d'Assises, il est clairement dit : « La loi ne demande pas compte aux Juges des moyens par lesquels ils se sont convaincus, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve ; elle leur prescrit de s'interroger eux-mêmes, dans le silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs : "Avez-vous une intime conviction ?" ».

issued free of charge to the accused persons, regardless of the number, and in all cases, a single copy of the charge sheet and written statements of witnesses and reports»²⁷⁷. They are also supposed to take copies through their counsels, but at their costs, of all documents of the proceedings²⁷⁸. It therefore follows that those who would not have taken copies would find themselves prevented from learning different indispensable acts of the proceedings necessary for understanding the criminal proceedings they are subjected to.

- *Constitution of a defence counsel*

Constitution of a defense counsel is not an easy thing; one should have the means to do it. Many are accused persons who cannot constitute a defense of their choice. In criminal matters, the law wanted to fill this gap by instituting appointment by the court of counsels through the mechanism of judicial assistance.

Judicial assistance, involves financial or legal assistance which the State gives to those facing trial and whose incomes are insufficient to have access to justice. It takes care in full or partially, of the fees for the proceedings and expertise, legal fees of the counsel, the assistance being paid directly to the counsel²⁷⁹.

In theory, this mechanism would have enabled the accused person who does not have the means, not only to pay the fees for the proceedings but also enjoy the services of an advocate. As a matter of fact, judicial assistance or legal assistance is very badly organized, files for the proceeding are often given to the advocate appointed by the court on the eve of the hearing and not at the beginning of the investigation²⁸⁰, and consequently the accused person will only enjoy approximate defense, this not being the wish of the counsel appointed by the court.

Beyond the financial situation of the accused person, we have to reckon with the contradictions of his/her statements during the conduct of the proceedings.

b- Contradiction of statements made by the accused person

It is not uncommon for the accused person to panic and make contradictory statements²⁸¹. As an illustration, an accused person can declare to know the facts brought against him at the preparatory stage of the proceedings and change unexpectedly in the dock, by totally denying the facts. In these circumstances, the bad faith of the accused person to cooperate with the court in order to assist in showing the truth is very pertinent..

Note also that the accused person very often ignore that his/her counsel is the best ally, the proof for this being refusing to tell him the truth and hoping to positively carry the day.

Under normal circumstances, they must be a contract of trust between the accused person and his/her counsel, which would serve in a better in protecting the interests of the accused person.

²⁷⁷ Article 245 du CPPB

²⁷⁸ Article 246 du CPPB

²⁷⁹ CORNU (G), op, cit p

²⁸⁰ SALAMI (I) « Institutional obstacles to the rights of defense », *Rights and Laws* (RTIJJ), n°16, July-August-September 2008, p.29.

²⁸¹ These statements differ from preliminary inquiry to decision proceedings, passing through the investigation stage at the point where the proceedings intermingle.

B- TIME REQUIREMENTS

The requirement for swiftness appears particularly important in criminal proceedings²⁸², and should not be taken lightly in criminal matters. We could not consider in a better way the problem of swiftness of justice than La BRUYERE, when he said: «*the obligation of judges is to render justice, their profession is defer it. Some know their obligation. Many do their profession*»²⁸³.

It therefore follows that rendering justice without excessive delay is the most mandatory of the obligations of judges, an obligation they hardly honor due to many unforeseen event which are not always of their own making but to which they adapt, in the course of their profession.

In Benin's positive law this requirement is inscribed in the constitutionality block through the African Charter on Human and Peoples' Rights in Article 7. Notwithstanding «*the exercise of judicial activity currently brings the proof that the requirement of swiftness is not often respected. If we can affirm that the right for the accused person to be tried in a reasonable time is taken into consideration by the laws of procedure, it goes against morals and judicial practices which on the other hand are the major enemies of justice*»²⁸⁴.

In a dynamic not less similar to the EDH Court, the Constitutional court of Benin also made a ruling on applications relating to non adherence of reasonable time limit. In doing this, it was able to push its own way, by setting aside from its analysis some criteria among which appear the attitude of the applicant and the behavior of national authorities to only taken into consideration the complexity of the matter and the behavior of judicial authorities²⁸⁵.

This jurisprudence of the Constitutional Court enables to possibly postulate, in the court of assize, some relative influence of the actors of the process on the time (1) and to affirm that the merit of the proceedings has an essential influence on the time (2).

1) *Relative influence of actors of the proceedings in the court of assize on time*

Detailed analysis of the criminal case show that the parties and the judge only have limited influence on the time of the proceedings.

- *Limited influence of the parties on the time*

Procedural slow-down is often due to the procedure itself, which for its integrity and the requirements of transparency and equity required by justice, the accused person enjoys some rights whose exercise can logically delay the termination of proceedings.

We could accuse the accused person of failing to actively collaborate with the procedure, when he/she uses his/her right of silence or uses legitimate legal means at his/her disposal such as application to waive court fees, appointment of a counsel by the court, consultation of the file or still study and reply to conclusions made by experts²⁸⁶.

²⁸² J.-F. BURGELIN, « La situation spécifique de la matière pénale », in J. -M. COULON et M.-A. FRISON-ROCHE (dir.), *Le temps dans la procédure*, op. cit., p. 31 ; S. GUINCHARD, J. BUISSON, *Procédure pénale*, Paris, Litec, 4ème éd., 2008, pp. 353 et s.

²⁸³ PRADEL (J), *Procédure pénale*, Paris, 10ème édition, CUJAS, 2001, p. 303.

²⁸⁴ LIAMIDI (B), op cit p. 49.

²⁸⁵ HOUSSOU (A), *Contribution au renforcement des droits de la défense au cours de l'instruction préparatoire au Tribunal de Cotonou*, Mémoire ENAM option Magistrature, UAC, 2009, p. 49.

²⁸⁶ CEDH, décision Bejer, 4.10.2001, § 58; CEDH, décision Zawadzki, 20.12.2001, § 92.

Consequently, in the majority of these stops, even if the EDH Court notices a certain link between delays entertained by the procedure and the attitude of the applicant in relation to the aforementioned behaviors, it refuses to commit its responsibility in case of violation of a reasonable time limit.

However, it sanctions on the other hand any delaying tactics for instance lack of diligence arising from acceptance of late conclusions, absence during hearings, non appearance of the accused and his/her counsel followed by an opposition, etc.²⁸⁷

In this regard, the influence of the accused person on the duration of the process can be admitted, but it is important to acknowledge that this influence is fundamentally relative.

- *Decreasing influence of the judge on the time*

The influence of the parties on the duration of the trial proved relatively limited, that of the judge seems to be remarkably on the decrease.

According to an analysis done by the EDH Court, the behavior of judicial authorities, as well as the attitude of administrative authorities, must be related to the principle of good administration which imposes upon states positive obligation to organize their jurisdictions in such a way that they are able to meet the requirements of Article 6-1.

This analysis therefore prohibits administrative authorities from using the excuse of a structural overload (lack of magistrates, shortage of equipments, inadequate general organization, back log of cases, lack of budgetary means, difficulties of recruitment, work overload) so as to escape adherence to a reasonable time limit.

In a dynamic society which is approximately similar, the constitutional judge in Benin believes that the negligence of the parties in the accomplishment of acts or procedure, malfunctions of the court clerk, irregular composition of the chambers, inability of the judges to attend hearings or their transfer, strikes would not exonerate the courts from their constitutional duty of rendering justice within a reasonable time²⁸⁸.

Under these circumstances, it is imposed on the judge to excel in rendering justice without any unreasonable delay, even when the means of this duty are often lacking due to the public powers, that it appear unfair to exonerate.

2) *Essential influence of the merit of the proceedings in the court of assize on the time.*

Time essentially undergoes the sensitive nature of the trial and the guiding principles which form the foundation of the trial and assist in its validation.

- *Fundamental influence of the subject of the trial on the time*

Procedural time adapts itself in a structural manner to the merits of the case, criminal procedure being its perfect illustration.

²⁸⁷ Notamment CEDH, décision Martins Moreira, 26.10.1988, Publ. Cour, série A, n° 143, § 50 ; CEDH, décision Kemmache, 27.11.1991, Publ. Cour, série A, n° 218.

²⁸⁸ Décisions DCC 00-07 du 02 février 2000 et DCC 01- 023 du 16 mai 2001. (Recueil des décisions et avis de la Cour Constitutionnelle des années 2000 et 2002).

The complexity of criminal matters deserves to be emphasized here. Indeed, according to the EDH Court, it is appreciated, in respect to elements of facts and law (complexity of administration of the evidence) which are in relation to the number of accused persons, volume of the file, number of people heard, connectedness, site visits, number of charges directed against the applicant and his/her co-accused, etc. It is such number of elements which make the criminal process unable to be sent and conducted in a sloppy manner, there is the quality of justice to be rendered therein.

This is indeed, the proof that the merit of the trial, better than the actors of the trial are subjected to it, influences in a large way the time of criminal reply.

Criminal reply, so as to get the approval of those under trial cannot occur *ex nihilo* meaning outside the facts it seeking to repress.

« If it is true that justice rendered after a lapse of excessive time, appears like justice disconnected from the reality it claims to apprehend, acceleration of justice should not, in as much be synonymous to expedited or more repressive justice »²⁸⁹.

It is mainly on the basis of this that we need to « () *strike a fair balance between adversarial requirements of a true protection of the rights of defense, on the one hand, and the efficiency and the swiftness of the action of justice, on the other hand* () »²⁹⁰.

- Increasing influence of guiding principles of the trial on the time

The guiding principles of a trial²⁹¹ govern the conduct of the trial. They are above all a bulwark against arbitrariness and no requirement of swiftness can override their implementation.

According to E. VERGES « (...) *if the guiding principles rid the procedure of its imperfection, it is [because] they form a body of rules different from others, in mind, soul, and meaning of justice* »²⁹².

Thus, the judge must «*give himself/herself time but he/she is supposed to give the same to the parties*»²⁹³, so that the guiding principles which are: the principle of respect of the rights of defense or contradiction²⁹⁴, the principle of loyalty²⁹⁵, the principle of good administration of justice, are well considered.

Consequently, the judge must henceforth be able to abide by all these principles and ensure in an efficient manner their reconciliation.

In the interest of good administration and quality of justice, the need for swiftness would find its limit in the adherence to the adversarial principle and the rights of defense.

Moreover, summary justice would not be better in meeting the expectations of those under trial than protracted justice. It is proving therefore indispensable to give time to those under trial to express their grievances, to defend themselves, to communicate and simply to give

²⁸⁹ KLEES (O), VANDERMEERSCH (D), « Les réformes de la procédure pénale après la marche blanche » in Une justice en crise : première réponse, Bruxelles, BRUYLANT, 2002, p.114.

²⁹⁰ ANGEVIN (H), *La pratique de la chambre de l'instruction*, Paris, Editions du Juris-Classeur (2ed), 2004, pp.141-142.

²⁹¹ Guiding principles belong to the category of the general principles of law and is opposed to corrective principles according to the approach of J-L BERGEL see in this case BERGEL (J.L), *Théorie Générale du droit*, Dalloz, Paris, 3^{em} éd., 1999, n°86, p. 99.

²⁹² VERGES (E), *La catégorie des principes directeurs du procès judiciaire*, typed thesis, Aix-en-Provence, 2000, p.65.

²⁹³ R. DENOIX DE SAINT MARC, « Le temps du juge », RA 2000, n° spécial 1, p. 26.

²⁹⁴ FRISON-ROCHE M.A. *Généralités sur le principe du contradictoire (droit processuel)*, thèse, Paris II, 1988. Conclusion p. 41.

²⁹⁵ M.-E. BOURSIER, *Le principe de loyauté en droit processuel*, thèse, Dalloz, Nouvelle Bibliothèque de Thèses, t. 23, 2003.

them the opportunity to argue their case, so that repressive justice comes out of it big.

2nd PART: FRAGILE STRUCTURAL GUARANTEES

The court of assize as an institution specifically charged with the responsibility hearing crimes of general law is characterized by its composition, its organization and its functions. It puts in place a mechanism whose finality is to establish the guilt or the innocence of the accused person, this mechanism is a summary of structural guarantees which are often criticized.

Indeed, the system of generalized collaboration between professional magistrates and jurors gives the impression of defiling the procedure and the failure to implement the principle of the right to appeal seems unachievable given that the accused person does not have a second chance.

Evidently, the frailty of structural guarantees would be dependent on absolute association plan agreed upon by the law for the composition of the court (I) and lack of recourse for the decision rendered by the court (II).

I- CONTESTED ABSOLUTE ASSOCIATION ARRANGEMENTS

Absolute association arrangements are currently facing strong opposition which denounce the confusion of jurisdictions between judges and jurors (A) the influence of a president with a voting right dominating the proceedings (B).

A- INAPPROPRIATE CONFUSION OF SKILLS

The punishment system of Benin, in matters of the court of assize provides for an absolute association arrangements. This arrangement is characterized by the fact that the judges of the court and the jurors, after the closure of the proceedings, withdraw in the deliberations room and cannot come out until they make their decisions²⁹⁶. They deliberate therein together and cast their votes in the same way by ruling in turns, «*on the main fact and if need be, on each of the aggravating circumstance, on subsidiary qualifications, on each fact of legal excuse, on the issue of judgment when the accused person was aged less than eighteen years at the time of commission of the crime, and as a must, when the guilt of the accused person had been established, on alleviating circumstances*»²⁹⁷.

In legal systems under the Common Law (England, Canada, USA, Australia), jurisdictions of jurors and judges are separated. It prevails in these systems a separation regime based on the distinction between law and fact. Indeed, «*in the first step, the jury used to rule on the fact (materiality and guilt) and, in case of an affirmative verdict on its part, the intervention of the court was needed in the second step, i.e. professional judges who used to rule on the law, on the sentence*»²⁹⁸.

The separatist arrangement of Anglo-Saxon inspiration even appealed to Spain in 1995²⁹⁹ which opted for the said arrangement due her pragmatism. Indeed, the jurors are in most cases the laymen of the law³⁰⁰ while the magistrates and the advocates are the professionals. For the uninitiated represented by the jurors, the legal language appears like a succession of

²⁹⁶ Art.312 du CPPB.

²⁹⁷ Article 313 du CPPB.

²⁹⁸ PRADEL (J), Les méandres de la Cour d'assises de 1791 à nos jours, Montréal, Revue Juridique Thémis, p. 135, www.themis.umontréal.ca.

²⁹⁹ Ibid.

³⁰⁰ Art 222 du CPPB.

incantations, and the instant of the hearing would not be enough to fill this gap.

By limiting the jurisdiction of the jurors in the appreciation of facts, the Canadian, English or American legislators were judicious in that, since it does not pertain to facts, which embody in most cases realities to which they are not foreigners, they will understand their meanings since the professionals, in this particular case, will draw the legal consequences.

Some analysts in the interest of perfecting the absolute association arrangement propose for the review the skills of the jurors. Beyond the skill of knowing how to read and write should we not look for a special skill namely a capacity in law so as to shield the jurors from the influence of the court of assize president?

B- INFLUENCE OF AN OVERRIDING PRESIDENT

Three big prerogatives enable the president of the court of assize to establish all his influence on the criminal matter, they will be appreciated on the one hand through organization (1) then on the other hand through the operations of the court (2).

- *Influence in the organisation*

Benin's statute of punishment comprises of the judgment jury of four jurors and gives power to the president, when a trial appears of to bring about long proceedings, to order for random choosing of one or two extra jurors to attend the proceedings³⁰¹.

In the interest of the accused person, there is a special majority of at least five votes when it pertains to deliberation on the guilt and on the existence aggravating circumstances, the other decisions are taken on a simple majority vote³⁰².

In these circumstances, a president of the court of assize having a strong personality just needs to convince four lay persons (the jurors) who often ignore all the rules of procedure. This must be an easy thing, when we know that the president ensures the policy³⁰³ and the direction of the hearings³⁰⁴.

Moreover, it is important to state that the deliberation takes place in the chamber and starts by a discussion stage not based on the law; it is evident that during this phase the most strong opinions are adopted by everyone and in this case, who is better than that who had a written knowledge of the file, who directed the proceedings and ensured its policy would seek to influence the votes if not the president of the court of assize?

- *Influence on the operations of the court*

The discretion of the president of the court of assize appears like an exception to the principle of legality. Indeed, the latter «*is invested with power (...) by virtue of which it can, in his honor*

³⁰¹ Art 262 du CPPB.

³⁰² Art 315 du CPPB.

³⁰³ Indeed, the president oversees that the proceedings are conducted in dignity, orderly and safely. He can take any measure in this regard, for example fixing the place of the accused persons, that of their advocates during the hearing of the witnesses, close momentarily the doors when the places reserved for the public are taken, not to allow into the chamber any person susceptible of being disorderly, order for the evacuation of the room in case of booing or even have the accused person expelled if he brings trouble.

³⁰⁴ In this regard, he interrogates the accused person, fixes the order for hearing of witnesses and experts. He can refuse to ask questions which he thinks not useful. It is also him who decides on suspension of hearing and the time necessary for the jurors and the court to take a break. He can receive a note asking for the suspension of the proceedings if there is need for it.

and conscience take all measures that he deems useful to discover the truth»³⁰⁵. One can therefore be tempted to affirm that this power does not have any other limit or rule apart from the conscience of the magistrate to whom the law referred for its exercise³⁰⁶.

Indeed, by virtue of his discretionary power, the president can « during the proceedings call when needed, by the mandate of bringing and hearing any persons or get any new documents which seem, in accordance with the developments given in the hearing, useful for getting to know the truth³⁰⁷. Moreover, he can despite opposition from the public prosecution or parties at the hearing of certain witnesses, hear them for information purposes³⁰⁸.

The interest of this power was originally meant to enable the president to react promptly against incidents which would arise during the hearing, which often require new measures of investigation and search for evidence. The objective being to avoid referring the matter to a subsequent session, or before a new court, where it would be necessary to restart all the proceedings; which would bring about, in this case, an extension of the preventive detention of the accused persons³⁰⁹.

Unfortunately, risks of abuse are far from being covered. Although we have affirmed that the president must always, in the exercise of his discretionary power, respect the rights of defense, affirming it only is not to limit the number of acts allowed, but contribute to determine to what extent the president can free himself from the ordinary rules of procedure by accomplishing the acts falling under the exercise of his discretionary power³¹⁰. By virtue of his discretionary power, the influence of the president during the proceedings is therefore established.

II- A SACRIFICED RIGHT OF REDRESS

Before talking about the inexistence of the right to appeal for judgments delivered by the Court of Assize (B), we should first talk about the lack of grounds which characterizes decisions rendered in criminal matters (A).

A- Lack of grounds for judgments rendered by the Court of assize.

Should we or should we not give grounds for the decisions rendered by the court of assize? There is need to accept that theorists and practitioners of law in Benin have never asked themselves this question. There is also need to state that the constitutional judge in Benin has never made a decision on this issue given that this matter has never been brought before him. However, the importance of the proceedings should be understated since the relevance of the arguments in favor or against the fact, in other respects, is substantial and deserves our attention

In the analysis of different observations done on the issue, it appears that in theory, giving grounds for decisions of the Court of assize is a possible option, but on the other hand, in practice, wanting to conform to the same at whatever cost is a risky undertaking.

³⁰⁵ Art 273 du CPPB.

³⁰⁶ Discretionary power of the president of the court of assize, Excerpt of the « Traité d'instruction criminelle » de R. et P. GARRAUD (T. IV, p.21 - Paris 1926).

³⁰⁷ Art 273 al 2 CPPB.

³⁰⁸ Art 292 al 3 et 298 al 2 CPPB .

³⁰⁹ le pouvoir discrétionnaire du président de la cour d'assises Extrait du « Traité d'instruction criminelle » de R. et P. GARRAUD (T. IV, p.21 - Paris 1926.

³¹⁰ Ibid.

1) *Grounds for the decisions of the Court of assize : a possible option*

«Any person who knows that he/she is authorized to give an opinion without having to give grounds for the same is naturally tempted to benefit from it or abuse it when he/she wants to impose a decision rather difficult to justify. Enabling a jurisdiction to render a unsubstantiated decision is to open the door to arbitrariness, which is not acceptable in matters pertaining to justice»³¹¹.

In the same breathe; a Belgian doctrine establishes that «*the law is both an act of authority and persuasion. The authoritarian law, that which is imposed by respect and majesty has no grounds. That which calls itself democratic, work of persuasion and reason, must seek, by the grounds, to obtain a reasoned adherence*»³¹².

In actual fact, different reflections indicate clearly that the grounds for decision of justice from where it originates must be seen as a fundamental requirement in the interest of persons in respect to whoever it is rendered.

However, it is no secret that the decisions of the court of assize evades this requirement, which would have enabled the person condemned to understand the contours and the meanders of his/her condemnation, which would have the effect of making him/her accept through «*reasoned adherence*» the contents of the deliberations.

During the hearing of a matter before it, the European Court on Human Rights, in a non-final ruling³¹³, decided in favor of grounds for decisions made by the court of assize. Indeed, keeping with the line of aforementioned arguments, the ECHR estimated that: «*(..) Judicial decisions must indicate in a sufficient manner the reasons on which they are founded. (..) The requirement for the grounds must also be reconciled with the features of the procedure, mainly before the courts of assize where the jurors must not give reasons for their private conviction.*»³¹⁴.

In this matter the ECHR revealed that the deliberations having led to the condemnation of the applicant, on the thirty two questions asked to the jurors, four among them only targeted the applicant and a positive answer was give to each one of them while' «*in this particular case, formulation of questions asked to the jury was such that the applicant was meant to complain that he ignored the reasons for which he had answered in the affirmative to each of these questions, while he denied any personal implication in the facts attributed to him*»³¹⁵.

Better still, the Court estimates that answers given to questions, to which it pertains, were terse and the questions themselves were formulated in a vague and general manner, a situation which put into question the transparent and non arbitrary character of the justice which had been rendered.

It is therefore mandatory for the person by the court of assize to understand and accept the grounds for which his/her guilt were established. «*That is very important due to the fact that the jury does not judge on the basis of the file but on the basis of what it heard during the hearing. It is therefore important, in the interest of explaining the verdict to the accused person but also to the public opinion to the «people», in whose name the decision was rendered, to emphasize on the considerations which convinced the jury on the guilt or innocence of the accused person and to*

³¹¹ <http://www.huyette.net/article-29711072.html>

³¹² PERELMAN (Ch.) et FORIERS (P) (sous la dir. de), *La motivation des décisions de justice*, Bruxelles, Bruylant, 1978, p.428

³¹³ CEDH, Arrêt Taxquet c/ Belgique du 13 Janvier 2009.

³¹⁴ Idem.

³¹⁵ Idem.

indicate concrete reasons for giving positive or negative answers to each question»³¹⁶.

Here, we are truly facing an audacious decision whose arguments keep and follow each other coherently, nevertheless, it appears difficult or rather risky, to practically expect, the grounds of the decisions of the court of assize while a number of unforeseen events shall be opposed to them.

2) *Grounds for decisions of the court of assize : a risky undertaking*

Giving the grounds for decisions of the Court of assize is a risky undertaking for simple and practical reasons which finally had significant praetorian supports.

Pertaining to practical difficulties, first, there is need to indicate that criminal files are often complex enough.

Indeed, criminal procedures sometimes experience multiple offenses with the accused persons who discuss each fact, each testimony, experts whose conclusions differ and better still the witnesses who contradict one another.

The requirements for giving grounds, is not an undertaking to be taken lightly. Consequently, giving grounds for a decision of the court of assize would therefore come back to writing on each important aspect of the file why such an argument is sustained and not the other one while we know that matters of least importance debated in correctional court for several days would have passed before the reasons for the judgment are given.

Thereafter, if the principle was applied in criminal matters, who would be responsible for writing the reasoned decision? In this hypothesis where the task would be entrusted to the president of the court of assize, what time limit would be allocated so as to produce this decision and how would he go about it? It is important not to ignore in this context that the decisions of the court of assize are the fruit of collaboration between professional magistrates and jurors, opinions of each other counts, personalization of the decision is not really acceptable

Moreover, seeking to imperatively give decisions for court of assize decisions, would come back to betray the secret of votes³¹⁷, the jurors being not empowered to express themselves during the deliberations, nor revealing the reasoning which led to the decision. It is therefore excluded that the president imposes to other members of the court to explain the direction they voted and why.

Moreover, it is important to indicate that decisions of the court of assize are not taken from the content of the written file, that the assessors of the president and the jurors do not know, but only from what is said during deliberations. Consequently, it would be difficult almost impossible, unless prior recording or transcription of the proceedings to produce «*a summary of main reasons for which the Court of assize declared it is convinced of the guilt of the applicant*», as it expected by the ECHR.

When this matter was brought before the French Court of Appeal, it remained rigid despite the precedent which the decision constituted in the matter of *Taxquet vs Belgium*, against which an appeal was filed.

³¹⁶ Idem.

³¹⁷ Art 316 du CBPP

In substance, the French Court of Appeal, in its ruling of 14th October 2009 affirmed that the decisions of the Court of assize need not to have grounds in the extent where it is established that «judges and jurors of the appeal court of assize, ruling in the continuity of proceedings, on a secret or qualified two thirds, gave to questions on the guilt, some, mainly, asked in accordance with the requirement of the indictment decision, the others, subsidiaries, subjected to discussions by the parties». And besides, «from then were assured that prior information on the charges which are the basis of the trial, free exercise of the rights of defense as well as the public and adversarial character of the proceedings, the decision meets the legal and conventional requirements invoked.»

In this regard, judges of the High Chamber of the ECHR, ruling on the appeal filed by Belgium against the decision rendered in the matter of *Taxquet*, reinforced the position of the French Court of Appeal by upholding the decision rendered by the first judges.

Indeed, the High Chamber of the ECHR is formal and brings finality to the polemic: «before the Court of assize with the attendance of a popular jury, there is need to put up with the special features of the procedure where often, the jurors are not supposed to –or cannot– give the grounds for their conviction (..). In this case also, Article 6 provides for the need to search if the accused person enjoyed sufficient guarantees meant to set aside any risk of arbitrariness and enable him/her understand the reasons for his/her condemnation (..). These procedural guarantees can for instance consist of instructions or clarifications given by the president of the Court of assize to jurors as pertains to legal problems posed or to elements of proof produced (..), and precise and non equivocal questions submitted to the jury by this judge, for a framework which is ideal for the foundation of the verdict or adequately compensate for the absence of grounds for answers given by the jury (..). Lastly, one must take into account, whenever available, the possibility for the accused person to exercise the options for appeal.»

However, this new jurisprudence imposes upon judges to formulate in a clear and precise the questions to be asked, in such a way that the accused person would have understood the basis of his/her guilt. This requirement appears to be practically difficult to implement; one gets the impression that the judges of the High Chamber just moved the problem without resolving it.

In reality, they were looking for another form of giving grounds without questioning the bases of the systems of the court of assize, as witnessed by the expression «adequately make up for the lack of grounds for the answers given by the jury (..)».

The law being dynamic, there shall come a day when there will be need for giving the grounds without seeking, through legal intricacies for the most adequate manner to make this idea be accepted by the conservatives of a system which must keep up with the time.

B- Exercise of an inexistent right of appeal

In the current state of the punishment system of Benin, the decisions rendered by the Court of assize are not susceptible to appeal. And, it does not seem evident that this law is for a short term, in the extent that the Bill on the Criminal Procedure Code presented before the National Assembly by decree³¹⁸, does not mention anything about it. However the accused person has an extraordinary way of redress, which is exercised under certain conditions defined by the statute. Consequently, this way of redress carries in itself the germ of its limits and would not be compared with the option of appeal.

³¹⁸ Décret n° 99-211 du 30 Avril 1999.

If some authors of the 19th century, seem to justify the position of Benin's statute, by referring to A.MORIN who says that the principle of the system of appeal appears to be «*socially very heavy for simple police offenses ; and, in the case of this sovereign jurisdiction which the Court of assize, () rationally absurd*»³¹⁹.

Today, «*the possibility of filing an appeal on an unfavorable decision is fairly considered as a human right and (...) it is for the person concerned to determine freely his/her interest since the opportunity of the actual exercise of his/her right to redress is left for his/her free assessment*»³²⁰.

We need therefore to assess the arguments against the lodging of an appeal in criminal matters (1) in order to assess the relevance of those in favor of the fact (2).

1) *Arguments against*

Two principles serve as the basis of the thesis «anti-appeal»; it pertains to the principle of popular sovereignty then that of mandatory two-tier proceedings in criminal matters.

- *The principle of popular sovereignty*

Justice is rendered in the name of the people and better still, «*vox populi, vos dei*», the voice of the people is the voice of God. This is essentially the reality which jury of the court of assize embodies. Through the absolute association arrangement agreed upon by the legislator, it would be difficult to throw stones to the judiciary, against condemnations which the jury would have issued against such or such accused person. Consequently, if sovereign people acknowledge the guilt of the accused person by answering «yes» at the end of the proceedings, this decision cannot be subjected to appeal due to the sovereignty attached to it.

Moreover the decision of the jury is in line with its private conviction, which is unique because it depends on the conscience of the person who expresses it.

It is therefore indisputable that the participation jurors in criminal proceedings is a form of democratization of justice whose objective is to establish a climate of confidence between justice and the people in whose name it is rendered.

- *The principle of two-tier investigations*

By virtue of Article 67 of the CPCB, «*preparatory investigations are mandatory in criminal matters*»³²¹. Moreover, they are conducted at two levels: first before the investigating judge, a single judge whose responsibility is to direct investigation and draw consequences from them through the orders he issues, then they continue in the indictment chamber, where the activities of the investigating judge are examined. It is also important to underline that the indictment chamber is a collegial formation whose prerogatives are enormous; it has powers of review which enables it to review entirely the investigation and power of cancelling irregular acts of investigation done. It is in summary a concrete demonstration of the principle of two-tier proceedings³²².

³¹⁹ MORIN (A), v° Appel - § 1 Historique « Répertoire de droit criminel » (Paris 1850).

³²⁰ RASSAT (M-L), procédure pénale, op. cit., p. 659.

³²¹ Art 67 du CPPB.

³²² Voir en ce sens AMOUSSOU (C-B), *Procédure pénale*, Cotonou, IMPRIMEX, 2004, 189p.

Furthermore during the conduct of the investigations, whether it pertains to the conduct of the first tier or the second tier, the accused person has the right of legal representation, right to participate in the proceedings, right to appeal against certain orders of the investigating judge.

It is at the end of this long and fastidious process that the indictment chamber issues the order of indictment before the court of assize.

In respect of all this, it might appear overabundant to want to introduce the exercise of a new type of appeal, which would definitely make the procedure heavier.

2) *Arguments in favor*

- *Practical arguments*

Initially, if the 1959 legislator in France had instituted between the investigating judge and the court of assize, an indictment chamber, it was to save the court from very light matters. The indictment chamber was therefore like a filter whose role was to help in reduction of judicial errors³²³.

Today, indictment chambers have become overloaded, the proof of this can be found in the High Court of Cotonou, all investigations offices handle in average about 536 files per investigating judge³²⁴ while in France the lowest threshold is 120 files which means cannot be compared with those in Benin³²⁵. In these circumstances, the chambers cannot exercise on the procedures careful examination expected of them³²⁶. It therefore follows that the indictment chambers do not add value to the file³²⁷.

Consequently, opening a right to appeal in the court of assize would enable a criminal, same as a delinquent, to appeal against his/her condemnation. As such, we would do away with the function of mandatory control which the chamber assumed to the benefit of exclusive capacity to make a decision on contentious issues³²⁸.

- *Legal arguments*

According to protocol n°7 an addendum to the European Convention on Human Rights, the right to appeal is a general principle of law. It was for conformity with this conventional requirement the 15th June 2000 Act in France instituted the right of appeal on the decisions of the court of assize. Indeed in a practical manner, *«the devolved role to the appeal court of assize is not the same as that attributed to the Court of Appeal ruling in correctional matters. It is not about confirming or quashing the first decision, but judging the whole matter again, as if the first decision was not in existence. This "absolute appeal" which can be opposed to classical "relative appeal" constitutes may be an echo of referral after appeal. There is also need to notice that the Court of Appeal means the Appeal court of assize as it is the case for the referral court of assize, without any special rules.»*³²⁹

³²³ JEANDIDIER(W), *La juridiction d'instruction du second degré*, Editions CUJAS, 1982, n°32.

³²⁴ HOUSSOU (A), op. cit., p.23.

³²⁵ CAPO-CHICHI (A)"Human rights before and after the trial", in « Human rights and administration of justice », Seminar organized on 6th to 8th of December 1999 in Cotonou by UNESCO and KONRAD ADENAUER Foundation, publication of the Danish Centre for Human Rights, p. 49.

³²⁶ PARDEL (J), op cit, p.149.

³²⁷ Ibid.

³²⁸ Like those interested in the nullities of investigation or relation to the acquittal of the accused person.

³²⁹ «Appeal against the decisions of the Court of assizes; Le poids de l'histoire » in *La Cour d'Assises, bilan d'un héritage démocratique*, French association for the history of justice, 2001 French documentation.

Beyond the European Convention on Human Rights, the International Covenant on Civil and Political Rights provides in Article 14(5) that «*any person declared guilty of an offense has the right to refer the matter to a higher court for examination of his/her guilt or condemnation in accordance with the law*». Consequently by not instituting a right to appeal in criminal matters Benin is in effect violating her international commitments arising from the ratification of the said treaty³³⁰.

CONCLUSION

Indispensable standards for holding a truly fair trial have significantly enlarged the domain of guarantees offered to the individual during the entire trial. Beyond the requirement of an independent and impartial court, which would be required to make a ruling within a reasonable time limit on the guilt of the accused person, the latter enjoys an anthology of prerogatives, a set of guarantees which the conventional language called the rights of defense³³¹. These rights, under the influence of an abundant praetorian activity from Strasbourg, have an admirable tendency to reinvent the structure of the trial; they put into question the skills and tend to reverse the limits of arbitrariness.

In criminal matters, the interest which this issue raises is very significant given that the life of the accused person strongly depends on it. It therefore follows that the revolution of the trial in court of assize is in progress and the process is irreversible. .

Procedural guarantees granted to the accused person as rights to defense deserve to be improved; on the other hand adversarial system of proceedings seems to have been consolidated.

As for structural guarantees, they must be reinvented and this requires reorganization of the operations of the court of assize.

In France and in Senegal, the trial in the court of assize has adapted new realities while the actors of the procedure in Benin³³², do not even raise the debate for the same due to fear of reforms. They are rather partisan to the idea according to which «*we don't experience the disadvantages of the legislation in force; we shall only experience the disadvantages of the legislation we will put in place*»³³³.

In spite of all this, the punishment system of Benin would win in changing and adapting to new current requirements.

Moreover, would it not be the nature of the rights to defense in a criminal trial that we will have to put into question? «*Assimilated to subjective rights, the rights of defense are only supposed to protect private interests of the accused establishing the act of defense into public act, as it is the case for acts of accusation or investigation, would not enable raising or strengthening the rights of defense as necessary tools for holding a fair trial*»³³⁴? At a closer look, this type of doctrinal choice would not be without consequences on judicial practice but will not fail to bring some light into it.

³³⁰ Etats de ratification de certains traités relatifs aux droits humains au 31 Décembre 2002/ www.aidh.org/ONG/Images/etat-des-ratif.pdf

³³¹ QUILLERE-MAJZOUB (F), op. cit., p. 104.

³³² Au regard de tous ces éléments, il semble évident que la thérapie de la réforme s'impose et les gouvernants, la société civile et tous les corps constitués (magistrats, avocats, police etc.) doivent avoir l'initiative des grands débats.

³³³ DELMAS-MARTY (M), op. cit., p. 292.

³³⁴ SAINT-PIERRE (F), « legal nature of the rights to defense in a criminal trial », D., n°4, chron, 2007, p. 260.

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