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FOREWORD

The rule of law can be compared to a building which is constantly under construction. It is not unusual that its foundations not only undergo political storms but also the irreducible aspiration of the people of Benin for the betterment of the rule of law. Unlike western democracies, which were with time, able to show and renew their understanding of the rule of law without pointless boastfulness, Africa like a young man in his twenties is still looking for her reference, her marks, on the route towards democracy and is somehow expressing her thirst for autonomy and her desire to assert herself in this field.

In Africa, Benin is a perfect illustration which could rightly or wrongly be referred to as the laboratory of African democracy or its rebirth. The only problem is that the democratic health of this country is far from being in good state. It is suffering from long-lasting ailments which are likely to compromise the dynamics which are essential in entrenching the rule of law. It is therefore in the perspective of having a better understanding of the rules of the democratic game, understanding its practice and the excesses which we can afford to have in purely Beninese context, that this and the second seminar on the Rule of law was initiated. This volume of the « African Law Study Library» co-edited by the Centre for Administrative Law and Territorial Administration (CeDAT) is the product of contributions produced by young legal researchers of the University of Abomey-Calavi with the financial and technical assistance of Konrad Adenauer Foundation. These young doctorate students (two have in the meantime defended their theses), wrote on various and relevant subjects, in line with the appropriate methodological rules, under our direction.

After analyzing different contributions in accordance with the framework of this second seminar, two major avenues can be identified, namely the question of enjoyment of civil and political rights on the one hand, and the implementation of economic, social and cultural rights on the other hand.

On the issue pertaining to enjoyment of civil and political rights, from the perspective of civil rights, rural land reforms in the Republic of Benin comes into question. If the Act of 14th January 2013 brought about a series of corrections to the Beninese Land Regime, we can nevertheless doubt the completeness of the ambition of the law maker who without really reaching it gives the impression of having preserved the dualism which has reigned in this matter. From the angle of public freedoms, it is the freedom to demonstrate and the right to strike which are illustrated, with triumph of force over law or over passion. As pertains to political freedoms, interest is put on the existence or non-existence of a status of opposition in Benin. In actual fact, if it is completed on normative level, the status of the opposition, in its current state, does not give real means to opposition parties to make the contribution expected of them within the framework of multiparty system of democracy. Other fields like international observation of elections and the problems arising out of organization of elections have not been overlooked.

On the implementation of economic, social and cultural rights, three major concerns have been raised, it mainly pertains to access to water provided by the State, illegal distribution of petroleum products and the protection of the intangible cultural heritage of Benin. Concerning access to water, the necessity to effectively decentralize basic public services and to open the sector of water distribution to private companies was emphasized. As for illegal distribution of petroleum products, the difficult encountered in controlling this informal sector of the economy in Benin is obvious in view of the various measures taken in trying to control it. The third research is a contribution to the rationale for the compliance of the provisions of the legislation of Benin with the international law.

Ultimately, these contributions by young Beninese researchers had the merit of diagnosing some ills which bedevil the fragile health of democracy and propose solutions which will restore it so that power remains with the law.

Hartmut Hamann **Ibrahim Salami**

RURAL LAND REFORM IN THE REPUBLIC OF BENIN

By **Valérie HOUANGNI**[*]

SUMMARY

The Act of 14th January 2013 is the culmination of a series of corrections made to the Benin land regime since 1993 that is at the beginning of experimentation by Benin on the mechanisms for rule of law and democracy. This law calls for the unification of the laws governing and restructuring Beninese land regime. We can nevertheless doubt the completeness of the task. The review of the application of this new regime to rural land is the place to take cognizance of the will to respect local practices shown by the law maker, but how do you respect local practices without maintaining a dualism or without deceiving oneself? These are the consequences of legislative "window-dressing'' in the rural areas which were discussed in the article on "Land Reforms in Rural Areas in the Republic of Benin''.

INTRODUCTION

Rural land refers to all land under agricultural, pastoral, forestry, fishing activities or meant to be put under either one of the aforementioned activities[1]. Over the last thirty years Benin has experienced an increase in agricultural settlement referred to as "settlement of migrants in a personal capacity on a rural area which is vacant and favorable for agricultural activities"[2]. Even if the convergence areas for this migration which are the latitudes of Dassa-Zoumè in the hills and the Sub-prefecture of Bembérék in Borgou[3] have become the granary of Benin for a number of products, there are more and more brewing and open conflicts between the foreigners (agriculturalists) and the natives, especially in the hills[4]. Benin, however considered as a country which is favorable for agriculture[5], thus offers a difficult access to land, which constitutes a major constraint to the expansion of this activity[6]. The Strategic Plan for Reviving the Agricultural Sector (PSRSA) of Benin, initiated by the Ministry of

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1 Rural lands are located outside urban areas, urbanized areas or areas of future urbanization, Article 7 of Law No. 2013-01 of 14 January 2013 on Federal Land and Code of the Republic of Benin (hereinafter CFD).

2 This migration is old. However, it has grown tremendously because of land speculation, high population pressure and environmental degradation experienced in some parts of the country, Laboratoire d'Analyse Régionale et d'Expertise Sociales (LARES) : « Atlas de sécurité alimentaire du Bénin », ONASA/MAEP, LARES, 2000, p 48.

3 Migration is mainly from three regions: Adja plateau Adja in South-West Bénin, Atacora Hills in North-West and Abomey Region in Central South of Benin. Pierre-Yves Le MEUR: « Droits et conflits fonciers en Afrique : le cas du Bénin, Étude de politique foncière », Rapport de recherche, mission de terrain, 16- 31 mars 2006, GRET-DIIS pour le Ministère Danois des Affaires Étrangères, octobre 2006, p 13.

4 Laboratoire d'Analyse régionale et d'Expertise sociale (LARES) : « Atlas de sécurité alimentaire du Bénin », ONASA/MAEP, LARES, 2000, p 49.

5 Minister in charge of Coordination and Government, Planning, Development and Employment Promotion, Millenium Challenge Account Bénin (MCA-Bénin), Projet Accès au foncier, « Livre blanc de politique foncière du Bénin, Projet », MCA-Bénin, mai 2010, p 58. Consultable sur le http://www.mcabenin.bj/sites/default/files/publication/Projet%20du%20Livre%20Blanc%20de%20Politique%20Fonci%C3%A8re%20du%20B%C3%A9nin.pdf visité le 09/11/2012.

6 In MCA-Bénin : « Livre blanc de Politique foncière du Bénin, Projet », Idem.

Agriculture, Livestock and Fisheries identifies as cause of such a situation, the regulation in force which has shown its incapacity to resolve serious problems in the rural areas[7]. Roch Abdon BAH sees in the co-existence of the three land regimes one of the causes of this land insecurity[8]. Joseph COMBY submits that the problem of land insecurity is concentrated on the question of the security of the changes[9]. Jean-Pierre CHAUVEAU on his part thinks that the problem is in fact bigger and more complex: « he finds in all the cases his source in the *property-ownership* bias and the inefficiency of postcolonial land legislations in West Africa, factors of marginalization of customary laws and institutional insecurity for agricultural producers [10]». The diagnosis can be multiplied at will. However, will the solution for better use of rural lands be realized by only taking into account customary laws?

The original customary law[11], although flexible[12], is also characterized by their oral nature, vagueness in the delimitation of rights, lack of a formalized transfer deed, latent conflicts, and multiple burdens which limit the access to land by women and young people[13]. To face these realities, the State chose to turn away from customary land and to undertake making and implementing land laws which promote spread of ownership of private ownership and ensuring generalization in writing[14] through a process of establishing customary land rights[15] and land registration. These processes, for various reasons, have only experienced poor adherence from the population. However, due to contact with urbanization, a sort of modern customary property was developed, which is not a right to property within the meaning of the substantive law, but which is more than a simple customary possession since transfers for a fee of the proprietary rights are very common[16]. These sales are ignored by the law without being formally prohibited[17]. They are recognized and even registered by

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7 Ibidem.

8 The customary regime which is oral ; Registration system (Based on Act no 65-25 of 14 August 1965 fixing land ownership regime in Dahomey) and occupancy permit regime (based on Act n°60-20 of 13 July 1960 fixing occupancy permit regime in Dahomey), Roch Abdon BAH : "L'immatriculation collective, le Registre Foncier Urbain et le Plan Foncier Rural: Expériences béninoises et la généralisation du cadastre'', Promoting Land Administration and Good Governance 5th FIG Regional Conference Accra, Ghana, March 8-11, 2006, in TS12.2 – Land Administration Issues in Africa, p 2.

9 Joseph COMBY : « La réforme du droit foncier au Bénin (…) », excerpt of a report written for SERHAU-SEM en 1998, comby-foncier.com, p 15, consultable sur le http://joseph.comby.pagesperso-orange.fr/benin/benin-4.html, visited on 20/12/2012.

10 Jean-Pierre CHAUVEAU, 2003, p 36 par Honorat EDJA et Pierre-Yves Le MEUR : « Le plan foncier rural au Bénin. Production de savoir, gouvernance et participation », IRD REFO, GRET, Document de travail de l'Unité de Recherche 095, N° 9, septembre 2004, p 1.

11 For Guy-Adjété KOUASSIGAN, land, "is not a tangible, its alienation seems inconceivable. There is between it and the social group a link that does not amount to a simple legal relationship, it is a real participation. And the law is applied to it, being stronger than the simple right of enjoyment is not any right of ownership ». Guy-Adjété KOUASSIGAN : « « L'Homme et la terre, Droits fonciers coutumiers et droit de propriété en Afrique occidentale »,» Berger-Levrault, Paris, 1966, pp. 9-10. Customary rights are recognized in Benin by Decree No. 56-704 of 10 July 1956 laying down the conditions of application of Decree-Law n ° 55-580 of 20 May 1955 on private and state-owned land and reorganization in French West Africa and French Equatorial Africa.

12 The flexibility of customary tenure in Africa is expressed both through evolution, in fact, customary rights to greater individualization under of pressure depletion of the resource, and through multiple arrangements for the access to land (loans, bequests, loans, indirect owner occupancy) Jean-Philippe COLIN : « Droits fonciers et dimension intrafamiliale de la gestion foncière, note méthodologique pour une ethnographie économique de l'accès à la terre en Afrique », Document de travail de l'Unité de Recherche 095 N° 8, IRD - UR Régulations Foncières, Montpellier, mai 2004, P 5.

13 MCA-Bénin : « Livre blanc …», op cit, p 25.

14 Hubert M. G. OUÉDRAOGO, with the participation of Honorable Edja, Mariatou Koné, Daniel Thiéba, rédaction finale Volker Stamm : « Étude comparative de la mise en œuvre des Plans fonciers ruraux en Afrique de l'Ouest : Bénin, Burkina Faso, Côte d'Ivoire », LandNet West Africa, Ouagadougou, January 2004, p 10.

15 Article 3 of Decree-Law n°5-580 du 20 mai 1955 portant réorganisation foncière et domaniale en Afrique-Occidentale française et en Afrique occidentale équatoriale française (J.O.R.F., 21 MAI, P. 5080.) prévoit : « En Afrique-Occidentale française et en Afrique-Équatoriale française, sont confirmés les droits coutumiers exercés collectivement ou individuellement sur les terres non appropriées selon les règles du Code civil ou du régime d'immatriculation ».

16 Joseph COMBY : « La réforme du droit foncier au Bénin (…) », op cit, p 3.

17 BILEOMA Advocate Notes a multitude of modes of titling. Besides the regular titles, there are documents without any legal basis which are according to him, « the reaction of the administration before (bad) management of land title ».

the administration[18]. Thus, although more dangerous than the original customary regime popular practices went along with the modern Beninese law[19] on land property. The consequence of these practices is lack of viability of documents establishing the rights and reluctance to invest or to grant land use rights to another person at the risk of not being able to prove his proprietary right afterwards. All these constraints therefore call for a reform of the Beninese land law.

The reform[20] can be defined as a correction done with a view to having an improvement. The expression "law reform'' according to Eric de MARI is a part of a movement for regeneration of the law[21], that is to say of a law which has for the first purpose, the progress of the society exclusively designed as a benefit[22]. Management of rural land regime of Benin has undergone changes since 1993 with the pilot experience of Rural Land Plans (PFR)[23]. The data collected thanks to this initiative enabled drafting and adoption of the Act n° 2007-03 of 16th October 2007 on rural land regime. However, even though it is a notable advancement in the organization of the rural land regime in Benin, it has been criticized to be « lying on the topographic view of land (a parcel defined by its limits and a rights holder), bypassing the issue of the sociopolitical nature of local land management, and on the real stakes of the intervention[24]». Following this Act and with the aim of having a single law governing all rural, peri-urban and urban lands, the Act n° 2013-01 on Private and State-owned Land Code in the Republic of Benin was adopted on 14th January 2013. The interest of this law resides in the reiterated ambition of the law maker to take into account the well-being of the population in its organization for rural land[25] unlike interventionisms[26] brought about by the previous

Maîtres Massihou BILEOMA et Didier NOURRISSAT: "La sécurisation des investissements par un système unique de *titrement* de la propriété immobilière'' in « Sécurité foncière au Bénin : La Chambre nationale des Notaires et le gouvernement béninois pour le même combat », Palais des Congrès, Cotonou, mars et mai 2009, Droit et Lois n°20-Dossier du mois.

18 Joseph COMBY, op cit, p 3.

19 Law No. 65-25 of 14 August 1965 on the system of land ownership in Dahomey introduced land title, the only rule conferring, through the registration, the right to property under modern law on land. Alongside this scheme ownership, there is a regime of right to use, occupancy permits, governed by Law No. 60-20 of 13 July 1960 establishing the regime residence permits in Dahomey.

20 Dictionnaire Hachette encyclopédique illustré, 1997.

21 Éric de Mari : "De la réformation à la réforme du droit'' in Olivier SAUTEL (dir) : « Réformer le droit », Débats et colloques, Lexis Nexis Litec, Paris 2007, p 7. The author, referring to the Historical Dictionary of the French language (ed. Oxford, Vol 2), reminds us that the word reform (change well in an opaque condition) appears in the seventeenth century in the French language, thus substituting in part, the word reformation (shape change is an improvement) appeared about him in the thirteenth century.

22 Éric de Mari nevertheless shows that there are substantial differences in meaning between the words "law reform'' and another that it is near, the" reformation of the law.'' Thus, the role of the king in the Middle Ages in France was to maintain the law. Alongside the king's laws, there was indeed the "law from the base'' or customary law, also Roman law or custom and practice are all essential sources of law. It was necessary to maintain all of these laws. Reformation is thus necessary in cases where the law is abused by misuse, corruption. Éric de Mari, Idem.

23 Millenium Challenge Account (MCA), Projet Accès au foncier, « Livre blanc de Politique foncière du Bénin, Projet », op cit, p 36.

24 PFR have effects both uncertain and highly contrasting according to socio-political and socio-land contexts. They can secure or insecure Philippe Lavigne Delville : « Reconnaître les droits coutumiers : propriété coutumière ou faisceaux de droits ? Cadres cognitifs, conception des droits et faisabilité politique de l'enregistrement des droits fonciers locaux en Afrique de l'Ouest », Montpellier 2006, p 3, sur http://www.mpl.ird.fr/colloque_foncier/Communications/PDF/Lavigne%20Delville.pdf consulté le 10/11/12 (inédit).

25 Article 6 of Law n° 2013-01 of 14th January 2013 on Private and State-owned Land Code in the Republic of Benin.

26 There was indeed, from 1947, the creation of a "Sector for Redevelopment of the palm wine industry'' whose realization resulted into outright felling of natural palm trees selected in the farms of Dahomeans. Following the failure of this program, laws 61-26 and 61-27 created Cooperatives for Rural Development (CAR) which forced the farmers to cooperate. Ahonagnon Noël GBAGUIDI : « La revendication du monopole foncier de l'État, l'intangibilité du Titre Foncier et l'accès à la terre au Bénin », Journal of legal pluralism, n° 39, Accra 1997, pp 52-53. See also Pierre-Yves Le MEUR : « État, paysanneries et pouvoirs locaux au Sud-Bénin, Le palmier vu d'en bas », Work based on a research program on local powers in Benin (see P.-Y. Le MEUR, Étude socio- anthropologique des effets sociopolitiques de la démocratisation en milieu rural au Bénin, la commune d'Ahouannonzoun (département de I' Atlantique)), rapport de

legislations[27]. It maintains customary land tenure along with modern land ownership. The customary land regime being the one under which most rural land fall[28], this option of the reform is a part of what we call land policies of the 1990s[29]. They are characterized by the concern for realism, pragmatism and anchorage in the local dynamics: « instead of land management from a central level, preference [is] given land management approaches based on taking into account local realities [30]». A land law enabling secure exercise of real property rights would have, itself alone enabled more flexible access to rights for use of rural lands. Beninese land reform does not however stop at improvement of land rights' protection. In particular, it aims at increasing investments on rural lands. This specific objective calls for the intervention of the law-maker in the use of rural lands with a view to have an effective value addition for the well-being of the population. Rural land reform in the Republic of Benin is therefore both security-conscious and agrarian. The analysis of the Private and State-owned Land Code nevertheless reveals that **the consideration of local realities in the security reform of the rights is partial (I) whereas it is ignored in the agrarian reform (II).**

I- Partial consideration of the local realities in the security reform

The innovation of the Private and State-owned Land Code (hereinafter referred to as, CFD) resides in the fact that protection of land rights is achieved, in the rural areas, through registration of certain land transactions, and incentive to adhere to administrative processes for clarification of rights on land. **The reform therefore appears to be partial consideration of the reservations to registration of land rights (A) and partial consideration of the stakes related to the control of transactions of rights on land (B).**

A- Partial consideration of the reservations to registration

Confirmation of land rights is mainly done in the rural areas on the basis of the rural land plan (1), but it is possible to obtain a certificate of customary ownership establishing presumed customary rights exercised on the land not covered the rural land plan and those which are not registered (2).

1- From optional registration to incentive to register: The deception

The authorities have the responsibility of encouraging the population to adhere to the process of the Rural Land Plan (PFR) (Article 193 CFD)**.** For the record, the Land Title of the

recherche EHESS- FSA-PUB-GRET, Stuttgart, Université Hœnheim, 1994, pp 86, 88 et s.

[27] Mr. Mensah , Minister for Rural Development and Cooperation from 1966 to 1967 said about these cooperatives as: "The force of the Act, the actions of authorities and elected officials at all levels a long and patient work of persuasion done by our technicians has not been too much to get farmers to accept their new condition . " Mr. Mensah : "The Dahomey experience in production cooperatives in the context of rural development schemes ," Dahomey Studies , No. 6-7 , Cotonou , 1966, pp. 73-80 , by Pierre- Yves Le MEUR : " State and local authorities peasantry in southern Benin , the palm seen from below ," Work based on a research program on local authorities in Benin (see the PY million, socio -anthropological study of the effects sociopolitical democratization in rural Benin , the common Ahouannonzoun (department I Atlantic)) , Research Report EHESS -FSA -PUB -GRET , Stuttgart, Hœnheim University , 1994 86.

[28] Only a quarter of presumed landlords have written proof of property in the rural areas (PSIA, 2006 Survey), the percentage being very high in the South 47%), due to growth of land market in Philip LANGLEY and Boniface FADE with the collaboration of Alfred MONDJANAGNI : « Habilitation juridique des pauvres par rapport à la propriété au Bénin », Centre pour l'environnement et le développement en Afrique (Ceda), février 2008, p v. See also, PSIA Bénin / OCS 2006 Survey in Observatoire of social change (OCS), Study on impacts of land reforms on poverty and the social situation in Benin, Poverty and Social Impact Analysis Bénin (PSIA Bénin) 2005-2006, Cotonou, décembre 2006.

[29] Hubert M. G. OUÉDRAOGO, with the participation of Honorat EDJA, Mariatou KONÉ, Daniel THIÉBA, final writing Volker STAMM : « Étude comparative de la mise en œuvre des Plans fonciers ruraux en Afrique de l'Ouest : Bénin, Burkina Faso, Côte d'Ivoire », LandNet West Africa, Ouagadougou, January 2004, p 6.

[30] Idem.

Act 65-25 which was the only title of property before CFD was not largely adhered to in the rural areas. In the urban areas the State experimented without much success an operation for transformation of residence permits, precarious titles, into land titles. Initiated by the Decree of 2001-291 of 28th August 2001 and the implementation from 2003, the operation which targeted 2835 conversions, was able to create 1483 titles, but only 110 (7.4%) of them were drawn by July 2006[31]. There is therefore the problem of consent to securitization or to the need for the same to the eyes of population. The RLP is not less a massive securitization than this operation: « After the final documents for the rural land plan have been drawn, each holder registered in the list of beneficiaries is issued with a Certificate of land ownership » (Article 200 CFD). It does not therefore secure customary rights, but transforms them for purposes of investment[32] which does not leave the choice[33] to the populations. Even if they do not collect their titles, they will at most be committed to the new obligations. This system is more constrained than optional registration of the Act no.65-25. It therefore creates a new *proprietary* bias[34], which only overloads the CFD. The land registered[35] indeed plays the same role as the RLP[36] and for investment; the title of land ownership can obtained outside the establishment of the RLP[37].

2- Between registration in the land register and intermediary title: continued insecurity

Article 112 of the CFD provides that only the Certificate of Land Ownership confers full ownership in the Republic of Benin. All the characteristics of ownership right are attached to this Certificate of Land Ownership. All lands which are not covered by a Land Ownership Certificate are under the empire of presumed rights[38]. But on unregistered land and those

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[31] Explanations of the difference between the objective and number of titles withdrawn differ according to the stakeholders. For some, it would be the disagreement of the populations to the project, their poor purchasing power and lack of awareness or distribution of texts and their stakes (LASSISSI, 2006, p. 170). For others, it pertains to old parcels of land which are today part of the urban fabric where the holders are not interested in getting a land title, the parcels being often indivisible, the rightful owners benefiting from shared rents...The operation however enable conclusion of the possibility of reducing the time limit and the cost of issuance of land titles and in fact experimenting a method for regularizing the land division done outside private land of the State. Philip LANGLEY and Boniface FADE avec la collaboration de Alfred MONDJANAGNI : « Habilitation juridique des pauvres par rapport à la propriété au Bénin », op cit. Les démarches et coûts d'établissement du titre foncier se trouvent à l'annexe 3 de ladite enquête.

[32] Article 195 CFD: « PFR has the objective of ensuring real property rights, specifically those established or acquired according to the custom or according to the legislation in force, so as to encourage long-term investments and a better use of land ».

[33] Incite: « Lead to (someone to do something), by encouragements or by a moral influence », Electronic Dictionary Antidote HD 2010.

[34] Jean-Pierre Chauveau 2003, par Honorat EDJA et Pierre-Yves LE MEUR : « Le Plan foncier rural au Bénin Production de savoir, gouvernance et participation », Document de travail de l'Unité de Recherche 095 N° 9, IRD, GRET, septembre 2004, p 2.

[35] Cadastral register: A set constituted of cartographic and literal documents at the national or local level, comprising, in the first place graphic information, secondly information attached, in relation to individual property ; in terms of this code, the cadastral register is understood as a technical set of tools for identification, registration and description of land and cartographic representation of the entire national territory on a communal basis and according to its division in parcels of land (Article 7 CFD).

[36] Article 194 CFD : « Rural Land Plan is constituted : of a graphic document, cadastral survey which is all land maps of a village territory ; a literal document, land owners register which states for each land unit mapped the modes, characteristics of rights held and holders of these rights ».

[37] Article 16 CFD: « Any transfer of proprietary right of a building in urban, peri-urban or rural area is subordinate, under penalty of absolute nullity of the contract, to the confirmation of the rights of the said building ».

[38] Article 146 CFD: « Certificate of land property is final and irreproachable, safe for fraud or mistake ». Article 147 CFD: « Any person, whose rights were injured by issuance of land ownership certificate following confirmation of land rights or fraudulent registration, can institute legal proceedings in civil competent court of the place where the building is situated, for restoration of his rights or for compensation. The court seized shall rule in a summary matter and its decision shall be issued three (03) months after seizure ». Article 148 CFD: « in case of material error on a certificate or non-adherence of the legal procedure for issuance of land ownership certificates, or of any other alteration occurring in

covered the RLP[39], Article 352 provides that: « Any person holding any of the customary rights … and wishing to be issued with an effective title establishing the existence and the extent of his rights, shall make an application to the Communal Office of the body in charge of confirmation of land rights for purpose of formal and written recognition of his rights… after which he shall be issued with a **Customary land ownership certificate** [40]». The expression "an effective title which establishes the existence and the extent of his rights is not very specific. It can pertain to presumed proprietary rights or simple annual operation rights. The precision is much difficult than the short process leading to the issuance of this title: « The Communal Office for confirmation of land rights with the support of village and communal structures conducts a public and an investigative enquiry certified by a report » (Article 352 CFD). This vagueness posed a problem in the context of the initiatives preceding the CFD. During the pilot experience of the RLP, the initial reactions by peasant farmers, scalded authoritative land interventions, and worries of an approach which put emphasis on the inventory of land-use rights in the land enquiries (and those of the migrants), brought about the National Resource Management Program (PGRN[41]) to change the approach and put emphasis on "property", rights at the risk of securing the latter to the detriment of land-use rights[42]. Pierre-Yves Le MEUR thus observed the omission and the vagueness in the RLP process which tends to enhance the precariousness of the beneficiaries who are otherwise also often those who are concerned by time-limited transfers. He concludes therefrom by saying: « these ones are [not] really under the realm of the RLP, despite its claim for exhaustiveness[43] ». The certificate for customary land ownership is not a title of ownership and seems to claim for this exhaustiveness. It will therefore be either rejected as the pilot operations of RLP, or give rise to other confusions[44].

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the procedure for registration and confirmation of land rights, the injured party shall be indemnified without prejudice to an action for claim of proprietary right. In all cases, compensating indemnity bears in mind appreciation in value of the building ».

39 Article 351 CFD: « presumed customary rights exercised collectively or individually on land not covered by the Rural Land Plan and those not registered are confirmed ».

40 Compare : Article 9 of the Decree n° 56-704 of 10th July 1956, fixing implementation conditions of the Decree-Law n° 55-580 of 20th May 1955, on land reorganization and state land in French West Africa and French Equatorial Africa : « … The Chief or the Commander of the circle… numbers and puts the pieces drawn… in a booklet to which a final map of the building is attached… The booklet is drawn in three original copies. The first one is kept at the court registry, the second… is given to the holder of the rights established, the third is addressed to keeper of land property… » Article 10: « Authentic titles thus issued are effective against to all third parties. They enshrine real rights of the holder/holders who exercise(s) his/their rights in accordance with the conditions fixed by Article 5 or article 6 of the Decree n° 55-580 du 20 may 1955 ». the Decree-Law n° 55-580 of 20th May 1955, on land reorganization and state land in French West Africa and French Equatorial Africa (J.O.R.F., 21 MAI, P. 5080), Article 5: « … the rights thus established, when they comprise disposal rights and obvious and permanent hold on the land, can also be transformed into proprietary rights to the benefit of their holder which requires in this regard their registration ». Article 6: « Customary rights other than those defined in Article 5 cannot be registered. They can only be transferred to individuals or communities like to posses the same rights by virtue of custom and only in the conditions and limits it provides… »

41 Le PGRN, developed in the years 1990-1992 had the mission of (a) « institutional enhancement, including review, promulgation and implementation of legislative texts, development of policies and capacity building and planning and monitoring and evaluation; and (b) identification and implementation of pilot actions, capable of promoting sustainable use of agro-sylvo-pastoral resources and contribute in holding back degradation of renewal natural resources » (World Bank 1992: 12). PGRN became in 1999, Program for management of regions and natural resources (PGTRN). Par Honorat EDJA, Pierre-Yves LE MEUR : « Le Plan foncier rural au Bénin Production de savoir, gouvernance et participation», Document de travail de l'Unité de Recherche 095 N° 9, IRD, GRET, septembre 2004, p 4.

42 Voir Jean-Pierre Chauveau, Jean-Philippe Colin, Jean-Pierre Jacob, Philippe Lavigne Delville, Pierre-Yves Le MEUR: « Modes d'accès à la terre, marchés fonciers, gouvernance et politiques foncières en Afrique de l'Ouest », Résultats du projet de recherche CLAIMS, CLAIMS (Changes in Land Access, Institutions and Markets in West Africa) et IIED (Institut International pour l'Environnement et le Développement), avril 2006, p 61.

43 Normally, the lineage beneficiaries and non-member users of the segment of «landowner» lineage are less counted (and probably much more arbitrarily, or more exactly particularly in line with local force reports) that the parcel lifted is big, Pierre-Yves LE MEUR: « Le Plan foncier rural au Bénin Production de savoir, gouvernance et participation », op cit, p 18.

44 Maître Massihou BILEOMA therefore criticized Article 111 of the Law n° 2007-03 of 16th October 2007 on rural land regime (…the rights established or acquired according to the custom thus established and registered in PFR enable

If the procedure for confirmation of land rights of the CFD is simple, clear[45] and not costly, then why the need for this title? Should we claim to take into account local practices while maintaining risks of insecurity? Moreover Article 360 provides that: « permanent transfer of a rural land governed by customs can be done through buying, intestate or testate succession, gift inter-vivos or through any other obligation effect ». The act of transfer shall be preceded by obtaining the land ownership certificate by confirmation of rights. A person believing in holding permanently a rural land governed by customs shall only be required to have a title of property and not an intermediary title. All the other measures for securing right and lands can therefore be put under the control of land transactions.

B- Partial consideration of the stakes of control of land transactions

Customary law offers a flexible access to land[46]. This flexibility is also a source of the vagueness which reins therein. The law-maker therefore provided for a stamp for some land transactions; bearing in mind that customary land law has already, in several areas, lost its substance by different misconstruction of its principles. The applicable law to any land regime being in its substance, which is henceforth unified (2) there is no more need of differentiating the degree of control of land transactions in accordance with the land tenure (1).

1— somewhat decadent control of land transactions

Deeds establishing transactions on registered lands shall be drawn in the presence of a Notary Public[47]. The registration of these deeds is null and void for lands falling under RLP[48] and not enforceable for a building whose rights have been confirmed. For lands not registered[49] in the land registry books, two situations arise:

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their holders to obtain, at their costs a Rural Land Certificate) by writing that the legislator: « instead of tackling the difficulties », created, through the rural land certificate, another form of property title ». This opens the way according to him to a third land regime while the problem of dualism (modern / customary) is not yet resolved. Advocates Massihou BILEOMA and Didier NOURRISSAT: « La sécurisation des investissements par un système unique de titrement de la propriété immobilière » in « Sécurité foncière au Bénin : La Chambre nationale des Notaires et le gouvernement béninois pour le même combat », Palais des Congrès, Cotonou, mars et mai 2009, Droit et Lois N°20 - Dossier du mois. Pour Roch Abdon BAH, in the current context of generalization of land title of land certificate which could just like occupancy permit be transformed into Land Title is untimely. Roch Abdon BAH : "L'immatriculation collective, le Registre Foncier Urbain et le Plan foncier rural: Expériences béninoises et la généralisation du cadastre'', Promoting Land Administration and Good Governance 5th FIG Regional Conference Accra, Ghana, March 8-11, 2006, in TS12.2 – Land Administration Issues in Africa, p 20.

45 Joseph Comby underlined in 1998 the malfunctions of preservation of land titles : poor physical state of documents, lack of thoroughness in book keeping, non-location of land maps attached to the file (due to lack of cadastral register). Thus, updating changes and transactions is not automated, it is very slow, and probably in an incomplete manner, on the basis of land turns from tax officers. These malfunctions are factors of uncertainties and weakening of « real » legal security of land title, weakening noted by different departments like DUA (Ministry of Housing Environment and Town Planning: MEHU) which mentions lack of reliable and irreproachable property titles, by Pierre-Yves Le MEUR: « L'information foncière, bien commun et resource stratégique, le cas du Bénin », IIED, Dossier n°147, mai 2008, p 9.

46 Hubert M. G. Ouédraogo et al, op cit, p 43.

47 Any facts or any conventions on a building whose rights have been confirmed, having the effect of constituting, transmitting, declaring, changing or extinguishing a real immovable right, must be established by a notarial deed or by a deed under private seal with a notary public report, regardless of the place of situation of the building, subject to facts, conventions or sentences subjected to registration (Article 18 CFD). These deeds similar to mortgage or to a long lease are recorded in land registers under the penalty of unenforceability (Article 156 CFD). See also article 16: « Any transfer of proprietary right of a building in urban, peri-urban area or rural area is subordinate, under penalty of absolute nullity of the contract, to confirmation of the rights of the said building ».

48 In rural areas, all transactions and transfers registered in PFR must, under penalty of nullity, be established in writing and registered in the village section of land management (Article 157 CFD). These transactions and changes must, in view of this registration, be established by a notarial deed or under a private seal signed before a notary public.

49 Permanent transfer deed of rural land governed by customs must be registered in the Local office of the organ in charge of confirmation of land rights in conformity with provisions on confirmation of rights under penalty of nullity. The transfer must be subject to a written contract signed before the village section of land management (Article 360 CFD). This rest of this article 360 has an error: « This contract must be supported by the rural land certificate corresponding to the

- Any acts, agreements or sentences having the effect of constituting, transmitting, declaring, changing or extinguishing one of the rights which is subject to the certificate of customary land holding… shall be established by the local offices of the organ in charge of confirmation of land rights (Article 353 CFD). In this framework, user rights can be granted for purposes of land-use by no-owner occupancy[50], by holders of customary rights to those who an application for the same. These rights, established or formalized in writing, are registered in the village section for land management[51] (Article 354 CFD) (emphasized by us).

- When they are still under the customs, rural lands can be subject to delegated rights of use[52] commonly accepted by customs and usages. However, the delegation shall be established in writing in the presence of witnesses. This writing states the agreement between the parties on the terms for granting and enjoyment of delegated rights of use. In all the cases, consultation of the village section for land management is required in the villages where it already exists, failure to which the deed for the transfer of the right of use will be null and void (Article 363 CFD) (Emphasized by us).

There is therefore a gradual disengagement of the State from the control of land transactions. In the presence of Certificate of customary holding, changes are made and registered. The rights of use for purposes for land-use by non-owner occupancy in the acts correspond to the same reality. They consist, for a person who holds land falling under customary law, of granting a right of use to another person. Nevertheless, because they in the first place, relate to the rights established and in the second place to un-established rights, the control of the land transactions is different. The idea remains that there is need to register, to record the transactions; failure to which, the State will do nothing.

The reform would have been the place for generalization of systematic registration of all transactions regardless of the land regime with the issuance of title of property in case of change of regime through permanent rights. All other transactions can only be done on the basis of the copy of the register for these transactions. Joseph COMBY in this regard, showed that it was possible to secure land rights without a land register or boundary marking,[53] but with mortgage registration offices where a copy of all the deeds of conveyance were supposed to be deposited and a register for the same was kept giving them a certain date. The prerequisite to the efficiency of such a method is good on the existence of land taxation and acquisitive prescription principle[54].

parcel of land concerned as soon as the village where this land is situated and subjected to establishment of a rural land plan as provided by this code ». the rural land certificate is not issued under the code. It is rather in property title, certificate of land property, that the people whose lands are registered in PFR have rights.

50 Indirect farm owner: making use of a piece of land through a contract without being the owner.

51 Article 304 CFD: « It is created in each municipality, land management commission. It has an advisory role and assists the Mayor in managing land issues. The Land Management Committee has sub-committees of district and village sections. "Article 305: "The composition, organization, powers and functioning of the Committee on Land Management of the municipality, sub-committees of district and village land management sections are fixed by decree of the Council of Ministers».

52 Delegated right of use: Right to use temporarily granted to a person by the holder of land acquired in the forms accepted by custom and practice, and local standards.

53 The idea that it is possible to secure the property without the prior Cadastre, or even a boundary of all land based on taking no account of historical fact. In all European countries, the widespread private ownership of land and legal security of transactions were brought to a high level of reliability even before cadastral registers were made and without the rule of land demarcation of . Joseph COMBY : « Sécuriser la propriété sans cadastre », Joseph COMBY, mai 2007, p 8, disponible sur le http://www.adef.org/RESSOURCES/propriete_sans_cadastre.pdf consulté le 21/ 10/2012.

54 Idem, p 9. Voir également Joseph COMBY : « La réforme du droit foncier au Bénin (…) », extrait d'un rapport réalisé pour SERHAU-SEM en 1998, comby-foncier.com, op cit, p 15 : « l'essentiel du problème de l'insécurité foncière se concentre sur la question de la sécurité des mutations ».

2- Decadent control of transactions in a unified land regime

The Court of Appeal ruled in 2007 that: « … our customs in Dahomey and in Benin do not confer right of ownership of land by virtue of prescription…[55] » The right of ownership is not described by its non-usage[56]. However, the action trying to claim for it should be it[57]. Article 396 to this extent provides that: « Any citizen has the right to institute legal proceedings to claim or confirm his proprietary right or to enforce his claims on a building. However, the legal action by an ascendant, a descendant or by a close relative by blood or by marriage, for a transaction carried out by the owner or the presumed owner on a building belonging to him is inadmissible »[58]. Besides, in terms of Article of Article 30 CFD, there is henceforth a 10-year limitation period[59] which shall be extinguished by precise terms[60] , a pre-existing presumptive right of ownership.

Private and State-owned Land Code does not define customs and the customary law no longer corresponds to the established or acquired right in accordance with the local practices and standards without any mention of different Beninese customs[61]. This broad definition of the customary law and the safeguards[62] for the exercise of management power of the

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55 Cour d'appel d'Abomey, arrêt n° 2007-19 / 1ère CT-B/CA-AB du 07 novembre 2007, Rôle général : 129/CTI-B/06.

56 The right to property is a perpetual law. Thus, only other real rights (usufruct, right of use or habitation, servitude, mortgage ...) can be extinguished. Only the regular acquisition of the property by a third party owner fulfilling the conditions of acquisitive prescription is likely to hinder the action claim. Without being extinguished by the effect of any requirement, this action is then held in check by the advent of a new and retroactive unassailable right to property resulting from adverse possession, which carries correspondingly disappearance of the right claimed (Civ 3e, 19 mai 2004, JCP 2004, IV, 2411, Limoges 9 fev 2005, JCP, 2006 IV, 1993). François Terré, Philippe Simler, op cit, n° 522, p 409. Voir également Anne-Marie SOHM-BOURGEOIS : " Prescription extinctive'', mars 2002, in V° "Prescription civile'', Recueil Dalloz 2008, n° 3.

57 There is a thirty-year prescription of law common to the Civil Code Article 2229 of the Civil Code (French) from 1804 still in force on certain aspects in Benin. It is however not applicable here in this area of land where special time limits exist.

58 The action for the ownership of land open to the injured party must be made within a set period of one (01) year from the date of discovery of the fraud. CFD Article 146: "The certificate of land ownership is final and unassailable, except in cases of fraud or mistake." In any event, any action is extinguished within five (05) years from the date of establishment of the certificate of land ownership (Article 147). Voir Patrice JOURDAIN : "L'articulation des doubles délais extinctifs en droit français'' in Patrice JOURDAIN, Patrick WERY : « La prescription extinctive, étude de droit comparé », Shulthess, Bruylant, LGDJ, Bruxelles, 2010, p 688.

59 Article 30 raises a CFD year rule: "For the purposes of this code, extinctive prescription is to terminate a peaceful possession, notorious, uninterrupted and unequivocal ten (10) years presumptive right of pre-existing property." Section 147 CFD raises the five-year limitation for land with certificate of land ownership. The proof of the rights of land without certificate of land ownership can be made among others by the rural land certificate , state agreement or not , the administrative certificate ; acts issued during operations subdivision or consolidation ; reviews tax , the permit to live , confession , oath, assumptions and the evidence (Article 375), the court has the force of res judicata has the same probative force as the certificate of land ownership (Article 377) . From the entry into force of the CFD, the invalidity shall nevertheless punishment of any final transfer of land rights not preceded by a confirmation of rights. A link must be found between the penalty and the possibility to benefit from the acquisitive prescription of Article 31 CFD.

60 Article 38 CFD: « The requirement does not apply to public or private areas of the state and local authorities. It does not apply to buildings equipped with certificate of land ownership or illegally occupied "buildings. ».

61 Customary law is defined in Article 4 of Law No. 2007-03 of 16 October 2007 concerning rural land tenure as "law established or acquired in accordance with customary rules and local practices and standards." Note that this law is repealed by Private and State-owned land Code

62 The customary chiefs who govern, according to custom, land use by families or individuals can in no case exercise their functions to claim other rights on the ground that those resulting from their personal use in accordance with custom. (Art 352 in fine). The code then takes the principle of Article 4 of Decree-Law No. 5-580 of 20 May 1955, land and State reorganization in French West Africa and French Equatorial Africa (Official Gazette, May 21, p 5080)

customary chief[63] does not abolish customary law[64] on land matters[65] as the law-maker did in the Family and persons code[66]. These two codes nevertheless control strongly[67] customary land law by leaving it only a part of the rules for definition of contracting partners[68]. The rest of the prerogatives: costly or permanent transfer of land, extinctive prescription, rules governing the transactions, rights of women and heirs are governed by the modern law. Concerning rural lands without title of ownership, the rights exercised are henceforth only customary by name. A security reform therefore should no longer distinguish between the methods of control of transactions since the security need becomes the same[69] due to interferences between regimes: customary law redefined and governed by modern law should not totally be left to its oral source of insecurity. This hierarchy in the protection of land rights reflected in the plan of operation of the rural land so that land and Federal Code strengthens the position of the owners of land compared to operators not owners

II- Ignorance of the local realities in the reform for use of rural lands

During his mission in Benin in 2009, Olivier de SCHUTTER, a special rapporteur of the United Nations Human Rights Council on right to food, estimated that, despite its advantages, securitization[70] :

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[63] Women and young people are generally excluded from discussions on issues of land management. Many local arrangements are made in the privacy of the special relationship uniting the heads of lineages between them, or in the secret agreements between the head of the lineage and his "foreign." "It is [therefore] not easy to speak publicly and deeply land issues to outsiders because it's all about family problems, so intimate issues." During a process of "clarifying rights'', issues and latent disputes on land management run the risk of being suddenly brought to light. Hubert G. Ouedraogo et al, op cit, pp. 29-30. Some women under the weight of the company or by ignorance of their rights can not intervene explaining the need for a systematic application of the Code of Persons and the Family

[64] Not see our customs in general, but with regard to the collection of customs that is customary of Dahomey in relation to the rights of the human person, DCC 09-087 of 13 August 2009 decided: "Whereas in decision DCC 06-076 of 27 July 2006, the Constitutional Court said and found "... the customary can serve as a legal basis for a judicial decision; ... no court cannot base its decision on a law, a statutory or administrative action meant to affect the fundamental rights of the individual and public freedoms; ... it follows that ... decisions of the Court of First Instance and the Court Ouidah in Cotonou who invoked a provision of which is customary condition of slavery status of a party to proceedings violate the Constitution''».

[65] In fact, it could not be otherwise. Customary local rules and practices that regulate access and use of land take the lead for one reason or another in modern property law. Hubert G. Ouedraogo believes that top-down approach from the law to local land rights is challenged in favor of down-up approach, from the reality of the local rights to the definition of suitable land legislation. Hubert G. Ouedraogo et al, "A comparative study of the implementation of rural land plans in West Africa: Benin, Burkina Faso, Côte d'Ivoire", op cit, p 35...

[66] Law No. 2002-07 of 24 August 2004 Code of Persons and Family in which customs cease to have force of law in all matters governed by it (Article 1030) , provides in Article 619 that: " The children or their descendants inherit from their parents or other ascendants , without distinction of sex or age although they are from different marriages ... They inherit in equal portions and per person, when they are all first degree called their leader , they succeed by strain when they come all or in part by representation. " The rights of the surviving spouse are organized by sections 630 and following of the Code. Article 630: „The surviving spouse against whom there is a judgment of separation has the force of res judicata is called to the succession, even when there are parents in the conditions laid down in the following articles." Knowing that Article 126 of the Act , only the marriage solemnized by a registrar has legal effects , it is necessary that the marriage is legally recognized until the surviving spouse can benefit from this provision , which is not often the case in rural areas or in the population not pay salaries . But that is not the purpose of this discussion.

[67] Confer articles 10, 11 et 19 du Code foncier et domanial.

[68] Professor GBAGUIDI noted in 1999 that "the new procedures, the recognition of customary land rights, in that it promotes personal and permanent hold, even if it does not change the legal status of the land that is still governed by the law traditional and registration in that it definitely gives property rights erga omnes, are instruments of repression of the customary land tenure system."Ahonagnon GBAGUIDI Christmas: "The claim of the land monopoly of the state, the intangibility of land title and access to land in Benin", op cit, p 44.

[69] Voir Liz ALDEN WILY there is need : «to recognize rural customary land tenure as being equivalent to statutory land tenure, a legitimate way of establishing legal rights on land », Liz ALDEN WILY : "Réformes foncières en Afrique : Une Nouvelle Évaluation'' in « La tenure coutumière dans le Monde moderne, les droits aux ressources en crise : état de lieux de la tenure coutumière en Afrique », Essai 3 /5, Initiative pour les Droits et Ressources (RRI), janvier 2012, p 13.

[70] Securitization is a neologism built on "title'' in imitation of English securitization, itself built on securities (securities) to designate a comparative technique. Gérard CORNU: « Vocabulaire juridique », PUF, Paris 2011.

> « firstly, can lead to strengthening the negotiation power of the property owner against farmers cultivating the land, especially in a context of increasing land speculation; and can lead to depriving the farmers, currently cultivating the lands without title [of property][71], of the land they depend on. Secondly, if clarification of land titles, through the establishment of rural land plans at the level of each commune, is not accompanied by support to agricultural production for mainly the most vulnerable farmers, these farmers could be tempted to transfer their lands to investors… [72]»

We need therefore to know what we are expecting from the reform. Pascal ROSET, in discussing transfer of land rights in Benin, believes that:

> « If the objective is growth of GDP, therefore sale of agricultural land can appear to be efficient. If on the other hand the objective is to account for consequences of institutional change in relation to laws controlling access to land, then other criteria of efficiency must be taken into consideration. In this case, it seems more pertinent to include in the criteria for measuring efficiency the socio-economic consequences brought about the change of the institutional context undergone by the stakeholders who are directly concerned, namely the farmers who sell their lands »[73].

The 2013 reform came to confirm the principles of Act n° 2007-03 of 16th October 2007 on rural land regime. **It ignored the realities of Benin in her restrictions to simple fee acquisition of rural lands (A) and in the organization of the access to land-use rights by non-owners (B). The reform seems to be meant for growth of the GDP without sufficient regard to farmers and the difficulties they face.**

A- Ignorance of local realities in the restrictions to simple fee acquisition of rural lands

In Benin civil servants and business men buy land to practice perennial agriculture such production of teckwood and fruits in view of land speculations especially in peri-urban areas. The sizes of lands concerned were within the range of 20-50 hectares. However for around ten years now, the phenomenon has developed further with the purchase of larger pieces of land and the entry of foreign investors and multinationals in the acquisition of pieces of land in the regions considered as the bread basket of Benin[74] Foreigners acquiring land[75] are mainly from Libya, Saudi Arabia, Lebanon, Italy, China, Nigeria and from United

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[71] Word added by us. The new legislation allows any operator to have a law observed and recorded, but remains in a precarious situation if the title belongs to another person or reverts to another person than him.

[72] Olivier De SCHUTTER, Report of the Special Rapporteur on the Right to Food, Mission to Benin (12-20 March 2009), the Council of Human Rights, 13e session, document A/HRC/13/33/Add.3, §§ 47 et 48.

[73] Pascal ROSET : « Les transferts de droits fonciers : facteur de renforcement des asymétries sociales ; une approche économique institutionnelle dans le village de Mougnon au Bénin », Institut de hautes études internationales et du développement, Genève 2010, p 23.

[74] According to an estimate from IFPRI, between 15 and 20 million hectares of farmland have been subject to transactions or negotiations with foreign investors in developing countries since 2006. Developing countries in general and sub-Saharan Africa in particular are especially concerned because of the widespread belief that they have large areas of land, a climate conducive to agricultural production, a labor-'cheap labor and a land prices still quite interesting. Olivier de Schutter, Special Rapporteur on the Right to Food "acquisitions and leases of land on a large scale: A set of core principles and measures to respond to the imperative of human rights", 11 June 2009 p 3, on

[75] The Italian company Green Waves would have obtained 250 000 hectares for sunflower farming; the French firm, Géocoton (anciennement Dagris), developed a chain from the cotton seed, and information was obtained on a plan to spend 400,000 hectares for the production of palm oil in the south of Benin, for the production of biodiesel for export

Arab Emirates[76].The stakeholders in the rural areas such as Alliance "Synergie paysanne''[77] proposed a cumulative limit of the sizes of rural lands to be acquired by each person, but their opinion was not taken into account (1). Local authorities through implementation laws of the Code must therefore oversee clear and non-violent transactions in matters pertaining to rural land (2).

1- Non-cumulative limitations to acquisition of arable lands

Private and State-owned Land Code conditions simple fee acquisition of rural lands whose surface area is above two (02) hectares to prior approval by the communal council for a development project for agricultural, fishing, pastoral, social, industrial, artisan purposes or for environmental conservation or generally related to a public interest project (Art 361 CFD). These restrictions are aimed at slowing down acquisitions of rural lands by land speculators and to encourage effective development of agriculture in Benin. The penalty is a compulsory lease imposed on the owner for the benefit of any person required to use the land and makes an application for the same. There is no better way of legalizing speculation of rural lands. Moreover the geographical area for the restriction only corresponds to the administrative territory of the authority which gives the approval[78] : « Any acquisition of land shall be subject to prior approval by the communal or municipal council of the place of the building after a reasoned opinion from the Land Management Commission. In any event no land acquisition can exceed a surface area of a thousand (1 000) hectares » (Article 361 CFD). No provision of the law therefore prohibits the multiplication of the acquisitions in all communes of Benin. It follows that the authorities must be vigilant so as to ensure equitable access for all nationals[79] who wish to have a simple fee acquisition of rural lands.

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by foreign investors. Olivier de Schutter, UN Special Rapporteur on the Right to Food, Mission to Benin (12-20 March 2009), the Council of Human Rights, 13th Session, document A/HRC/13/33/Add.3 , § 51.

[76] Nevertheless the opacity surrounding these transactions does not have all the information because there is no functional land records in public and transactions are under private seal. Bruno ANGSTHELM (CCFD, France), Nestor MAHINOU et Anna-Maria LUKACS (Synergie paysanne, Bénin) : « Accaparement des terres, Agricultures familiales et sociétés civiles face aux investissements massifs dans les terres agricoles au Benin», report from a study done on the Commune of DIDJA (in the South of Benin) by Synergie Paysanne in partnership with CFD – Terre solidaire, 2010, p 3, consulté sur le http://ccfd-terresolidaire.org/e_upload/pdf/agriculturesfamilialesbenin.pdf?PHPSESSID=664b2243839fc0ae4894d2a813af85b3 le 21/09/2012. Voir également Dr. Lionel GBAGUIDI, Agrivet Partners : « Achat / Accaparement des terres en Afrique : opportunités ou menaces ? Le cas du Bénin en Afrique de l'Ouest », mai 2010 consulté sur le http://www.fondation-farm.org/zoe/doc/foncier_benin.pdf le 26/11/2012.

[77] L'Alliance d'ONGs Synergie Paysanne (représentés par Simon BODEA et Ernest PEDRO sur l'émission radio télévisée "Débats actuels'' du 06 janvier 2013, Golfe Télévision, Cotonou, janvier 2013) propose : Distinguish acquisition of freehold land development of agricultural land : a- An individual shall not be able to acquire cumulatively throughout the territory and freehold, more than 50 hectares of land , welfare associations such as orphanages or foster homes for disabled , more than 100 hectares b -For enhanced by fisheries agricultural projects, etc. , area yawning can be unlimited if you want to use : . This is not because we have a project covering an area of 1000 hectares to be acquired outright the same area . 2 - After 05 years of undeveloped or non -production, the owner or holder of the customary rural land undeveloped will be dispossessed of their land or be hit with a fine: Fallow or quiescence of land is no longer a cultural current method. It must immediately when the earth produces more efficiently introduce fertilizer plants. With this technique, the non- development cannot exceed 05 years since, after this period, the soil fertility is restored ...

[78] CFD Article 361: "The acquisition of rural land with an area between two (02) and twenty (20) acres is subject to prior approval of the municipal or city council, a draft development for agriculture, fisheries, livestock, forests, social, industrial, craft or preservation of the environment in accordance with Articles 368 and following of this Code or generally associated with a project of general interest. Beyond twenty (20) to one hundred (100) hectares, the proposed development defined in the preceding paragraph shall be approved by the National Agency in the field of land and after consulting the municipal or city council. An area greater than one hundred (100) and less than or equal to five hundred (500) hectares, the demand for land acquisition is admissible only under the following conditions: - the project is approved by the municipal or city council; - the project has received the approval of the National Agency in the field and land - the project has been approved by the Minister in charge of land. Beyond five hundred (500) hectares, the proposed development is approved by decree of the Council of Ministers. In all cases, depending on the nature and importance of the project, the views of ministers are required without prejudice to the environmental impact „study ».

[79] The situation of foreign nationals is governed by Article 14 : " Foreign nationals can acquire a building in the Republic

The situation of non-owner land-users only being treated in a secondary manner, equity in this matter does not seem to concern them.

2- Negotiation power of the owners to be supervised

According to Pascal van GRIETHUYSEN property appears to be a formidable instrument for expanding power and influence:

> « left to itself, property economy is inevitably supported by an in egalitarian, circular and cumulative social dynamics, leading to concentration of wealth in the hands of a very rich elite, while the number of the excluded is increasing and becoming poorer and poorer [80]».

Analyses of experiences of opening agriculture to investments done in other countries show that at the local level, economic benefits remain uncertain[81]… The promises for jobs offer few opportunities of social promotion for farmers who have regular income… Moreover we can with difficulty admit that these projects are meant to ensure food security for the population while the biggest part of the production is meant for supply to external markets[82]»[83]. Despite this risk, the administrative authority, in order to facilitate the realization of development or public interest programs, can notwithstanding the proprietary right for family communities and natural or legal persons under private law, prohibit certain activities constituting nuisances to the said programs or to the environment, in accordance with the legislation in force (Article 366 CFD). Here it pertains to generosity granted to individual interest for the same reasons as what is necessary for consideration of public interest. We will therefore need to supervise the prerogatives within the limits of Article 361 CFD: « Any development project must ensure sustainable agriculture, respect ecological balance, environmental conservation and contribute to guaranteeing food security for the present and future generations ». There is moreover extreme land fragmentation in the southern part of Benin leading to multiplication small agricultural holdings, which are hardly viable economically, in view of the status of agricultural techniques. The national land and property agency must therefore exercise its preemption right on transactions operated on rural lands[84] with the aim of maintaining availability of land for non-owners who use it[85]. This availability shall be

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of Benin for a primary residence if they are married to a Beninese national or if they exercise a commercial, industrial or professional activity for at least twenty (20) years ... commercial leases , industrial or residential can be reached by non-nationals settled in Benin "and Article 61 of the Code which restricts the right the long-term lease of non-nationals: "The long-term lease or long lease that gives the tenant a real right which mortgage has a duration of between eighteen (18) and ninety to nine (90) years. It is renewable. This right can be sold in the manner prescribed by the foreclosure. Non-nationals can access land in Benin rental or long-term leases may not exceed a period of fifty (50) years and not renewable. « ».

80 Pascal van GRIETHUYSEN : « Pourquoi sommes-nous "accros'' à la croissance ? » in MYLONDO B. (dir) : « La décroissance économique, Pour la soutenabilité écologique et l'équité sociale », Broissieux, Ed du Croquant, 2009, pp 5 et 20, par Pascal ROSET : « Les transferts de droits fonciers : facteur de renforcement des asymétries sociales ; une approche économique institutionnelle dans le village de Mougnon au Bénin », Institut de hautes études internationales et du développement, Genève 2010, p 38.

81 A une échelle macro-économique, « il n'est pas certain que les recettes soient significatives : beaucoup de sociétés disposent d'exonérations fiscales. A D'après les visites réalisées sur le site du projet Malibya (Mali), les collectivités locales ne reçoivent aucune taxe sur l'extraction des carrières utilisées pour la construction de la route.

82 FLORENCE BRONDEAU : « Les investisseurs étrangers à l'assaut des terres agricoles africaines, Réflexions sur le dernier avatar des politiques agricoles post coloniales », EchoGéo, numéro 14, septembre /novembre 2010, p 5.

83 Pour un avis divergent, voir Kandeh K. Yumkella, Patrick M. Kormawa, Torben M. Roepstorff, Anthony M. Hawkins : « L'agribusiness au secours de la prospérité de l'Afrique », Organisation des Nations Unies pour le développement industriel, 2011.

84 Article 362 CFD : « L'Agence

85 Voir également, pour les immeubles bâtis, l'article 528 : L'exécution d'une décision de justice, de jugements ou d'arrêts et ordonnant une expulsion forcée est précédée d'une étape de négociation à l'amiable en vue du rachat, par la partie

maintained and the exercise of proprietary rights on rural lands is channeled to agricultural cooperatives. It does not pertain to rural planning cooperatives, by virtue of Article 13 of the Act 61-67 of 10th August 1961 on the status of agricultural cooperation are created by the Ministry of Agriculture and cooperation and has compulsory support of natural and legal persons having proprietary on the field situated within the perimeter of rural planning[86]. The legal, social and political difficulties caused by state intervention on collectivity[87] of lands remains big and the space of this Article does not allow discussion of the same[88]. The abovementioned articles 361 and 366 of the CFD can nevertheless be implemented to encourage the creation of cooperatives by virtue of **Article 4 of OHADA Uniform Act of 15th December 2010 in relation to cooperative societies law : «** Cooperative society is an independent group of people coming together voluntarily in order to meet their aspirations and common economic, social and cultural needs, through a company whose ownership and management are collective and where the power is exercised democratically and in accordance with cooperative principles ».

B- Ignorance of local realities in access to land-use rights by non-owners

Two thirds of the poor live in rural areas with an average size of 1.7 hectares for 7 people[89] for agricultural activities. Difficulties of access to resources are mainly non-heirs especially women, non-native migrants[90]. In the CFD, these difficulties in accessing credit (1) and land-use rights (2) have nevertheless only been treated in a secondary manner to proprietary rights or presumed land owners.

1- Access to credit prohibited for temporary land rights holders

Land rights arising from customs and local practices and norms recognized, established and registered in accordance with the regulation in force or the provisions of the Code, can serve as a guarantee for land credits (Art 350 CFD). This provision will, if respected, enable

perdante au procès de l'immeuble habité. Cette négociation devra être menée sous l'égide du Conseil consultatif foncier. L'État devra garantir le payement du montant du rachat à hauteur du tiers de la valeur vénale de l'immeuble non bâti… l'État préempte sur toute transaction devant être opérée sur ledit immeuble en faveur de l'occupant de bonne foi ».

86 Confer M. MENSAH : « L'expérience dahoméenne en matière de coopératives de production dans le cadre des périmètres d'aménagement rural », op cit, note 27.

87 This collectivization of rural lands which in reality is an illegal and unfinished expropriation poses problems of return in the property of the land right holders among them cooperatives did not succeed in the operations. The owners of these rural lands were indeed supposed to participate on full time basis in the activities of the cooperative until the age of 55 years; or to transfer their lands - and "the sale price cannot exceed 120% of the average value of sale or estimation of lands of the same nature during the three years preceding the sale..." (Article 18c, 3); or even let them for a minimum duration of 50 years - and "the rental price cannot exceed 3% of the maximum value.." (Article 18c, 4). Voir Ahonagnon Noël GBAGUIDI : « La revendication du monopole foncier de l'État, l'intangibilité du Titre Foncier et l'accès à la terre au Bénin », et Pierre-Yves Le MEUR : « État, paysanneries et pouvoirs locaux au Sud-Bénin, Le palmier vu d'en bas », op cit, note 26.

88 E. DIJOUX: « Poverty and access to land between men and women in southern Benin "inequalities, Laboratory of Legal Anthropology of Paris, University of Paris I. consulted on http://www.fao.org/docrep/004/Y3568T/y3568t10.htm 04/04/2013. Heirs of owners of land traffic lights forming cooperatives since the 1970s that divided claim their property. The State-owned conflicts involve under-exploitation of plantations. Some heirs proceed to fragmentation and land sales of these cooperatives, which reduces as arable areas. Promotion of palm oil industry: The return of the golden age is not for tomorrow, the Journal Other fraternity 26/08/2012 http://lautrefraternite.com/?p=24718; *Projet d'activités génératrices de revenus (PAGER) :* "République du Bénin: Échapper à la pauvreté *République du Bénin'', Profile* **n° 23 - septembre 2004, consulté sur** http://www.ifad.org/evaluation/public_html/eksyst/doc/profile/pa/bj_f.htm **le 04/04/2013.**

89 PNUD, 1997, données prises de MDEF-MAEP (2006) qui est un document préparatoire à l'élaboration de la stratégie de croissance pour la réduction de la pauvreté (République du Bénin, 2007) in Philip LANGLEY et Boniface FADE avec la collaboration de Alfred MONDJANAGNI : « Habilitation juridique des pauvres par rapport à la propriété au Bénin », op cit, p 9.

90 Idem.

holders of rights of use (youth, women, migrants, animal keepers, land-less farmers …) of Article 354[91] who registered their rights in the village section for land management, to get an investment for their activities. Unless this provision of Article 350 is not addressed to them, the characters both real and *intuitu personae* of the right of use in modern civil law[92] and the frequent contestations in rural areas on the extent of the rights of "non-owner[93]'' users of land make it doubtful the transferability and the possibility of seizing[94] these rights by financial institution in case of insolvency of the user. In modern law of land ownership, the long lease (whose duration lies between eighteen (18) and ninety nine (99) years renewable) which confers to the tenant a real right susceptible of mortgage[95] can be transferred and seized in the form prescribed by foreclosure (Article 61 CFD)[96]. It seems, in comparison with the modern regime, that the right of use to give access to credit should not be temporary and precarious. It must be real rights in the long term, but only rural practice bear witness to the effectiveness of this provision.

2- Holders without land, a stopgap measure for absentee land-lords

It is only in the absence of any maintenance or any production of rural lands acquired in simple fee or held in the forms accepted by the customs during a continuous period of five (5) years (Art 368 CFD), any natural or legal person shall request the Mayor, for the authorization to use the piece of land which has not been developed by its owner (Art 369 CFD). This recognition of the phenomenon for massive acquisition of rural lands and the precarious situation of farmers without land does not however seem sufficient. Klaus DEININGER[97], author of the report «For land policies favorable for growth and reduction of

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[91] Article 354 CFD: « It may be granted rights of use for the purposes of use by non-owners, by the holders of customary rights in favor of those who request it. These rights granted or formalized in writing, are registered with the village section of land management. " See also Article 363 CFD: " Rural land still under the influence of custom can be use rights delegates commonly accepted by custom and usage. However, the delegation must be recorded in writing before witnesses. This specific written agreement of the parties on the conditions for granting and enjoyment of rights to use to delegates ... In all cases, the consultation section of the village land management is required in areas where it already exists, under penalty of nullity of the deed of transfer of right to use. „Section 354 comes after 352 Certification of customary ownership obtainable on land not covered by either the PFR or a registration. Section 350 is part of the general provisions of Title VI on all rural and customary land, but requires that "... These rights are granted and formalized in writing [are] registered with the village section of land management ... " section 363 CFD requires no registration , at most, it says a consultation section of the village land management , it seems that the holders of such rights cannot benefit delegates secured credit unless the consultation worth recording , which would be very doubtful.

[92] The peculiarities of the regime of rights of use and habitation are mainly "intuitu personae '' and somehow food for these rights. They can not be sold or rented to another by the holder. Can not be assigned, these rights can not be mortgaged, only transferable rights can be mortgaged. French jurisprudence declared the unseizable (Civ. August 5, 1878, HB 1879, 1, 75 (but with limitations regarding the fruit unless the use has been established as food for)) and they are 'extinguished by the death of the holder or in the event of expropriation for public utility property to which they relate. François TERRE et Philippe SIMLER : « Droit civil, les biens », Dalloz, Paris 2010, n° 864, p 758.

[93] LARES: « The phenomenon [of migrant farmers] generates in connection with the evolution of the status of the land, problems in many areas. More of latent or open conflict against the foreigners (agricultural settlers) and indigenous peoples, including the Department of hills ». Laboratoire d'Analyse Régionale et d'Expertise Sociales (LARES) : « Atlas de sécurité alimentaire du Bénin », ONASA/MAEP, LARES, 2000, p 48.

[94] The leasehold, although a lease is not a personal, it gives a real mortgageable right (the right to use as dismemberment of real proprietary right property law is a real right, but his strong intuitu personae nature and sometimes food for, make it non-transferable, non-seizable and therefore not mortgageable)

[95] Article 55 CFD: « The mortgage is a real estate lien conventional or forced. It is made of a creditor as security for performance of an obligation. It gives its holder a right to follow and a right of preference. "Article 56: "Only structures that have been subject to confirmation of rights and having certificate of land ownership can be a mortgage." ».

[96] The simple lease or rental is a personal right, it can not be sold even less be mortgaged. It is the same in general use rights and housing. CFD Article 50: "The right to use immovable property cannot be transferred to third parties unless an express clause." CFD Article 52: "The right to housing cannot be transferred to third parties unless an express clause».

[97] Un Rapport de recherche politique de la Banque mondiale, par Klaus DEININGER, Oxford University Press et Banque mondiale, 2003.

poverty» observes that: «the land-lease helps significantly to improving the well-being of the people[98]». For Colin[99], delegation land rights through agrarian contracts is currently seen by economists as the best way of ensuring, apart from distribution of landholding and possible purchase-sale market rigidities, an efficient (stopgap measure for market imperfections and for presence of risk) an equitable distribution of land as a productive resource[100]. The establishment of a lease policy[101] by local authorities shall therefore be necessary. Article 84 of the Act n° 97-029 of 15th January 1999 on organization of Communes in the Republic of Benin provides that: «The commune shall develop and adopt its development plan. It shall oversee its implementation in harmony with the national directives in view of ensuring the best living conditions for the entire population. Under this framework : it shall develop the necessary planning documents : Master plan for commune planning, social and economic development plan ; master plans in urban areas ; rules in relation to land use ; …» The management shall nevertheless be in consultation with the national government so as avoid inequalities or injustices in accordance with the desire of each Mayor or each commune council in the 77 communes of Benin.

CONCLUSION:

Farmers who are owners of the land they farm are the most vulnerable to security crisis of the rural land. The low rate of investment in the rural areas and agriculture in general was therefore attributed to this insecurity. Nevertheless, despite this diagnosis, improvements done in the Benin land law did not stop at the rural areas due to security issues. Better still, they tried to take into account local practices and lesson learnt from the past experiences. The difficulty appeared at the level of definition and the consideration of land rights within the meaning of these local practices. Customary land laws have therefore, through rural land been transformed into modern laws. The end result is that only holders of rights or presumed holders of proprietary rights on land are really protected in their rights and assisted in using their lands. However, in accordance with the General Observation n° 12 (Right to sufficient food) of the social, economic and cultural rights committee, that it is the responsibility of the State to give effect to the right to sufficient food (Art. 11 of International Covenant on Economic, Social and Cultural Rights) means that it has to take a lead in trying to enhance the population's access to resources and means to ensure its subsistence, including food security, as well the use of the said resources and means. The premises of the reform therefore seem not to have been well defined. The security need is exactly the same regardless of the land tenure and even more so now with the transfer of non-registered lands. In reality there are no specificities to be taken into account, at least not for differentiating the land regimes. Security should be the same on all lands, the security of lands can pass through registration of all transactions, regardless of the nature, by the village section of land management instead of simple consultation of this structure (Article 363 CFD) without any registration of the transactions. This process shall reassure the transferors and the transferees on the nature and the extent of the rights transferred for temporary holding. Besides, a registration at the rhythm of the farmers and the creation of cooperatives (OHADA) assisted by agricultural incentives shall avoid clearance sale for

98 Idem.

99 Colin, 2001 par Ministère français des Affaires étrangères : « Droits fonciers délégués en Afrique de l'Ouest reconnaître et sécuriser les procédures », Travaux coordonnés par le GRET (Paris) et l'IIED (Londres) juin 2001, p 14.

100 Idem.

101 Professor Christmas GBAGUIDI believes that the establishment of a right to adequate farm lease can help create a legal mechanism to facilitate access for all to expropriate land without the customary owners. GBAGUIDI Ahonagnon Christmas: "The claim of the land monopoly of the state, the sanctity of the land title and access to land in Benin", op cit, p 65..

rural lands for the benefit big investors. Indeed, the cooperatives for rural planning (CRP) as meeting of people putting together their lands would have been helpful in materializing the reform in its two aspects: security and agrarian. Nevertheless, the compulsory character of these cooperatives under the Act no. 61-27 of 10th August 1961 on the status of agricultural cooperation is contrary to provisions on proprietary right provided by the Constitution of 11th December 1990 and by the Act n° 2013-01 of 14th January 2013 on Code on private and State-owned land in the Republic of Benin. With the **OHADA Uniform Act of 15th December in relation to cooperative societies' law,** each member of cooperative is a debtor towards the company for all what he undertook to bring in cash, in kind or in industry (Article 30). In consideration for their contributions, cooperative members receive company shares issued by the cooperative society (Article 31). Article 39 of this Act provides that: **« when the contribution is in form of leasehold, the contributor shall stand as security for the cooperative society like a lessor for the lessee ».** On the basis of these provisions, cooperatives can be constituted between landlords and land-less farmers on lands voluntarily under leasehold by cooperative members. They can assist in effective use of rural lands for the well-being of the local population and respect of land rights of each one as envisaged by the reform.

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THE RIGHT TO DEMONSTRATE IN BENIN

By **Simone K. HONVOU**[*]

INTRODUCTION

« *Acquiescence democracy » where citizens are not centres of initiatives, but simple homo economicus (producers and consumers) is a society whose regime of freedom and liberties is under threat* »[102]. Under normal circumstances, democracy supposes participation of individuals in decisions which concern them. In this regard, citizens have several means of expression either individually or collectively.

Individually, each citizen has the right to freedom of thought, conscience, religion, opinion and expression[103]. Collectively, citizens, through assemblies, associations and demonstrations, shall express their will. These freedoms collectively granted to individuals are personal fundamental freedoms. They are enshrined in the Constitution of Benin[104] in Article 25 which provides that « *The State shall recognize and guarantee, in accordance with the conditions set by the law, the freedom of movement, association, assembly, procession and demonstration*. ».

One of these means of collective expression of will increasingly in use both at the national and international level is the freedom to demonstrate. Proliferation of demonstrations in Benin has become a real subject of concern which needs to be understood both legally and practically. It is for this reason that the choice was done to examine the theme relating to our thinking entitled **the right to demonstrate in Benin.**

Demonstration is a right of collective expression[105] of ideas and opinions just like association or assembly. Indeed, it is very closely related to freedom of expression, because it enables expression of a claim or a protest[106], generally « against public authorities »[107]. It is a collective political action, which is mainly characterized by a protest march, which could have different objectives. It can pertain to improvement of living conditions, often called by trade unions, or during strikes (demonstrations organized by the teachers' trade union), or protest against closure of an industry or against wrongful dismissals, or protest against a law (protest organized by women on the National Assembly for the vote of the Persons and Family Code of Benin of 2004), a Decree, a reform (abolition of sale of adulterated fuel) or political claims (fight against fraud or against reelection of a president or demonstration against disappearance

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[102] CHARVIN (R.) et SUEUR (J.-J), Droits de l'homme et libertés de la personne, Paris, Litec, 5è éd., 2007, p. 193.

[103] Article 23 of the Constitution of Benin of 11 December 1990 provides that: "Everyone has the right to freedom of thought, conscience, religion, opinion and expression in accordance with public order established by law and regulations. The worship and expression of beliefs is performed in compliance with the secular state…. »

[104] La loi n° 90-32 du 11 décembre 1990 portant Constitution de la République du Bénin.

[105] ISRAEL (J-J.), Droits des libertés fondamentales, Paris, LGDJ, 1998, p. 499.

[106] Ibid.

[107] COLLIARD (C.-A.) et LETTERON (R.), Libertés Publiques, Paris, Dalloz, 8è éd., 2005, P. 499. V. également ISRAEL (J-J.), op cit, p. 499.

of an influential personality). Demonstration therefore aims at having an influence on an opinion, political power and, in doing this, contribute to the birth of public policies leading to responding to the claims raised. It can therefore be defined as « *a group of people using public roads to express a collective will*. »[108]. If the demonstration is mobile, it is a **procession**, and if it is immobile, we talk of a **gathering**[109]. It is also necessary to distinguish the difference between demonstration and unlawful assembly. Although defined as a gathering of people, unlawful assembly is distinguished from demonstration by its spontaneous, unorganized or accidental in nature, as well as its illegal objective or susceptible of leading to trouble or public disorder[110]. Demonstration can also be distinguished from assembly. Demonstration is an « occasional gathering »[111] just like an assembly, but the essential distinction resides in the fact that demonstration is held on public roads[112].

Demonstration, by definition, takes place on public road and public roads are the places for the exercise of the fundamental freedom of movement. Besides, public roads are principally made for traffic flow. It therefore follows that freedom of demonstration and freedom of movement can on the other be in conflict and can at times infringe on general interest objectives like law and order[113]. This is why it is necessary to control and regulate such freedom. Moreover, fundamental rights are susceptible of having limits, exception being done in some rare cases[114].

Indeed, demonstrations are subjected to a certain condition of seeking authorization from public authorities which, in some cases, denies the authorization to some groups and gives others. **Is this practice of controlling the freedom demonstration in Benin compatible with the regime for the protection fundamental freedoms?**

For some years now, we have observed that demonstrations are subject to political filtering either to enable a given group to express its opinions or to prevent dissident groups from expressing their opinions. Opposition groups in Benin are regularly prohibited from holding demonstrations and one would wonder if there is a legal basis which controls the exercise of the freedom to demonstrate in Benin. Certainly, there are Constitutional Court decisions on the freedom to demonstrate in Benin since the introduction of the new democratic process[115]. We also know that since the time of Montesquieu that one's freedom stops where the freedom another person starts. This clearly explains WHY there should be a control for the freedom of demonstration. But what are the possible limitations to this fundamental freedom? In the light of the deviances of these prohibitions, could we say there exists in Benin the right to demonstrate granted equally to all persons?

These multiple questions need detailed and careful analyses so as to understand the mode of exercising the right to demonstrate and deduce its efficiency in Benin. To do this, it is possible to examine the legitimate reasons for the demonstrations as well as the jurisdictional framework for the protection of demonstrations. However, this option appears not to be examining in a better way our challenges and we are therefore not going to give it weight.

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[108] COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 499 ; V. également ISRAEL (J-J.), op cit, p. 499
[109] ISRAEL (J-J.), op cit, p. 499.
[110] Idem, p. 499-500.
[111] COLLIARD (C.-A.) et LETTERON (R.), op cit P. 499.
[112] Ibid.
[113] FAVOREU (L.), GAÏA (P.), Droit des libertés fondamentales, Paris, Dalloz, 2004, P. 183 et s.
[114] Idem, p. 184.
[115] The 1990s marked the beginning of democratic renewal that began in Benin with the Conference of Active Forces of the Nation held from 19 to 28 February 1990 in Cotonou

But then, if we study the legal and jurisdictional framework for the protection of the right to demonstrate on the one hand and the control of its exercise on the other hand, we shall in a better way understand the efficiency of the right to demonstrate in Benin. Even if this last option is not devoid of tricks, it offers a holistic view of the right to demonstrate in Benin. We will accordingly show in the first place that the right to demonstrate enjoys an established recognition (I) in Benin even if its control is purely abused (II).

I- An established recognition

Freedom of demonstration, just like other freedoms, enjoys legal protection. However, there are freedoms whose exercise would lead into conflict with the exercise of other rights. It is indeed the rights which constitute fundamental liberties which are faced with these difficulties. In Benin, the right to demonstrate is a right which is sufficiently recognized (A) even if its conciliation appears painful (B) in view of the interest of third parties and law and order.

A- Legal framework of the recognition

The right to demonstrate is guaranteed by national legislations of Benin as well as by international instruments recognized by Benin.

1- International instruments

Several international instruments have explicitly or implicitly made the freedom of demonstration, a right which the state must protect.

At the universal level, Universal Declaration of Human Rights (UDHR) of 10th December 1948 in a way recognizes the right to demonstrate by enshrining in Article 20 paragraph 1 that « Every person has the right to freedom of peaceful assembly and association », it indirectly alludes to the right to demonstrate which is a form of freedom of assembly[116] ; demonstration being an assembly on public roads. International Covenant on Civil and Political Rights (ICCPR) of 1966 also recognizes the freedom of demonstration. Thus, the freedom of demonstration is a part of the freedom of « peaceful assembly » which is enshrined in Article 21 of the said Covenant. This is why some people[117] think that freedom of demonstration is not independent by explaining on the one hand that the Constitutional Council in France considers it as an element of the freedom of expression and on the other hand that the control organs of the international conventions mainly the Human Rights Committee for the 1966 covenant treats it like an aspect of the freedom of assembly. Thus, we are at the heart of control of protection for the freedom of demonstration by the human right committee through Article 21 of the covenant when the committee considers that it is excessive to pursue a group of about twenty-five people who brandished a banner on the way of a Head of State on an official visit in Finland accusing him of violating human rights[118].

At the African regional level, African Charter on Human and Peoples' Rights implicitly recognizes the freedom of demonstration by proclaiming in Article 11 that « *Every person has*

[116] International treaties regard freedom of expression as one of the aspects for freedom of assembly. COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 500. V. également CHARVIN (R.) et SUEUR (J.-J), op cit, p. 202.
[117] COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 501.
[118] CDH, Communication n° 412/1990 du 31 mars 1994, Mme Auli Kivenmaa c. Finlande.

the right to assembly freely with others. ». Similarly, African Charter on Democracy and Good Governance of 2007 insists on the obligation of the States to protect human rights among them the right to demonstrate. Thus, Article 6 of this Charter provides that « *State parties shall ensure that citizens effectively enjoy fundamental human rights and freedoms taking into account their universality, their independence and their indivisibility* ».As pertains to protocol on democracy and good governance of ECOWAS, it recognizes in Article 1(j) that freedom of peaceful assembly and demonstration is guaranteed.

In view of these legislations, we can clearly see that the right to demonstrate is a right which is well recognized by universal and regional instruments for protection of Human Rights in Benin either implicitly or explicitly.

Besides international protection, the right to demonstrate enjoys legal protection through national legislations.

2- National legislations

The right to demonstrate is a right which enjoys a wide national legal protection. Indeed, protecting the freedoms would mean conferring upon them the highest possible legal authority[119] and thus, there exists a close relationship between the Constitution and protection of freedoms[120]. Enshrining rights and freedoms in the Constitution would amount to choosing rights and freedoms enforceable against public authorities, rights and freedoms having in this regard received constitutional enshrinement and guarantee. The force and guarantee of these rights and freedoms therefore become those of the norms which clothe them[121]. Thus, enshrinement of the right to demonstrate in Article 25 of the Constitution has made it a fundamental right in Benin. By fundamental rights, it is understood to mean « *Constitutionally guaranteed rights and freedoms* »[122]. In other words, fundamental rights are « *all rights and guarantees which constitutional order acknowledges to individual persons in their relationships with state authorities* »[123]. Moreover, the people of Benin solemnly proclaim, from the preamble of the Constitution, their firm determination to create a State governed by the rule of law and multiparty democracy. In this State, fundamental human rights, public freedoms, dignity of human person and justice are guaranteed, protected and promoted as the necessary condition for true and harmonious development in time, cultural and spiritual dimensions ».Here it pertains to a special form of protection of rights and freedoms.

After enshrinement of a right in the Constitution, it is upon specific legislations to regulate the exercise of this right. There is a Decree-Law which organizes the freedom of demonstration in Benin and which was in place before the Constitution. It pertains to the Decree-Law of 23rd October 1935 on regulation of measures relating to enhancing maintenance of law and order. This French legislation which was in place in Dahomey, a former French colony is the main reference legislation in matters pertaining to the exercise of the right to demonstrate in Benin. This Decree-law provides in Article 1 paragraph 2 that « *any procession, march or meeting of people and, generally any demonstration on public roads is subject to prior declaration* »[124].

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[119] ARDANT (Ph.), « *Les constitutions et les libertés* » ; In Pouvoirs n° 84, 1998, P. 67.

[120] Idem, P. 61.

[121] FAVOREU (L.), GAÏA (P.), op cit, P. 75.

[122] Idem, P. 86. Le Conseil constitutionnel a, pour la première employé cette expression dans sa décision 89-269 DC du 22 janvier 1990 pour désigner les droits et libertés constitutionnellement garantis.

[123] BADINTER (R.) et GENEVOIS (B.), ''Normes de valeur constitutionnelle et degré de protection des droits fondamentaux», Rapport d'Ankara, In R.F.D.A. (3) mai-juin 1990 – P. 317

[124] Cf. Article 2 of Decree-Law of 23 October 1935 concerning regulatory measures for strengthening the maintenance of public order.

And since it is on public roads which is characteristic of demonstration, its regulation thus falls on communal authorities. Thus, Act n° 97-029 of 15th January 1999 on organization of communes in the Republic of Benin regulates the exercise of the freedom of demonstration in Benin through the role it grants to communal authorities. Article 76 of this Act provides that « *The Mayor is in charge of administrative police in the commune. It seeks in this regard, for assistance from competent State departments. Actions of the Municipal police are for ensuring law and order, safety and health. They comprise of : 1- All that pertains to safety and convenience of passage in public streets, places, paths and roads ; 2- Maintenance of order in areas where big meetings are held such as fares, marches, festivities, public ceremonies, places of worship and other public places* ». In the same meaning reference can be made to the Decree 2005-377 of 23rd June 2005 on regulation of maintenance of law and order which provides that « *maintenance of law and order aims at preventing infringement of law and order and to take the necessary measures to restore the same* ». This Decree also participates in regulating the right to demonstrate. Indeed, it is to prevent the outcomes and especially disturbances to law and order, that the Decree of 2005 can be examined as organizing the right to demonstrate in Benin. Maintenance of law and order would thus call for regulation of demonstration. There is therefore a legal framework for demonstration by these two legislations which protect law and order.

In as much as there is need to protect the right to demonstrate, it is important to preserve the right of the other people who are not taking part in the demonstration and in this regard; law and order; which is often hard to reconcile.

B- A delicate reconciliation

The freedoms proclaimed by the Constitution belong to all the citizens either individually or collectively. As a matter of fact, collective exercise of the rights by some people can be a hindrance to enjoyment of individual freedom of others. This is why we can notice intermingling of the interests of the demonstrators with those of third parties.

1- Right to demonstrate and the right of third parties

A fundamental right can come into conflict with another. This is a problem posed by what we call in German law the « collision of fundamental rights. »[125]. There is a collision of fundamental rights when two subjects of the law have non-compatible fundamental rights[126]. But, to what extent does the right to demonstrate by citizens conflict with the right of movement[127] of the other citizens, those who are not taking part in the demonstration, thus third parties to the demonstration.

Freedom of movement is a part of these freedoms which are both « symbols and privileges of democratic societies. »[128]. It is inherent to the individual person[129]. Thus, it appears like an essential condition[130] for exercise of all the other rights. It is a fundamental freedom enshrined in Article 25 of the Constitution as the freedom of demonstration. Public roads are thus discussed by two fundamental rights, all enshrined in Article 25 of the Constitution.

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[125] FAVOREU (L.), GAÏA (P.), op cit, P. 186.
[126] Idem, P. 75
[127] ISRAEL (J-J.), op cit, p. 501.
[128] PENA (A.), « *La liberté d'aller et venir* », in Fundamental Rights Dictionnay (under the Direction of Dominique CHAGNOLLAUD et Guillaume DRAGO), Paris, Dalloz, 2006, P.1.
[129] Move, move around, visit, discover, stay.... Are part of the basic attributes that make man a free being. see PENA. Cf. PENA (A.), op cit, P.1.
[130] PENA (A.), op cit, P.1.

Seen from this angle, the freedom of movement and that of demonstration can come into conflict on the use of public roads[131]. Demonstration can therefore prevent third parties from enjoying their freedom of movement[132]. This situation can become worse when the demonstrators attempt to force third parties to take part in the demonstration. This is indeed the case in demonstrations where tyres are burnt on public roads preventing free movement of people or student demonstrations where significant violence is perpetrated towards the populations[133]. These demonstrations are generally causes of immense barbarism[134].

The exercise of the right of movement just like that of the right to demonstrate presupposes respect for law and order. Thus, the enjoyment of these freedoms calls for reconciliation of the law and order demands and guarantee of constitutionally protected freedoms[135].

2- Right to demonstrate and law and order

Law and order is a concept inherent to the law[136]. It indeed appears in all legal disciplines[137]. It is at the heart of the law. A heterogeneous and relative notion, it covers fields which legal systems intend to exclude from will. According to Doyen Cornu, law and order means, a « *preemptory norm from which individual persons can neither deviate in their behavior, nor in their agreements ; norm which, whether expressed or not in a law corresponds to all fundamental requirements (social, political etc.), considered as essential for proper functioning of public services, maintenance of security or morality (in this case law and order encompasses good morals), running of the economy (economic law and order) or even for meeting primary individual interests (law and order for individual protection)* »[138]. This definition makes us realize the important role played by law and order in any legal system.

The constitutional court of Benin has never defined the meaning of law and order, but on reading its decisions[139], it is easy to understand what it is referring to. However, Decree of June 2005 on regulation for maintenance of law and order in Benin gives a definition of law and order by its object. Indeed, maintenance of law and order would consist of « *ensure public security, peace and health* ». Thus, maintenance of law and order has the objective of « preventing infringement of law and order and to take the necessary measures to restore it when it is disturbed »[140]. Thus, when we refer to the Act n°97-029 of 15th January 1999 on organization of communes in the Republic of Benin we can note a definition of law and order by its content. Thus, « *The Mayor is in charge of administrative police in the commune. It seeks in this regard, for assistance from competent State departments. Actions of the Municipal police are for ensuring law and order, safety and health. They comprise of : 1- All that pertains to safety and*

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[131] D'ALMEIDA (E.), « *Droits fondamentaux et libertés publiques* », in Les droits de la personne humaine et maintien de l'ordre, Seminar organized by UNESCO Chair of Human Rights and Democracy with the support of Konrad Adenauer Foundation, Cotonou from 09 to 10 October 2000, P. 43

[132] Cf. ADELOUI (A.-J.), « *Prévention des violations des droits de l'homme dans les manifestations publiques : Approches, acteurs et limites* », communication présentée à l'occasion de l'Atelier sur le thème central : « Maintien de l'ordre dans les manifestations publiques et respect des droits de l'homme », Infosec, Cotonou les 18 et 19 avril 2013, P. 8.

[133] ADELOUI (A.-J.), op cit, P. 8 et s.

[134] Ibid. the Author gives an example of student demonstrations where the restricted were forced to join the strike

[135] COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 500.

[136] Sur ce concept en général en droit privé, V. notamment l'ordre public à la fin du XXe siècle, Dalloz 1996 ; « L'ordre public », Travaux de l'Association Henri Capitant, Journée Libanaise, Tome XLIX/1998, Paris, LGDJ, 1998.

[137] ARCHER (D.), Impérativité et ordre public en droit communautaire et droit international privé des contrats (Etudes de conflits de lois), Thèse, Cergy-pontoise, 2006, p. 25.

[138] CORNU (G.), (Sous la direction de), Vocabulaire Juridique, Paris, PUF, 2012, V. « ordre public ».

[139] V. decisions DCC 01-097 of 7 November 2001, DCC 03-134 of 21 August 2003 and Decision DCC 06-045 dated April 05, 2006 the Constitutional Court of Benin, which all relate to the freedom of demonstration.

[140] V. Décret 2005-377 du 23 juin 2005 portant réglementation du maintien de l'ordre au Bénin

convenience of passage in public streets, places, paths and roads ; 2- Maintenance of order in areas where big meetings are held such as fares, marches, festivities, public ceremonies, places of worship and other public places »[141].

If law and order is the mark of « ubiquitousness », we get the feeling that tensions will not fail to arise between several preemptories which are possibly contradictory[142]. Law and order and exercise of some freedoms can come into conflict and it is mainly the case with the right to demonstrate. It is therefore necessary to reconcile fundamental rights and « general interest purposes » which are also considered as « objectives of constitutional value. ».[143]

Maintenance of law and order is the reason mostly given for, either to prohibit demonstrations[144] or to disperse demonstrators[145]. Some violations of fundamental rights are done in the name of law and order. This why demonstrations were cancelled in the name of law and order while there was no threat whatsoever[146]. Maintenance of law and order being a necessity for the exercise of freedoms, it follows that, in some circumstances, freedoms can be limited to safeguard law and order[147] since police power authorizes the authority which is holding the power to ban a demonstration at any time if it deems that the danger for law and order is very high as compared to the necessities of ensuring the exercise of the freedom to demonstrate[148].

This power of limitation or reconciliation belongs to the law-maker[149] since Article 25 of the Constitution provided that freedom that freedom of demonstration is guaranteed « *in accordance with the conditions set by the law* »[150]. It is therefore upon the law-maker[151] to carry out the necessary reconciliation between respect for the right to demonstrate and safeguarding law and order without which the exercise of freedoms would not be assured. A legislative intervention would be indicated since in practice, there is the question of definition of machinations or actions which can constitute trouble to law and order. It is in fact at this level where we observe abuses of the requirement for prior declaration.

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141 V. article 72 de la loi n°97-029 du 15 janvier 1999 portant organisation des communes en République du Bénin.

142 ARCHER (D.), op cit, p. 25.

143 FAVOREU (L.), GAÏA (P.), op cit, P. 186.

144 V. Lettre n° S 73/CUC/SG/SGA/DAPSC du 11 février 2002 et la lettre n° S 145/CUC/SG/SGA/DAPSC-SAP du 20 avril 2002. These letters are responses to the municipal authority for requests for permission to demonstrate which the Constitutional Court deems consistent with the Constitution. See DCC03-134 of 21 August 2003. V. also Order No. 05/PDB/SG/SAP / April 14th on the prohibition of the consecration ceremony of the chiefdom Karimama and other events relating thereto. The Constitutional Court declared the ban in accordance with the Constitution, as it seeks to preserve public order. See Decision DCC 01-097 of 7 November 2001 the Constitutional Court of Benin. Cf. decision DCC 01-097 7 November 2001 of the Constitutional Court of Benin.

145 See the decision of the Prefect of the Atlantic Coast on 07 August 2012 on emergency measures in the departments of the Atlantic Littoral to prevent or repress the steps on its territory. In this case, following the announcement by the Minister of Labor and Public Service December 31, 2012, of the results of recruitment examination for permanent state employees, sessions of 8 July and 25 August 2012 for the Ministry of Economy and Finance, it was found that the organization of these examinations was beset by massive fraud, scheming and monstrous irregularities and unions who wanted to show their displeasure slowed them down. V. ADELOUI (A. J.), op cit, P. 7.

146 Letter n° 287/CUC/CAB-SP by which the head of the urban constituency of Cotonou banned peaceful march which was to be organized by the party "Renaissance du Benin" is declared unconstitutional because the proposed demonstration was not a threat to public order. Cf. DCC03-134 du 21 Août 2003.

147 COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 92.

148 Ibid.

149 FAVOREU (L.), GAÏA (P.), op cit, P. 187.

150 V. article 25 of the Constitution

151 In March 2003 in France, during the review of the "Law on internal security," the Constitutional Council had the opportunity to take on the necessary balance between personal freedom and public order (decision n ° 2003-467 DC March 13, 2003). In particular, it exercised the control of proportionality on the provisions criticized by parliamentarians which allowed, in certain circumstances, three different types of searches of vehicles. In so doing, it recalled, as it often said that it is not for the court to substitute itself with the legislature.

II- An abused control

Control of demonstration in Benin appears directed towards a political choice. Indeed, for one to hold a demonstration, it is indispensable to report the same (A) to competent authorities which can authorize or ban the demonstration. The capacity of the authority supposed to allow the demonstration not being without effects on the authorization or not of the demonstration. We therefore often end up with authorization of a strabismic demonstration (B).

A- Regulations of the freedom of demonstration

The right to demonstrate is a fundamental freedom. Nevertheless, the exercise of this right is subjected to a formality which goes up to banning of the demonstration. In fact it pertains to a simple reporting which has practically been transformed into application for a license to demonstrate in Benin. Excessive political filtering of demonstration licenses (2) is encouraged by the ambiguity of its legal regime (1)

1- An ambiguous regulation

Like any public freedom, freedom of demonstration is defined by three cumulative elements. There is first its proclamation by a solemn rule[152] , then its lay out[153] by the law which sets the condition for its exercise and finally its guarantee by legal sanctions. Each freedom has its regulation for the exercise. There are in fact three modes of exercise of the freedoms.

First, there is repressive regulation, which paradoxically to its title, allows development of the human activity and only intervenes to criminally suppress the excesses of the same. It is the most liberal regulation[154]. Then, there is the preventive regulation which subjects the exercise of a freedom to a prior authorization given by public authorities[155] and finally the regulation of prior declaration which calls upon citizens to inform the administration of their intention to exercise a freedom[156].

This last regulation is the one which is meant[157] to govern the freedom of demonstration in Benin. Demonstration is therefore subjected to prior reporting in Benin. Thus, all processions, marches and gatherings of people, and, generally any demonstrations on public roads, with the exception of outings on public roads in conformity with local uses must be subject to prior reporting[158]. The reporting must be done at the Town Hall which covers the territory on which the demonstration will be held or even to the prefect of the area. The report must bear the surnames, first names and domiciles of the organizers, aim of the demonstration, place, date and time of the gathering and the projected itinerary. It must be signed by the organizers. The administrative authority shall be restricted to immediately issue a receipt for this report. This formality has two objectives. On the one hand, it enables

[152] La Constitution est la norme suprême qui garantit la liberté de manifestation

[153] The enjoyment of freedom to demonstrate is guaranteed by law. However, because freedom of demonstration is enshrined in the constitution in Benin, judge determines the constitutional power of the legislature by submitting to his interpretation of the Constitution.

[154] To a certain doctrine, freedoms organized under the repressive regime are the only "perfect freedoms." cf. Moranges (G.), Contribution to the general theory of public freedoms ». cf. MORANGES (G.), Contribution à la théorie générale des libertés publiques, thèse, Nancy, 1940, p. 73. V. également COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 76.

[155] COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 499.

[156] Ibid.

[157] Cf. Le Décret-loi de 1935 sur la liberté de manifestation.

[158] Cf. article 1er du décret-loi de 1935 sur la liberté de manifestation.

informing[159] the administration so that it can take adequate measures for effective conduct of the demonstration. On the other hand, prior reporting enables locating liabilities in case of disturbance to law and order observed during the demonstration.

However, we note that the administration is not simply restricted to issuing the receipt, because indeed the same administrative authority has powers to maintain and restore law and order. Consequently, it can ban the demonstration if it deems that the demonstration might disturb law and order. Thus, we can observe the danger of prior reporting which can lead to an insidious sliding towards an authorization regulation. In the beginning, the putting in place of the prior reporting regulation was supposed to enable prevention of possible interruptions of the demonstrations so as to guarantee the security of the demonstrators and proper conduct of the demonstration. But, the defense for law and order entrusted to administrative authorities authorizes them to restrain the demonstrations so as to preserve law and order. We are observing sliding of the regulation for prior reporting towards the preventive control in which the public authority is called to prevent disturbances to law and order by authorizing or refusing demonstrations in view of possible disturbances to law and order. This insidious reconsideration[160] of the reporting regulation is more and more receiving support from the constitutional court of Benin which has ruled several times on the cases of limitation of the freedom to demonstrate by ruling in some cases that the refusal by the administrative authority for the exercise of the freedom of demonstration is in conformity with the Constitution of Benin[161]. It follows from the analysis of the decisions of the Constitutional Court that, from the reconciliation of the right to demonstrate, a fundamental right and law and order, the latter takes precedence[162]. However, it is hard to assess the risk of disturbances of law and order[163] and in this regard, we are witnessing political filtering.

2- Political filtering

The question which arises here is that of knowing if the mechanism for prior reporting, put in place by the Decree-law of 1935, accompanied by the power granted to police authority to immediately give for prohibition for the reason of protection of law and order does not constitute a source of political deviance.

For some years now in Benin, we are witnessing a new spell of demonstrations. Workers' strikes accompanied by fierce demonstrations, students demonstrations and political demonstrations are increasing greatly. All these demonstrations are often subject to declaration accompanied by the power of refusal by the administrative authority. The regulation for prior reporting in preventive regulation is susceptible to a lot of shifts.

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159 COLLIARD (C.-A.) et LETTERON (R.), op cit, P.106.

160 COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 90

161 V. mainly DCC 01-097 of 07 November 2001 where the constitutional judge declared the prefectoral order banning any demonstration as constitutional

162 In its Decision DCC 06-047 dated April 05, 2006, the Constitutional Court ruled that "it follows from Article 25 of the Constitution that the enjoyment of freedoms by citizens must be in compliance with law and order established by law and regulations. Such provisions are intended to prevent abuse both in the enjoyment of such freedoms by citizens in their restriction by the authorities of the territorial administration. In this case by not allowing the planned march, the mayor did not violate the Constitution »

163 In France for example, the State Council ensures that the ban is well motivated by a real attack on law and order reached. It therefore rejected the ban pronounced because the event can "harm international relations of the Republic." And it aligns its jurisprudence concerning demonstration on it has developed for meetings. It clarifies that the prohibition of a demonstration may be imposed for "a reason, which does not refer to the risk of disturbing law and order ».

First, the administrative authority which is supposed to issue the license can have mandatory power or discretionary power. In the first case, when the person making the declaration to demonstrate fulfills a number of predefined criteria, he is sure of enjoying his right. This system guarantees him some legal security[164] since the behavior of the administration is predictable. In the second case, the administration can have discretionary power which is « *the power to choose between two decisions or two behaviors both in conformity with the law.* »[165]. As pertains to prior authorization for demonstration, discretionary power of the administration enables it to grant or deny the demonstration in accordance with the criteria defined by itself. It is an excessive power conferred upon it. It is by virtue of this power that authorities assess disturbance to law and order.

In Benin, the regulation currently applicable to the freedom of demonstration is the preventive regulation. This is in addition to discretionary power enjoyed by the administrative authority. The issuance of the received transformed into a license thus has quite some arbitrariness in view of the political influence of the administrative authority. Indeed, the power of assessment exercised by the authority can lack neutrality and consequently denote some political tendency. We thus find ourselves in a political filtering regime for the freedom of demonstration.

B- Cross-eyed protection

Banning demonstrations sometimes aims at giving direction towards a given political choice. Thus, we can observe that there are demonstrations meant for propagating government policy (1) and we can also observe marginalization of opposition politics (2).

1- Demonstration for propagation of government policy

It is not in any way iconoclastic to agree with one of the judges K. MBAYE that « *the big majority of African governments only used to accept, at least in politics, one opinion: that of the ruling party and his leader* ».[166] However, democratization of political regimes from the 1990s changed albeit not much, this perspective. Attitudes, behaviors or speeches can normally be put into question at any time without significantly affecting normal functioning of institutions which do not agree with them. Demonstration is one of the methods normally the most used to make collective protests.

Nevertheless, for some time now in Benin, we are witnessing a drop in demonstrations organized by the opposition but a rise in the so called demonstrations « for supporting government actions ». These demonstrations, instead of claims on behalf of the government in power, are restricted in praising the government; which constitutes an abusive use of demonstration. While some opposition groups apply for license which is in most cases denied[167], demonstrations for supporting government actions are never denied license[168]. This fact has been witnessed more than once. It is true that the ruling class does not accept dissenting opinion and « normal » demonstrations are not allowed. The Mayor, the Prefect or the Minister of the Interior are political authorities and their decisions are often not

[164] COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 83.
[165] CHAPUS (R.), Droit administratif général, tome1, 14è éd. 2000, p. 1033.
[166] MBAYE (K.), Les droits de l'homme en Afrique, Paris, Pedone, 1992, P. 180.
[167] D'ALMEIDA (E.), op cit P. 51; The author notes that "under these conditions, no evidence of the movement can be prohibited. When it is the opposition it is prohibited »
[168] Ibid.

neutral. They can, in some circumstances, be influenced by a given policy. Demonstration is therefore no longer a tool of claim in Benin. Moreover, some violent police actions meted against demonstrations over the last years raises concerns over the government's commitment to protect the right to peaceful demonstration in Benin. Thus, a series of bans for demonstrations calls for reflection on this issue.

In October 2010, the Minister for Interior had banned all demonstrations demanding information on the disappearance of Pierre Urbain DANGNIVO, a government employee in the Ministry of Finance who had disappeared in August of the same year. These demonstrations and protests were caused by the suspicions of a possible involvement of government authorities in this matter[169]. On 21st February 2011, police threw teargas canisters to disperse opposition demonstrators who were protesting against incomplete electoral register for the presidential election held on 6th March. Following the publication of the provisional electoral register, three weeks earlier, opposition parties had complained of omission of a third of eligible voters[170]. On the basis of Article 43 paragraph 2 of the Act n° 2010-33 of 7th January 2011 on general rules of elections in the Republic of Benin, the Minister of the Interior and public security, through a communiqué[171], banned some demonstrations during the electoral period. This is opposition supporters[172] who wanted to march to the Constitutional Court to protest against the Permanent Computerized Electoral Register (PCER), were dispersed. We also witnessed beating and arrests of members of parliament by armed forces during demonstrations organized by opposition groups[173]. On 24th March 2011, the police lobbed teargas canisters, in Cotonou, to disperse youths who were demonstrating against the results for the re-election of President Boni YAYI[174]. From these cases of banning demonstrations, we can note that opinions which tend to go against the government are strongly cracked down. The ambiguous regulation of the freedom of demonstration is from this point of view the basis of all the shifts observed.

The nature of a political regime depends on the position granted to public freedoms in particular the freedom of demonstration[175]. Thus, in big democracies, criticizing government action is fairly entrenched thanks to the spirit of tolerance and respect for others which involves acceptance of the difference and the criticism[176]. This is why we are witnessing quite a number of demonstrations, whether from the opposition or not. This cardinal virtue of democracy which is tolerance « *guarantees respect for fundamental freedoms which freedom of opinion, freedom of expression, freedom of association, freedom of demonstration, freedom of religion and especially the right to life* »[177]. Thus, beyond being a member of the political group in power, these embody the State to which they belong to intervene in order to enable conduct

[169] V. la Communication d'Article 19 précitée.

[170] Ibid.

[171] V. to this effect the daily Nation February 21, 2011 signed by the Minister Martial SOUNTON. Here is the substance of the statement: "In accordance with paragraph 2 of Law No. 2010-33 of 7 January 2011 laying down general rules for elections in the Republic of Benin" All public traditional, cultural, public,, or any other events likely to restrict individual freedoms are prohibited during the period of the official opening of the election campaign on the election day. ».

[172] This is the case of activists of the Union is the Nation (UN), opposition party, which was banned to deliver their motto to the President of the Constitutional Court. V. '''' La Nation' newspaper of Tuesday, February 22, 2011.

[173] During a demonstration of opposition groups on 24 March 2011, some members were beaten to death and other arrested This is particularly the case of the Honourable Raphael AKOTEGNON and many others. V. le journal la Nation du 24 mars 2011.

[174] V. la Communication d'Article 19 précitée

[175] HOLO (Th.), « *Les défis de l'alternance démocratique en Afrique* », in Proceedings of International Symposium of Cotonou on the challenges of democratic change of Government, 2009, P.18, 2009, P.18.

[176] MBODJ (El Hadj), « Les garanties et éventuels statuts de l'opposition en Afrique », in Proceedings of the Fourth Preparatory Meeting to Bamako symposium on to political life accessible on http://alhadjmbodj.com/index.php?2005/11/24/20-les garanties-et-éventuels-statuts-de-l'opposition-en-Afrique., P. 1.

[177] HOLO (Th.), op cit, P.18.

of a legal demonstration even if there would be threats of disturbances since « *in a democracy, the right to counter demonstrate would extend until it paralyses effective exercise of the right to demonstrate* »[178]. It is indeed « *tolerance which enables admission of legitimacy of contradictions inherent to any human society in democracy in effect ensures peaceful co-existence by coming up with essential rules for their expression and reconciliation* »[179].

It is urgent to promote education on human rights in accordance with the Constitution[180]. This education must be enhanced among members of armed forces, who have a duty of neutrality[181], which is currently getting eroded in Benin and we are witnessing the marginalization of opposition politics.

2- Marginalization of opposition politics

Opposition politics can be defined as « *all partisan forces who have the mission of taking power, criticize the current leaders and to define an alternative leadership program* »[182]. According to the glossary of legal terms, opposition means political party or parties opposed to the team in power by exercising a supervisory and a critical role, by giving a different opinion or even by preparing an alternative government team[183]. This last definition shall be retained within the framework of this research[184]. Thus, opposition politics, in a democracy[185], has rights and obligations[186] which are recorded in the status of the opposition. It is for the reason African States deemed it indispensable to recognize the opposition by coming up with a status for the opposition. During the Conference on « Assessment of the democratic process in Africa », organized in Libreville by International Assembly of French Language Parliamentarians (AIPLF), many parliamentarians had advocated for generalization of the status of the opposition[187].

In Benin, the status of the opposition is enshrined by Act 2001-36 of 14th October 2002. Article 2 of this Act defines opposition as being constituted of « *all parties, coalition of parties or groups of political parties which in the existing legal framework, decides to essentially profess different opinions from those of the government in power and to give a concrete expression to their ideas within the perspective of a democratic change-over of political power* »[188]. The right to express its opinions is therefore granted to opposition politics in Benin. Consequently, opposition politics in Benin has the right to demonstrate[189]. Holder of stabilizing and non-subversive

[178] CHARVIN (R.) et SUEUR (J.-J), op cit, p. 202.
[179] HOLO (Th.), op cit, P.18.
[180] V. Article 40 of the Constitution of Benin provides that "The State has the duty to ensure dissemination and teaching of the Constitution, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples Rights of 1981 as well as all duly ratified and international instruments relating to human Rights.
The state must integrate human rights in school programs and teaching different school and university levels and in all training programs of the Armed Forces, Public Security Forces and other related forces .The State must also ensure in their national languages by all means of mass communication, particularly radio and television broadcasting and teaching these same rights ».
[181] HOLO (Th.), op cit, P.20.
[182] Cf. SUREL (Y.) « *Le Chef de l'opposition* ». In Pouvoirs n° 108, P. 63.
[183] GUINCHARD (S.) et MONTAGNIER (G.) (Sous la direction de,) Lexique des termes juridiques. Paris Dalloz. 1999. P. 368.
[184] Even if the desire is to include all those in the opposition who do not share the same views as the government on a particular issue, we will limit ourselves in this analysis and for convenience the definition encompassing only parties' policies.
[185] Construction and deepening of democracy, are done through capacity building political stakeholders through the establishment of a legal and policy framework determining the respective rights and duties of the majority and the opposition
[186] HOLO (Th.), op cit, P. 4.
[187] MBODJ (El Hadj), op cit, p. 2.
[188] Article 2 de la loi 2001-36 du 14 octobre 2002 portant statut de l'opposition au Bénin.
[189] The opposition generally has the right to express its opinion on political life of Nation. Cf. HOLO (Th.), op cit, P. 5.

values, as well as ideas and projects of the society alternative to those advanced by the majority, the opposition must have the possibility of taking its message to the people. The opposition is indeed a « regulating element of the democratic system »[190]. It expresses itself through speeches, demonstrations or activities which give prominence to an opposition to the majority in power without any institutional consequence attached to this mode of expression. Demonstrations organized by the opposition are therefore generally meant for criticizing government actions. Opposition politics has thus a big role to play in a multiparty democracy[191]. It indeed exercises « *an essential function of opposing which has the end result of limitation of power* »[192]. It is bestowed with a real « *mission of public service in the extent where, by its power of criticism and counter-proposal, it moderates the heat shown by the majority and offers to the citizens an alternative to the policy defined and applied by the parliamentary majority* »[193]. The refusal for demonstration by the opposition group distorts the political regime since democracy supposes « *peaceful co-existence between a majority in power on the basis of confidence on the electoral body and a minority which criticizes it and proposes an alternative program* ».[194]

However, some leaders who are still unamenable to criticism from the opposition[195] complicate the enjoyment of this right by the opposition thanks to the regulation to which the freedom of demonstration is subjected. Indeed, the acquiescence of the exercise of the freedom of demonstration to a regulation of licensing by authorities who are generally influenced by the government in power is a very delicate question. The authority bestowed with the power licensing demonstrations, which is only more often than not a representative of the power in place, generally feels that the consequences of the demonstrations organized by the opposition are harmful. As a matter of fact, we are witnessing marginalization of opposition politics in Benin. It is indeed lack of loyalty from the administrative authority which can lead to these pitfalls. The administration must serve general interest. The duty of neutrality[196] of the administration calls upon it to direct its actions towards the preservation of common good since political opinions or persuasions should neither interfere with activities of public officers nor have any influence on their career[197]. However, it happens that a good number of officers, recruited, promoted by political officials believe or serve their cause for better or for worse[198].

CONCLUSION

The right to demonstrate is a fundamental right for the citizens of Benin. Beyond its legal protection by national and international legislations, it is consolidated in Benin by its protection in the Constitution. Thus, the freedom of demonstration enjoys a wide legal protection contrary to other states like France where it is not recognized by the Constitution but by jurisprudence[199] which merely gave it constitutional character. Its exercise is in the first place subjected to prior declaration.

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190 MELEDJE DJEDJRO (F.), « Principe Majoritaire et démocratie en Afrique », in RID n° 39, 2008, P. 34.
191 Le pluralisme dans une démocratie autorise autant d'opinions que de citoyens.
192 MELEDJE DJEDJRO (F.), op cit, P. 36
193 MBODJ (El Hadj), op cit, p. 1
194 HOLO (Th.), op cit, P. 4.
195 Ibid.
196 The duty of neutrality of the administration is not an obstacle for placing some people at specific and strategic positions who can serve the interest of leaders
197 HOLO (Th.), op cit, P.15
198 Ibid.
199 LEBRETON (G.), « *La liberté de réunion et manifestation* », in Dictionnaire des droits fondamentaux (sous la direction de Dominique CHAGNOLLAUD et Guillaume DRAGO), Paris, Dalloz, 2006, P. 656. V. également FAVOREU (L.), GAÏA (P.), op cit, P. 202.

However, the requirement of prior declaration instituted by the law has in effect been transformed into a preventive regulation. Indeed, the requirement for prior declaration recommends to administrative authorities to merely record the declaration and issue a receipt to this effect. This requirement has on the one hand the objective of informing the administration and to enable the demonstrators to freely exercise their right and respond to disturbances of law and order on the other hand while preventive requirement tends to prevent possible disturbances to law and order before even the demonstration is held. In this approach, it subjects any demonstration to licensing by administrative authorities which, is often transformed into a political license. For all intends and purposes, the political tendency of the authorities is sometimes felt in the licenses. This innovation in preventive regulation has been made possible thanks to the support of the Constitutional Court of Benin which issued decisions concerning licenses for demonstration where it decides on the compliance or not of the bans to the Constitution even if in the first place demonstration is only subjected to a license. Besides, the preventive regulation appears like a variable geometric system[200] and guided by a political perspective. Moreover, administrative authority can have a mandatory or discretionary power. In Benin, we can, by examining some decisions of the Constitutional Court say that, in the face of applications from forces supporting government actions, police administrative authority has a mandatory power while in the face of opposition groups, the former has discretionary power which sometimes tends to be closely linked with arbitrariness.

Protection of law and order is the foundation of abuse of control of the freedom of demonstration. However, there is no precise definition for the notion of law and order whose assessment of the possibility of disturbance is left for the assessment by the discretionary power of the administrative authority.

In any cases, according to the legislations applicable to the freedom of demonstration in Benin, a banned demonstration can even be organized. It will consequently be dispersed by forces of law and order and the organizers will of course be arraigned before court to answer charges of organizing unlawful demonstration[201]. Unfortunately, up to-day there is no decision by the administrative judge on the right to demonstrate in Benin. This failure of the administrative judge in this field can, to some extent, be indicative of the general conception of the administrative justice in Benin.

The influence of politics being increasingly applied on the licenses; it is convenient to wonder whether there is really freedom of demonstration granted equally to all citizens in Benin. On the other hand, the entire democratic system of Benin would be imbalanced[202] since decisions would only originate from the ruling class. This limitation to the freedom of demonstration, would according to some, distort democracy since the universal model of democracy would not be adapted to the Context of Benin to a point where they talk of « ***nescafé democracy*** »[203]?

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[200] COLLIARD (C.-A.) et LETTERON (R.), op cit, P. 96.

[201] Cf. Décision DCC 03-134 du 21 Août 2003. V. l'appréciation que fait le juge constitutionnel de l'avertissement qu'a donné M. AZANNAI Candide dans sa correspondance au Maire.

[202] MELEDJE DJEDJRO (F.), op cit, P. 28 et s.

[203] This expression was used by the President of the Republic of Benin, Dr. Boni Yayi in his speech of June 14, 2011 against the customs officers concerning their strike. Indeed, it is the Nobel Prize in literature in 1990, Octavio Paz that we owe this expression. He wanted to hear "the vast illusion to want to export all parts of democratic political systems in defiance of political, social and cultural conditions of the country or can not import them." No doubt it is in this sense also that President Boni Yayi employs prohibiting the strike of customs officers and threatening dismissal.

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WHAT REMAINS OF THE RIGHT TO STRIKE IN BENIN?

By **Accorédé Bachard LIAMIDI***

INTRODUCTION

In the name of freedom of association, the same through which workers and employers have option of constituting, being a member or not being member of local, national and international organizations for the protection of their interests without public authorities hindering legal exercise[204], the story of working masses of Benin was written.

This story is that of a people who experienced the rigors of colonization until 1946, the right to strike did not exist in French colonies. This right was recognized for the first time on 15th December 1952, the date from when the Act n° 52-13-22 putting in place an employment code in overseas territories was voted ; however its exercise was vaguely regulated by rare and very general legislations[205]. Despite the vagueness experienced as pertains to the rules governing the exercise of the right to strike at the time, the workers of Dahomey then, did not miss an opportunity to have recourse to this right. Thus, several strike movements were started with the end result of improving living conditions of the employees. Among the most memorable strike movements, we can mention that of railway workers of Benin-Niger Railway line which lasted from 10th October 1947 to 19th March 1948 i.e. almost six months. Besides, we can remember that after the creation of the Union Nationale des Syndicats du Dahomey (*National Union for the Trade Unions of Dahomey)*, the first national trade union of Dahomey (UNSTD)[206], trade union struggle intensified, and the general strike of 24th January 1958 demanding for the increase of SMIG[207] was a concrete proof of this.

After colonization, the wind of independence which was blowing in the 1960s did not fundamentally change the deal, even if the right to strike remains constitutionally recognized[208], its exercise is not regulated. This lapse attributed to the law-maker of the time, explained the anarchical proliferation of strike movements[209]among them that of 1963 organised by the Union Générale des travailleurs du Dahomey (UGTD) (*General Workers' Union of Dahomey)* which degenerated into popular uprising and brought to an end the regime of the *Parti Dahoméen de l'Unité* (Party of Unity of Dahomey) on 28th October 1963. Neither the regime of General Christophe SOGLO, nor that of Dr. Emile Derlin Zinsou were spared by these waves of walkouts, strike having practically become the main arm of workers in the fight for their well-being.

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204 DEGLA (R), *La liberté syndicale au Bénin*, Mémoire DEA Chaire UNESCO des Droits de la Personne et de la Démocratie, Université d'Abomey-Calavi, 2003-2004, p.3.

205 TCHIBOZO (H), « Bénin » in *Le droit de grève et la grève dans les pays de la CEDEAO* (sous la direction de) WEROBEL-la ROCHELLE (J), Fondation Hans Seidel, 1996, p. 4.

206 This national trade union body was a local chapter of the Union Générale des Travailleurs de l'Afrique Noire (UGTAN) crée le 19 Janvier 1957.

207 L'abréviation SMIG désigne le Salaire Minimum Interprofessionnel Garanti.

208 Art 9 of the Constitution of Dahomey of 11 January 1964: « *the exercise of freedom of association and the right to strike is recognized workers. This right is exercised under the conditions determined by law* ».

209 TCHIBOZO (H), op cit, p. 4.

It is in these circumstances and at the height of the walkout movements that President Emile Derlin ZINSOU, for the first time gave an order for the regulation of the right to strike[210].

Under the regime of PRPB[211], a regime for confiscation of freedom and generalized crackdown, even if the right to strike is theoretically recognized[212], a lull in trade union activities was observed between 1972 and 1988. It is only in 1988 that the social unrest due to delay observed in the payment of salaries for permanent state employees as well as other political and economic factors sanctioned the end of the said regime through the National Conference for the dynamic forces of the Nation held in February 1990.

Today, the recognition of the right to strike is established and its legal bases cannot be put into question. Indeed, the Constitution of 11th December 1990 stipulates that the State recognizes and guarantees the right to strike for all workers which can exercise it individually or collectively, or through an industrial action, for the defense of their rights and interests, in accordance with the conditions provided by the law[213]. Besides, there is also need to indicate that the Universal Declaration of Human Rights (UDHR), an integral part of the constitutionality block, implicitly recognizes the right to strike in Article 23 par. 4[214]. Moreover, the Act n°98-004 of 27th January 1998 on the employment code of Benin[215], the general collective bargain agreement of Benin of 17th May 1974[216] and Act n°86-013 of 26th February 1986 on the General Status of Permanent state employees amended and completed by the Act n°98-035 of 15th September 1998[217]recognizing the right to strike. Besides, the agreement n°87 on the freedom of association and the protection of trade union law, PIDCP in line with the same circle of influence as the UDHR indicates that « *every person has the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests* »[218]. Moreover, abundance of legal texts which serve as the legal foundation to the right to strike constitutes the proof that the debate on the recognition of the right to strike is closed completely. Then what remains of the right to strike? In other words what are the uncertainties which haunt the enjoyment of this right?

Under the era of the new democratic process, the thorny question of the regulation of the exercise of the right to strike resurfaced to the extent where no text was taken as reference for constitutional provisions to govern this law. Before the law-maker of 2001 realized it, the famous order of 1969 given by President Emile Derlin ZINSOU and decried in the trade union circles continued to have the binding force[219]. Recently, in view of enormous shortfalls generated by go-slows to the national economy, a bill initiated by the Government of Dr. T. Boni YAYI II, aimed at banning the right to strike for paramilitaries, in this case customs officers, became the talk of the town and continues to further discussions on the exercise of the right to strike in Benin characterized by intensive use of the same by trade union stakeholders.

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[210] Ordonnance n° 14/ PR / MFPRAT du 19 Juin 1969.

[211] Parti de la Révolution Populaire du Bénin.

[212] Law 86-013 of June 26, 1986, in article 48 of the "right to strike is granted to the permanent staff of the State to defend their collective professional interests. It is exercised within the framework defined by law " »

[213] Art. 31 of the Constitution of Benin 11 December 1990.

[214] Art. 23 al 4 Universal Declaration of Human Rights of 1948: « *Everyone has the right to form and to join trade unions for the protection of his interests*.

[215] As witnessed by Articles 35, 264, 298 of the Employment Code of Benin.

[216] The term "freedom to act freely in the collective defense of their own interests" contained in Article 8 of the General Collective Labor Agreement is an implicit proof of recognition of the right to strike.

[217] Art. 48 of the said law

[218] Art. 22 paragraph 1 of the International Covenant on Civil and Political Rights of 1966.

[219] This order contained drastic provisions for workers because it provided particularly severe penalties ranging from payroll tax for striking to the dismissal of the striking worker through various criminal penalties.

In view of these different observations and facts, the interest for a constructive reflection on **what remains of the right to strike in Benin,** is no longer to be illustrated and the need to bring to light public opinion on the issue seems to stand out.

The term « right» could have two meanings. In its objective meaning, it means a « *set of rules of conduct socially enacted and sanctioned, which is enforceable to the members of the society* »[220]. On the other hand in its subjective dimension, it carries the prerogative granted to each individual to claim or to sanction the failure to respect this prerogative by another individual or by the State[221]. For purposes of our analysis we will give privilege to the notion of law in its subjective dimension since it highlights the idea of exercise by citizens of their prerogatives conferred by the objective right.

For what pertains to the term « strike », it means « *Concerted and collective interruption of work by employees so as to ensure success of their claims (…), without terminating their employment, safe for professional misconduct attributable to employees* »[222]. We can therefore infer that strike is a prerogative whose exercise can be individual or collective. We can also add that, according to the end result sought, strikes can be political, go-slows, for solidarity or professional.

In summary, the exercise of the right to strike denotes the action by which each worker can take part in a strike without his legal situation undergoing other effects arising from the Constitution or from the law[223].

Only, some misunderstandings deserve to be raised so as to be able to give a better answer to the main question aforementioned. Was the Act n°2001-09 on the exercise of the right to strike in the Republic of Benin able to fulfill the expectations as compared to the Act of 1969? The minimum service and the requisition instituted by the laws in force, in case of a strike, would it really manage to ensure continuity of the public service in the interest of the users ? What are the remedies against intensive recourse to strike movements? Intensive use of the right to strike can it lead to abuse of the right of the same? Limits or bans of the exercise of the right to strike are they conceivable and how should they be implemented?

Upon the analysis of different concerns, the question of the exercise of the right to strike in Benin can be hinged on two points which appear to us as essential: the first point will the objective of clarifying the debate on the legality of the exercise of the right to strike (I) and the second will enable assessment of the use which the stakeholders make of this right and the measures which the public authorities take to control it (II)

I- A NORMALLY REGULATED EXERCISE

Strike is a very formidable phenomenon; some will say that it pertains to an arm so powerful that it comes to counterbalance the balance of powers which intervene during collective disputes between employees on the one hand, and employers (group of employers, public authorities) on the other hand[224]. Because it pertains to a formidable arm, of a constitutionally guaranteed power, the exercise of the right to strike in a democratic society is nourished by the principle according to which any power can only validly exercise it within the framework

[220] CORNU (G), Vocabulaire juridique, Paris, PUF, 2007, p.333.
[221] GUILLIEN (R), VINCENT (J), Lexique des termes juridique, Paris, DALLOZ, 2003, p. 223.
[222] CORNU (G), Vocabulaire juridique, Paris, PUF, 2007, p. 44B.
[223] Ibid.
[224] DEMEZ (G), « *La grève : rôles des acteurs sociaux et étatiques* », *Reflets et perspectives de la vie économique*, 2003/4 Tome XLII, p. 49.

of an appropriate procedure so as to prevent any excesses ensuing from a situation of abuse of power or right[225].

In this regard, the Beninese regulation on the exercise of the right to strike, informs, on the one hand, on the holders of this right (A) and imposes, on the other hand, scrupulous respect of the procedural requirements in relation to its implementation(B).

A- HOLDERS OF THE RIGHT TO STRIKE

In Benin, the regulation on the exercise of the right to strike applies « to *civilian employees of the State and local authorities as well as to employees of public, semi-public or private institutions, with the exception of officers expressly prohibited from the exercise by the law* »[226].

It is therefore possible to infer from the abovementioned provision, that there exist two categories of workers, in this case, those who can be hit by the ban (2), pertaining to the exercise of the right to strike, and those who can enjoy it fully (1)

1- WORKERS ENJOYING THE RIGHT TO STRIKE

In the category of workers who can exercise the right to strike, we can distinguish those who are covered by a regime of public law and those who fall under the legal regime of private law[227]. The reason for this distinction resides in the determination of legislations which are going to govern the status of these employees. Thus, the status of civil employees of the State and local authorities would fall under public service law while the status of employees of public, semi-public or private companies would be governed by the rules of the Employment Code of Benin and those of Collective Bargain Agreement. Regardless of the status, the right to strike is assured both for state officials (a) and those working in the private sector (b).

a) STATE OFFICIALS

Essentially governed by the Act n°86-013 of 26th February 1986 on General Status of Permanent State Officials as amended and completed by the Act n°98-035 of 15th September 1998, public service workers in this case the entire group of employees of the State and local authorities, enjoys a full status.

Public service employees just like those working in the private sector to the extent where they are not hit by a legal ban, can enjoy the exercise of the right to strike, either individually or collectively, or through an industrial action. While recognizing the right of the group of workers not form a union, the laws of the Republic envisage that the right to strike be exercised by groups of workers not affiliated to a national trade union federation or confederation.

However, the industrial action, in view of the mobilizations it generates and the balance of power it brings about, seems to get full attention of public opinion, civil society, development partners, the reason why we shall direct our reflection in this direction.

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[225] See also, CHEVALIER (J), Synthèse sur l'Etat de droit/ http://www.u-picardie.fr/ and Carré de MALBERG (R), « Confrontation de la théorie de la formation du droit avec les idées et les institutions consacrées par le droit positif français relativement à sa formation », Paris, Sirey, 1933.

[226] Art. 2 de la loi n°2001-09 portant exercice du droit de grève en République du Bénin.

[227] We can refer on the question of Article 2 para 1 in fine of Benin Labor Code.

Industrial action is not conceivable outside trade union movements and the new democratic process which started in the 1990s was the compost of an anthology of trade union movements. Among, the most representative national trade unions[228] we can mention : l'UNSTB (Union Nationale des Syndicats des Travailleurs du Bénin)[229], (*National Union of Trade Unions for Workers of Benin)* la CSA- Bénin (Centrale des Syndicats Autonomes du Bénin)[230],(*National Union of Autonomous Trade unions of Benin)* la COSI (Centrale des Organisations Syndicales Indépendantes)[231],(*National organization of independent trade unions(* la CSTB (Confédération Syndicale des Travailleurs du Bénin)[232],*(Confederation of Trade Unions of Workers of Benin)* CGTB (Confédération Générale des Travailleurs du Bénin) *(General Confederation of Workers of Benin)*.

However, as a general observation « *there is need to note that if trade unions in Benin are in particular illustrated by frequent recourse to strike as a means of struggle, their modes were always followed in big part by their bases, which sometimes assimilates trade union officials to generals without group* »[233].

Today the credibility of trade union organizations is put to test for several reasons.

In the first place, « wild » trade union pluralism and its consequences which are conflicts of management between officials of the trade unions and strong politicization of trade unions seriously damage cohesion of the movement and the industrial action[234].

For purposes of illustration, we can count at least seven (7) trade union organizations which advocate at the same time for improvement of living and work conditions in the national education sector[235].

In the second place non-payment of contributions by members of the trade unions, is proof of the lack of commitment and militancy within the trade unions, the trade union struggle losing its efficiency in this regard.

Where are we with employees of the private sector?

b) EMPLOYEES OF THE PRIVATE AND INFORMAL SECTOR

« Formal » private sector is opposed to the informal sector to the extent where the activity of the public sector is by definition regulated, the State being an important player in the said sector.

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[228] According to Article 3 of the Decree n°97-617 of 18 December 1997 on definition of different forms trade union organizations and criteria of representation in Benin: « *union federation is a horizontal union, that is to say, several unions in the same sector of activity. The central or confederation is a vertical union of several unions of different sectors of activity* ».

[229] Going by the professional elections of 2003, CSTB is the most representative organization, followed by CSA-Benin, UNSTB and COSI.

[230] According to Guillaume ATTIGBE, Secretary General of CSA-Benin, its organization has in 2005 seven federations bringing together 93 local trade unions from all sectors of business with a membership of 55 000 members.

[231] Going by the professional elections of 2003, CSTB is the most representative organization, followed by CSA-Benin, UNSTB and COSI.

[232] Idem.

[233] TCHIBOZO (H), op cit, p. 10.

[234] DEGLA-CHOUBADE (R), la liberté syndicale au Bénin, Mémoire DEA, Chaire UNESCO/ FADESP /UAC, 2003-2004, p. 50.

[235] It pertains to local trade unions as follows : le SYNAPRIM (Syndicat National des Enseignants Publics Maternels et Primaire), le SYNESTP (Syndicat National des Enseignants Secondaires Techniques et Professionnels), le SYNAPROCER (Syndicat National des Professeurs Certifiés), le SNES (Syndicat National des Enseignants du Supérieur), le SYNARES (Syndicat National de la Recherche de l'Enseignement Supérieur) , le SNETP(Syndicat National des Enseignements Techniques et Professionnels), le SYNECOB(Syndicat National des Enseignants Communautaire du Bénin).

Pertaining to the « formal » private sector, the exercise of trade union rights in all the Institutions or Companies regardless of the legal form, individual property or collective property carrying out a production, distribution or supply of goods or services working in Benin, must specifically subject themselves to the provisions contained in General Collective Labor Agreement but also to those contained in the Employment Code of Benin.

Indeed, this agreement enacts a set of rules whose exclusive end result, is to enable « *the free exercise of right to organize and the freedom of expression for the workers within the company* »[236].

Besides, it is important to underline that the expression of freedom of association in places of work, i.e. businesses, must put up with some requirements which are defined in the said agreement[237].

According to Professor N. MEDE « *Business is a micro-company with its hierarchical relationships, its representative structures. These play the role of facilitating human relations and guaranteeing internal harmony. Staff representatives, social welfare advisors and trade unions are among mechanisms of social dialogue in the business* »[238].

Without however reducing the importance of social welfare advisors and trade unions, the institution of staff representative is quite original and a protector of freedom of association in businesses in view of the importance of the role assigned to him or her[239]. His mission being to seek for some balance between seemingly contradictory interests and well-being of the workers as opposed to the prosperity of the business entity.

Concerning the informal sector, it can be understood « *as a set of units producing goods and services with a view to mainly create jobs and incomes for the people concerned. These units, with a poor level organization operate as small scale and in a specific manner, with hardly any division between labor and capital as factors of production. Labor relations, when they exist, are especially founded on casual employment, parental relationships or personal and social relationships rather than on contractual agreements containing appropriate guarantees*»[240].

Indeed, it could be true that the informal sector, for those who work there, present the drawback for sowing the seeds of total legal insecurity (clear lack of social protection). The fact of the matter is that the degree of informality of employment is very high, if we reflect on the degree of formalization of labor relations and the distribution of jobs per institutional sector (formal sector/informal sector)[241].

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[236] Art. 126 Benin Labour Code.

[237] General Collective Labor Agreement in Title II relative to the exercise of trade union rights in particular Articles 8 and 9.

[238] MEDE (N), op cit, p.128.

[239] In accordance with the law, staff representatives have the duty : « - *to present to the employer any individual or collective complaints concerning working conditions, remuneration or employment seize the labor inspectorate for claims concerning the application of legal requirements, regulations or agreements - communicate to employer any suggestion for a better social or economic organization of the company , perform any other function that is imposed on them by this Code, give their views on plans to restructure the company. They should be consulted on the management of social works* "Art of Benin 109 Labor Code.

[240] CHARMES (J), « Les origines du concept de secteur informel et la récente définition de l'emploi informel », l'Institut de Recherche pour le Développement (IRD, Paris), p.4 ou Cf. BIT, 1993b.

[241] The employee rate, which is an indicator of the level of formalization of labor relations, is 5.1 percent. The formal sector is split almost equally between the formal private sector (2.5 percent) and the public sector (2.7 percent). In urban areas, the employee rate reached 10.8 per cent, against 1.6 per cent in rural areas. The majority are self-employed (70.2 percent), primarily engaged in the informal economy, while caregivers occupy 17 percent of employment and 5.2 percent of apprentice's jobs (INSAE-RGPH de 2002). (Cf. HONLONKOU (A), OGOUDELE (D), Les institutions du marché du travail face aux défis du développement : Le cas du Bénin, Secteur de l'Emploi /Document de travail de l'Emploi n° 66, BIT, 2010, p. 11).

From the analysis of the data of the 3rd General population and housing census published in 2004 by INSAE, 94.3% of the active population is found in the informal sector and 5% in the formal sector divided almost equally between public and private sectors (2.6% and 2.4%)[242].

Bearing mind the importance of the informal sector in line with the field of activity, employees of this sector who are essentially self-employed come together in association to defend their interests.

As an illustration, association of sellers of adulterated fuel on the road sides spread over the entire national territory of Benin triggered a one week strike on Monday the 26th November 2012, by demanding from the Government of Benin support measures, namely their reconversion in other sectors of activity before cessation of sale of these banned products.[243] Clearly, industrial action is hardly conceivable, outside the exercise to the right to strike, which for some category of workers, can be subject, when the general interest is threatened, to legal restrictions or prohibitions.

2- WORKERS DEPRIVED OF THE RIGHT TO STRIKE

The guarantee for the freedom of association recognized both in the private sector and the public sector is without prejudice to the question of the right to strike by state employees remains entirely not in question[244]. In other words, the recognition of the freedom of association for public service workers is not incompatible with taking some depriving measures for the exercise of the right to strike for civil servants of some departments deemed essential, in the prescribed forms (a), in as a much as these depriving measures are accompanied by compensatory guarantees (b).

a) DEPRIVING MEASURES FOR THE EXERCISE OF THE RIGHT TO STRIKE

Two major facts of current or distant topic illustrate in a better way the thorny issue of measures touching on limitation[245] and banning[246] of the right to strike.

It pertains on the one hand, discussion on imposition of minimum service in essential services and the other hand the controversy surrounding the banning of the right to strike for paramilitaries.

- Discussion on imposition of minimum service in essential services

Here, we will direct our reflection under two approaches, the first will be interested in the case where the minimum service must be imposed and the second will look into recourse to requisition as a sanction in the absence of the said service.

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[242] INSAE-RGPH, Rapport Général publié 2004.

[243] http://www.afriquinfos.com/articles/2012/11/27/benin-vendeurs-lessence-frelatee-declenchent-greve-pour exiger-lexecutif-activites-reconversion-213655.asp

[244] BIT, 1947, p. 112.

[245] The strikes occurred in the health sector where the hospital staff observed a stoppage of work without minimum service

[246] The legal prohibition of the right to strike paramilitary occurred following the ongoing wrangle between the government and the departments of Customs

✓ ***In case of need for a minimum service***

Essential services mean according to the meaning of Act n°2001-09 on the exercise of the right to strike in Benin, « *(…) those falling under health, security, energy, water, air transport and telecommunications with the exception of private radio and televisions* »[247].

It is obvious that the social legislator of Benin of 2001 drew inspiration from the definition proposed by the committee of freedom of association of OIT, which envisaged essential services as those « *whose interruption would endanger, all or part of the population, life, security and health of individual person* »[248]. Even that may be so, a service deemed non-essential at the beginning can gravitate into an essential service if the strike goes beyond a certain duration or a certain extent endangering life, security and health of people[249].

In Benin, the expression essential services is used « *to mean services where the strike is not banned but where it is possible to impose a minimum service of operation* »[250]. It is in this dynamics that the regulation on the exercise of the right to strike indicates that « *civil servants and officers of public, semi-public or private institutions with an essential character whose total cessation of work would bring serious prejudices to the security and health of the population are required to provide a compulsory minimum service* »[251], the same applies to civil servants and officers from public, semi-public or private institutions with a strategic character[252].

In the foregoing, it is safe to affirm that the strike movements started in 2010 in the health sector by the United Front of trade unions organizations of health without minimum service[253], was not only illegal but also and especially abusive due to the form of strike used[254]. During this period, many sick people, due to lack of treatment, lost their lives in a painful manner, under the powerless watch of their parents[255].

✓ ***In case of refusal of minimum service : requisition***

« *The law gives the possibility to the government to requisition striking workers in case of sufficiently serious prejudice to the continuity of public service* »[256].

In the situation where workers do not organize the compulsory minimum service, the authorities under which they fall in this case the ministers concerned, prefects, mayors and heads of institutions, as the case may be, can do requisition under certain conditions.

Thus, before it is in conformity with the legislations, the requisition must also comply with the rules of form and substance.

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247 Art.14 and Law No. 2001-09 on the exercise of the right to strike in the Republic of Benin.

248 Opinion of the Committee of the Freedom of Association by ODERO (A), GERNIGON (B), GUIDO (H), « les principles de l'OIT sur le droit de grève » in Revue Belge de Droit International vol XXXIII, 2000-1, Bruxelles, Bruylant, p.51.

249 ODERO (A), GERNIGON (B), GUIDO (H), « les principes de l'OIT sur le droit de grève » in Revue Belge de Droit International vol XXXIII, 2000-1, Bruxelles, Bruylant, p.51.

250 Ibid.

251 Art.13 and Law No. 2001-09 on the exercise of the right to strike in the Republic of Benin.

252 Art. 17 de la loi n°2001-09 portant exercice du droit de grève en République du Bénin.

253 http://www.beninsite.net/spip.php?article1495.

254 Il s'agissait d'une forme de grève prohibée dénommée « grève perlée ».

255 http://www.beninsite.net/spip.php?article1495.

256 L'équipe juridique fédérale, « *le droit de grève dans la fonction publique* » in Journal Interco n°204 • septembre/octobre 2010, p.32.

Pertaining to rules of substance, « *(…), the number of those requisitioned shall not exceed 20% of the staff of department, administration or institution concerned, including the management team* »[257]. Besides, « *in all cases, trade union officials of the strike movement shall not be requisitioned by the Administration or by the institution concerned unless they belong to the management team or they are the only specialists in their field* »[258]. Moreover, the security of the people requisitioned must be ensured by competent authorities (ministers, prefects and heads of institutions concerned) and the necessary means for the accomplishment of the mission of service must be put at their disposal[259].

As pertains to formal requirements, they are essentially committed to notification by administration channel of the requisition the people concerned, either directly, or to their domicile and to the head quarters of their trade union organization if need be. In the hypothesis where the people requisitioned do not show up at their place of work, the requisitions would be subject to publication through the press. On the other hand when they are invited at the head quarters of a trade union organization, the requisitions shall also be displayed therein[260].

In any event those who contravene the requisition shall be liable to disciplinary sanctions of the first instance as provided by the legislations in force[261].

Beyond the power of restriction to the right to strike, granted to the public administration, by way of the requisition, through the initiative of a law, public authorities[262], can do more, by seeking for simple ban of the right to strike[263].

Ω- ***Controversy surrounding the ban for the right to strike***

In reaction to multiple strike movements observed in the public service in the customs and due to the shortfalls that this strike movement has caused to the national economy, the Government of Dr. T. Boni YAYI II, seized the National Assembly for a bill on general rules applicable to military personnel, public security forces and related forces whose end result was banning the right to strike for customs officials.

Several voices, both in civil society and in trade union circles were raised, denouncing the enthusiasm of the public authorities to incarcerate public freedoms.

After the vote of the Act n° 2011-25 on general rules applicable to military personnel, public security forces and other related forces by the National Assembly, some members of parliament, just like the President of the Republic, seized the Constitutional Court so as to issue a decision on the compliance of this law with the Constitution.

After analyzing the arguments raised by Louis VLAVONOU M.P. in favor of the unconstitutionality of the said law, the constitutional judge in an explicit and coherent

[257] Art 16 al 1 de la loi n°2001-09 portant exercice du droit de grève en République du Bénin.
[258] Art 16 al 2 de la loi n°2001-09 portant exercice du droit de grève en République du Bénin.
[259] Art 20 de la loi n°2001-09 portant exercice du droit de grève en République du Bénin.
[260] Article 19 and Law No. 2001-09 on the exercise of the right to strike in the Republic of Benin.
[261] It is for private sector employees and Law No. 98-004 on the Labor Code of Benin, while for public sector workers, it is the law n ° 86-013 of 26 February 1986 on General Statutes of the Permanent Civil Servants amended and supplemented by law No. 98-035 of 15 September 1998.
[262] Art 105 of the Constitution of 11 December 1990
[263] The initiative of the law is the exclusive prerogative of parliament and government, we may well fear a resurgence of legislative measures mainly bills aimed at further undermining the freedom of association. As an illustration we can cite the Order No. 14 / PR / MFPRAT of June 19, 1969.

examination refuted point by point, the arguments advanced by the Member of Parliament, by bringing clarifications which persuaded us.

On the alleged violation of Article 31 of the Constitution of 11th December 1990 by Article 9 of the Act n° 2011-25, the constitutional judge operates a salutary and progressive jurisprudential turnaround[264], by establishing that « ***the right to strike is exercised in the conditions defined by the law (...) that this right, although fundamental (...) is not absolute.****(…) that by providing that the right to strike is exercised in the conditions defined by the law, the constituent wants to affirm that the right to strike is a principle with a constitutional value, but it has limits and empowers the legislator to define the said limits* ***by operating the necessary reconciliation between defense of professional interests, of which the strike is a means, and the preservation of the general interest which may be affected adversely by the strike*** *; (…)* ***limitations on the right to strike can go upto banning of the said law for the officials whose presence is indispensable to ensure the functioning of the service elements whose interruption would adversely affect essential needs of the country****; that, the State, through the legislative power, can, for purposes of general interest and objectives enshrined in the constitution, prohibit the determined officials, from the right to strike* »[265].

On the alleged violation of regional and international instruments, an integral part of constitutionality block, the constitutional judge, invoking Article 11 of the African Charter on Human and Peoples' Rights, notes that this right is exercised by tolerating the necessary restrictions enacted by the laws and regulations, in the interest of national security, safety of the other person, morals and rights and freedoms of peoples ; that consequently , if strike is a legitimate means of the worker to defend his interests, the legislator and the government enjoys the same legitimacy to give restrictions to this right or even banning it in regards to personnel exercising functions of authority on behalf of the State or those having important responsibilities in departments and companies carrying public service duties. Moreover, Article 8 paragraph 2 of the International Covenant on Economic, Social and Cultural Rights states that the constitutional guarantee of the right to strike « *does not prevent subjecting the exercise of these rights to restrictions by members of the armed forces, police or by public service employees*. »

In summary, the principles of the OIT on the right to strike[266]corroborates in its entire dimension the thesis for limitation or banning of the right to strike by the law and refuse to envisage it as an absolute right subjected to all forms of restrictions. We are witnessing some decisions delivered on the freedom of association, which indicate on the one hand that «*Banning of the right to strike for customs workers exercising functions of authority on behalf of the State is not contrary to the principles of the freedom of association* »[267]. Better still, they even establish that «*civil servants of the administration and those in the judiciary are civil servants who exercise functions of authority on behalf of the State, and their right to turn to strike can therefore be subject to restrictions, such as suspension of the exercise of the right or bans*. »[268].

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[264] In an earlier decision (Décision DCC-06-034 of 4 April 2006) , *the constitutional judge had established that the right to strike « The right to strike as proclaimed and guaranteed by the Constitution of 11 December 1990 is an absolute right for the benefit of all workers including citizens in uniform of the Armed Forces. The ordinary legislature can not adversely affect this right. It can only under a law defining the limits, and in the case of the military, make the necessary reconciliation between the defense of professional interests of which strike is a means and safeguard of general interest which the strike may be likely to prejudice. In this case, if the strike for the military may infringe the constitutional principle of "protection and security of people," its legality can be limited by the legislature to the public interest.*

[265] Decision DCC -11-065 of 30 September 2011 delivered by the Constitutional Court

[266] ODERO (A), GERNIGON (B), GUIDO (H), « les principes de l'OIT sur le droit de grève » in Revue Belge de Droit International vol XXXIII, 2000-1, Bruxelles, Bruylant, p.49.

[267] Decision of ILO on Freedom of Association, 304th Case Reports 1719.

[268] Décision de l'OIT sur la liberté syndicale, 336ème rapport, cas n° 2383.

It is however right to underline for all intends and purposes, that banning or limiting the right to strike for some public service workers must be accompanied by compensatory guarantees.

b) INEXISTENCE OF COMPENSATORY GUARANTEES

In the interests of equity and justice, civil servants deprived of the right to strike must be granted compensatory guarantees whose end result above all aims at making up for the refusal to strike, the way through which professional claims are done more comprehensively. Indeed, on the question, the committee of freedom of association considers that civil servants exercising functions of authority on behalf of the state or workers of essential services such as military personnel, public security forces and other related forces, of which legislation banned the right to strike,[269], should enjoy a compensatory protection[270].

Banning of the right to strike, as instituted by the law must be able to put up with real «*appropriate guarantees*» which touches on «*impartial and expeditious reconciliation and arbitration procedures [...], to various stages in which interested parties should be able to participate and in which the sentences delivered should be applied in full and quickly*»[271].

Unfortunately, in the current state of the positive law of Benin, it is hard to say if compensatory guarantees were granted to civil servants not allowed to go on strike.

Indeed, the examination of the Act n°2011-25 of 1st October 2011 on general rules applicable to military personnel, public security forces and other related forces in the Republic of Benin, shows that the legislator seemed to evade the question of compensatory guarantees; he chose to establish that « *military personnel, public security forces and other related forces are required to carry out their duty in all circumstances and cannot exercise the right to strike* »[272].

Besides, there is need to underline that the same law gives « *public security personnel and other related forces (…) freedom of association (…) [whose] enjoyment (...) is exercised [without], (…) under no circumstances, be prejudicial to emergence public service, proper functioning of the service and general interest* »[273].

However, no Article out of the 12 contained in the law gives information on compensatory guarantees which the concerned civil servants are entitled to.

Thus, compensatory guarantees , instead of getting assimilated to « acquired rights » for public security forces personnel and other assimilated forces deprived of the right to strike, have become « simple expectations » ; as shown by the provisions of Article 11 of the Act n° 2011-25 of 1st October 2011, if we consider that « *special and individual status* » will eventually be taken into account.

The capacity of the holders of the right to strike being clearly qualified, it would be interesting to look into the rules governing the process of going into strike.

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269 Art 9 de la loi n° 2011-25 du 1er Octobre 2011 on general rules applicable to military personnel, public security forces and other related forces in the Republic of Benin.

270 ODERO (A), GERNIGON (B), GUIDO (H), « ILO principles on the right to strike », op cit p.55.

271 Ibid.

272 Art 9 de loi n°2011-25 du 1er Octobre 2011 portant règles générales applicables aux personnels militaires, des forces de sécurité publiques et assimilés en République du Bénin.

273 Art 5 law n°2011-25 du 1er Octobre 2011 on general rules applicable to military personnel, public security forces and other related forces in the Republic of Benin.

B- PROCEDURAL REQUIREMENTS

So that the exercise of the right to strike is not illegal, it has to abide by imperative rules of procedure enacted for the protection of social order and general interest. These rules must be observed, not only, before the start of the strike action (1) but also after its beginning (2)

1- BEFORE THE START OF THE STRIKE

Before the strike begins, social partners who are trade unions are subjected to two requirements which on the one hand touch on prior negotiation pertaining to the claims demanded (a) and the other hand in case of failure of negotiations, issuance of a notice which must precede the strike itself (b).

a) **PRIOR NEGOTIATION**

National unions, trade union federations or confederations never exhaust claims since improvements of living and working conditions for the employees is an endless quest.

By opting for prior negotiation each time collective disputes arise in all sectors of professional life[274], the legislator privileged search for social peace by doing what is possible to limit confrontation.

Indeed, collective disputes in question can concern permanent state employees and local authority officials. Consequently , the negotiations to which these disputes will be subjected shall be undertaken, either with the minister in charge of public service or his representative in cases of conflicts of national scale, or with the responsible minister, prefect, mayor or their representatives in case of sectoral or local conflicts[275].

Pertaining to staff in business enterprises, agencies, organizations and public, semi-public or private institutions, negotiations are governed by the Employment Code of Benin[276]. In this regard, « *any collective dispute must be notified immediately by the parties as the case may be, to labor inspector when the conflict is limited to the jurisdiction of departmental labor inspection or to the labor director when the conflict falls within the jurisdiction of several departmental labor inspections* »[277]. Competent authorities seized with the dispute shall try to reconcile the parties within the framework of negotiation[278].

At the end of the negotiations, the protagonists will prepare a report establishing total or partial agreement or disagreement. The validity of the said report is subject to signature by the parties who took part in the negotiations and this shall be done within a time limit of forty-eight hours after the end or breakdown of the negotiations[279].

In case of disagreement or breakdown of the negotiation, the beginning of the strike becomes almost inevitable; however, for it not to be hit by an illegality, it must be subordinate to issuance of a notice.

[274] Art. 3 de la loi n°2001-09 on exercise of the right to strike in the Republic of Benin.
[275] Art.4 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin.
[276] Art. 5 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin.
[277] Art. 253 of the law n°98-004 on the employment code in Benin
[278] Art 254 of the law n°98-004 on the employment code in Benin.
[279] Art. 6 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin.

b) ISSUANCE OF A NOTICE

Issuance of a strike notice is not an exclusive privilege of one or many properly constituted trade union organizations for workers[280], it can also emanate from any group of workers outside trade union organizations.

Indeed, the strike notice is a warning, an advance notice which the workers must sometimes respect, by virtue of the law or collective agreements, between the decision to strike and real stoppage of work[281].

For it to be admissible, the strike notice must indicate some elements, among them the reason for the strike, the place, date and starting time as well the planned duration of the strike; if, it pertains to a renewable strike, then the notice is supposed to indicate the same[282]. It is also very important to underline that the issuance of a strike notice is closed in a time limit; it must reach the hierarchical authority or the management of the institution or the organization concerned as well as the minister in charge of public service at least three working days before the beginning of the strike with the exception of a situation where the strike aims at responding to a serious action adversely affecting the right of the worker by an official of the department, and in this case the strike notice is twenty-four (24) hours[283]. Under no circumstances, the strike notice should not put an end to negotiations meant for resolving the conflict, further negotiations must continue within the framework defined by the law.

2- AFTER THE BEGINNING OF THE STRIKE

After the beginning of the strike, search for social peace should not be broken. In this regard the legislator provided mechanisms parallel to the strike; it mainly pertains to statutory arbitration (a) as a result of social dialogue (b).

a) STATUTORYARBITRATION

Statutory arbitration in a collective labour dispute is a requirement provided for by the law. Consequently, it has the objective of continuing to pace up and down in the corridors of negotiation with a view to obtaining a solution which satisfies the wishes of different protagonists of the dispute without in any way affecting the strike. It takes various forms depending on whether the collective labour dispute affects the public or private sector.

Pertaining to the public sector, when there is a total or partial disagreement leading to issuance of a strike notice, arbitration by the National Civil Service Council or by a mediator appointed through an agreement between the parties is a must so as to try to reconcile the parties from the acceptance of the mediation when the strike exceeds two (2) full days[284].

Concerning, the private sector, provisions relating to settlement of labour disputes provided for by the employment code are applicable[285]. This is why an arbitration council was

[280] Voir en ce sens MEDE (N), Employment regulation, op cit, p. 138.
[281] CORNU (G), op cit, p.702.
[282] Art. 8 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin
[283] Art 9 of the same law.
[284] Art. 12 de la loi n° n°2001-09 on exercise of the right to strike in the Republic of Benin.
[285] Ibidem.

instituted within the jurisdiction of each Court of Appeal with the prerogative of ruling « *in law or in equity and its decision becomes enforceable from the 5th day after notification to the parties; except if one of the parties files his opposition to the decision through a registered letter with an acknowledgement of receipt addressed to the chairperson of the arbitration council within four days after the notification of the decision* »[286].

If eventually, the arbitration does not yield a suitable solution for the resolution of the dispute, continuation of social dialogue should not be interrupted.

b) CONTINUATION OF SOCIAL DIALOGUE

Social dialogue is defined « as *a set of procedures aimed at putting in place mechanisms for dialogue, consultation, mediation and dispute management in which interests of each party are preserved. It consequently covers all forms of negotiation, consultation and exchange of information between government representatives, workers and employers on issues of mutual interest related to social and economic policy* »[287].

In Benin, in an attempt to establish dialogue with social partners and following the recommendations of the International Labour Organization, employee-employer structures were created[288] to tackle issues in connection with the labour relations[289].

Despite the powers of these social dialogue organs, they have remained ineffective in mobilizing state stakeholders and trade unions around a consensus truly beneficial to everybody.

The political initiative by the Government of Dr. T. Boni YAYI, which consisted of creating a ministerial portfolio in charge of social dialogue, did not bear fruits[290].

II- A PRACTICALLY ABUSED EXERCISE

When the social dialogue breaks down, and that negotiations between workers and employers are broken, confrontation becomes inevitable.

Each camp hardens its position and implements drastic measures conferred to it by the law and regulations, to the extent of abusing these measures.

Thus, strike changes and takes forms which denote deliberate desire of striking workers to destabilize the business entity or the public service (A), a situation before which public authorities take coercive measures which tend to adversely affect the fundamental rights of the striking workers (B).

A- HEIGHTENING OF STRIKE MOVEMENTS

Does heightening of strike movements lead to a situation of abuse? This question calls for both a positive and a negative answer. The truth is, it is very possible to have hardening

[286] MEDE (N), op cit p. 214.

[287] OUMAROU (M), « *Le dialogue social dans l'administration publique des pays Membres de l'Union économique et monétaire ouest-africaine (UEMOA)* » Genève, Bureau international du Travail, 2007, p.34.

[288] A number of consultative organisations we can name : Le Conseil National du Travail ; la Commission Nationale Paritaire des Conventions Collectives et des Salaires ; la Commission Nationale de Sécurité et de Santé au Travail.

[289] MEDE (N), op cit, p. 217.

[290] http://lautrefraternite.com/2012/02/19/le-concept-de-dialogue-social-au-benin-selon-philippe-noudjenoume-un-outil-de-duperie-des-travailleurs/

of the strike without any abuse. Nevertheless, abuse could arise, not only, from the nature of the claims and circumstances of the strike (1), but also and especially from the conditions inciting the strike (2).

1- ABUSE OF THE RIGHT TO STRIKE

The notion of abusing the right to strike is a very controversial notion, as shown by praetorian debates it raised and continues to raise[291]. However, we can, beyond, the critics agree with P. BATHMANABANE who sees in the abuse of the right consisting in hijacking a legal prerogative from its social or economic purpose with the aim of getting a higher benefit or different from the one which would be granted by the normal exercise of the law and causing, in consequence, a loss to the other person[292].

Thus said, it would be useful to examine the abuse in this matter, by verifying on the one hand the abusive nature of the claims (a) and the abusive circumstances of the exercise of this right on the other (b).

a) ABUSIVE NATURE OF THE CLAIM

Two fundamental criteria allow us to get information on the abusive nature of the claims by workers in the struggle for a well-being[293]. It pertains among others lack of professional claims and sometimes the excesses in the said claims regardless of the professional nature.

α –Lack of professional claims

It is very recurrent to observe in industrial action practices in Benin, strike movements whose claims are foreign to the profession of the striking workers.

The so called political strikes correspond very much to this reality which has been decried for long. Indeed, political strikes have the disadvantage of being directed not against the business entity or the public service in which the employees work but rather against government policy[294]. The main purpose of these strikes is to be able to pressure the government so that it can withdraw a policy of any nature which is deemed unpopular.

Industrial action above all aims at defending the interests of unionized employees, promotion of the well-being and their education without forgetting and this in priority the improvement of working conditions of the worker[295]. Industrial action is therefore opposed to political action, in this case that the latter exclusively aims at the conquest of the political power, denouncing this power being one of many other means of realizing this conquest.

We can therefore not understand the pernicious game in which political and trade union circles are illustrated, one manipulating the other and vice-versa to achieve objectives which are often foreign to the duty assigned to them.

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[291] See in this direction, DUBOUIS (L), « *La théorie de l'abus de droit et la jurisprudence administrative* ». In Revue internationale de droit comparé. Vol. 16 N°1, Janvier-mars 1964. pp. 231-233.

[292] BATHMANABANE (P), l'abus du droit syndical, Paris, LGDJ, 1993, p. 7 et suivants ;

[293] BATHMANABANE (P), op cit, p. 224.

[294] CORNU (G), op cit p.448.

[295] MEDE (N), la réglementation du travail au Bénin, traité pratique de droit et relation de travail, Fondation Friedrich Ebert 2ème edition , 2006, p. 140.

Several contemporary example such as walkout movement started by the employees of the Ministry of Finance to protest against forced disappearance of their colleague Pierre Urbain DANGNIVO[296] or the strike of magistrates affected by extended sovereignty fever demanding public excuses from M/s. Marie Elise GBEDO Advocate, Minister of Justice for having claimed that the corporation of magistrates of Benin is corrupt[297].

Consequently, political strikes must be considered as demonstration of the abuse of the right to strike.

Ω- Excesses in the professional claims

The question of « excesses» is a reality which is very difficult to understand if beforehand the law itself does not give the guarantee to define in advance the situation in which professional claims become excessive.

According to the doctrine embodied by P. BATHMANABANE, « *two hypotheses can likely illustrate* »[298]the situation of excesses, mainly, sympathy strikes and unreasonable strikes.
To the extent where unreasonable strike can be ambiguous and that the Beninese legislator did not bother about it, we are going to show our interest on the so called sympathy strike.
According to the opinion of J- E. RAY, sympathy strikes are likely to have two purposes, one is said to be external and deemed illegal to the extent where « *employer A has no legal means to make employer B to (…) reinstate an employee who has been dismissed* »[299] ; the other is called internal and can be considered legal under some conditions.

Indeed, sympathy strikes mean « *movement through which striking workers, intend to give their support to a claim in which they are not directly concerned* »[300]. If the sympathy strike gives rise to a renewed interest in trade unions which identify it as symbol of one of fundamental values of the working class[301], it should however not be started to give support to an established criminal offender or to support an employee who had committed a gross misconduct which would have led to his dismissal[302].

On this issue, the Beninese positive law recognizes sympathy strike without however distinguishing internal sympathy strike from external sympathy strike. On the other hand, the social legislator qualifies as illegal any sympathy strike started by any national union, any union federation or any local trade union although the strike it supports is in itself illegal and that the officials of the institution or the establishment have not been informed about it beforehand.[303].

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[296] Voir en ce sens, GANDAHO (E), « *Suite à la disparition de Pierre DANGNIVO* » in Bulletin le Matinal n°3429 du 1er Septembre 2010 ; HOUSSOU (B), « *Grève tous azimuts : DANGNIVO hier ! Point indiciaire aujourd'hui … n'est-il pas tant d'arrêter ?* » in Bulletin Fraternité, n°2884 du 14 Juillet 2011 ; « *le Père de Pierre DANGNIVO envoie une lettre de protestation à Yayi* » in Bulletin Fraternité n° 2940 du 06 Octobre 2011.

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

[298] BATHMANABANE (P), op cit, p.224.

[299] RAY (J-E), Droit du Travail, droit vivant, Paris, Editions LIAISONS, 20èmeed, 2012, n°971, p. 669.

[300] BATHMANABANE (P) , op cit, p.224.

[301] Voir en ce sens, GAUDU (F), « *La Fraternité dans l'Entreprises* », Dr. Soc. 1990, p. 136 et RAY (J-E), « *L'Entreprise et le déclin du mouvement syndical* », Les Petites Affiches, 1991, n°54, p. 11 et s ;

[302] RAY (J-E), op cit, p. 669.

[303] Art 11 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin.

b) CIRCUMSTANCES OF THE ABUSE OF THE RIGHT TO STRIKE

Outside the nature of claims, the circumstances of the exercise of the right to strike can enable assessment of abusive enjoyment of this fundamental right of the workers. These circumstances can fall under the moment chosen to start the strike (1) or in the manner with which the movement was conducted (2).

α - Abuse due to the moment chosen

The moment chosen by the trade union to start the strike can be a proof of its will to exercise the right of strike with the intention or disorganizing the business entity or the public service[304].

On this issue, the Beninese regulation on the right to strike, there can be no strike, whether in the private sector or public sector, started without a notice[305], if it wants to be termed as being legal.

By opting for the requirement of the notice, the legislator of Benin reserved to organization of employers and for public authorities the capacity to anticipate the strike so as to prevent the consequences of the strike in case it would become inevitable.

In French law, a distinction is made; if the employees of the public service are subjected to the requirement of the notice[306], those of the private can do without it[307]

This is why it was established that, surprise strike started by cashiers of a hypermarket an hour before the peak time, does not constitute an abuse, despite the damaging consequences of such a movement[308].

On the contrary and in another matter the judge considered « that sudden work stoppage immediately after the settlement of a dispute and the agreement signed for resumption of work betrayed »[309] the will of the striking workers to disorganize the business entity and this can constitute an abuse.

From the analysis of the two situations aforementioned, we can note the wide powers of assessment by the French social judge as pertains to the abuse of the right to strike due to the moment chosen.

Ω – Forms of abuse of the strike

It is clear that the regulation on the exercise of the right of strike of 2001, did not enumerate the forms of prohibited strikes[310]. However, we can turn to the analysis that un-regulated forms of strike are susceptible to abuse.

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304 BATHMANABANE (P), op cit, p.229.

305 The notice is meant to give the administration a time limit, within which it can resort to legal instruments aimed at convincing those who have the intention of going on strike, to denounce such an approach or to temporary requisition of some replacements who can help in ensuring operation of public services under its responsibility.

306 The exercise of the right to strike is governed by the employment code (articles L 2512-1 à L 2512-5 of the employment code) which mainly imposes, different from the private sector, the obligation for a strike notice by trade union organizations.

307 http://www.cgtlaborit.fr/Le-droit-de-greve-des-salaries.

308 http://ul.cgt.montpellier.over-blog.net/article-15596103.html

309 Cons. Prud'hon, Charleville –Mézières 29 nov. 1974, jurisp, soc, U.I.M.M. 1975. p.159.

310 FROSSARD (J), « La grève dans les services publics en droit français », Les Cahiers de droit, vol. 21, n° 3-4, 1980, p. 708.

Under the regulation of the exercise of the right to strike of 1969, the legislator of the time had clearly established that « work *stoppage on a staggered or rotational manner affecting different professional groups or categories of employees in one and the same institution or department or different institutions or departments of the same business entity or organization cannot be allowed to take place* »[311]. In these terms, the legislator was describing « rotating strikes »[312].

In the same dynamics the Constitutional Judge of Benin did not miss to raise the harmful character of this form of strike[313].

Besides, during the last strike movements which shook the education field, public opinion met for the first time a type of strike known as « sit-in »[314]. It pertained to a type of strike which consisted of occupying places of work during working hours, without working. According to a certain doctrine[315], it encompasses, in reality, two distinct situations: strike on the spot[316] and demonstration of the striking workers inside the business entity or public service[317].

The abusive form of sit-in is that which is accompanied by occupation of the places of work for a duration if the occupation of these places is extended beyond the normal working hours and has the effect of preventing non-striking workers from working[318].

From the foregoing it follows that « idle sit-in » observed by the teachers had nothing contrary to good trade union practices in the fight for their well-being.

The situation of abuse in the context of strike movements, does not exclusively lie in the nature of claims or circumstances of the strike, it can arise from violent acts surrounding the strike, in this particular case non-peaceful forms of picket lines.

2- ABUSE OF PICKETING

« *Picketing constitutes one of the forms of pressure normally associated with labour disputes and in particular to strikes. It does not in any way pertain to a new phenomenon* »[319]. Two notions of « picketing » are accepted, one is meliorative and the other one is pejorative. Meliorative or peaceful notion of picketing must adhere to the law[320], while pejorative or non-peaceful notion constitutes an abuse and must be discouraged. Here, we are interested in the non-peaceful form (pejorative notion) of picketing in its demonstrations (a) and protective measures which appropriate to it (b).

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311 Art 5 de l'ordonnance 69-14 PR/MFPRAT portant exercice du droit de grève.

312 Rotating strike is defined as the one which affects in succession several departments in the same administration or business entity; which through coordination of movements in the time lead to total paralysis of the administration or the business entity.

313 Décision DCC 95-026 du 11 Juliet 1995 : «*Considering that rotating strike is by its nature harmful in the extent where it disorganizes to the maximum public service or the business entity ; that general interest was supposed to be also protected the legislator chose to ban this form of strike* ».

314 http://www.lacroixdubenin.com/2012/03/24/la-greve-bras-croises/

315 Yves SAINT-JOURS, « L'occupation des lieux de travail accessoirement à la grève », D. 1974, 28.

316 On the spot strike supposes that the striking workers, after collectively stopping to work, remain in their position as a sign of demonstration. Still the demonstration by the striking workers should be without threats or violence.

317 The striking workers can remain within the business entity without adversely affecting the rights and freedoms of those who are not on strike. In this case the sit-in can only be legal.

318 GAJA, CE Sect. 11 févr. 1966, *Legrand*, Lebon 110.

319 LEBEL (L) VERGE (P), « le piquetage », Les Cahiers de droit, vol. 10, n° 3, 1969, p. 483.

320 According to the freedom of association, strike pickets, if they are organized in accordance with the law, «should not see their action hindered by public authorities». Their ban «*would only be justified if the strike lost its pacific character*». (*Recueil*, paragr. 583 et 584).

a) DEMONSTRATION OF ABUSE OF PICKETING

The non-peaceful notion of picketing apply to « *a watch-out, surveillance and propaganda service, organized by striking workers with a view to spy on the factory under boycott, to get information on what is happening there in, to note the workers who are still working, intercede with them, to convince them to stop working, to make them join the striking union if they are not members, to make them take part in the strike and, as we said to hinder resumption of work for those who are called" strike breakers"* »[321].

This definition proposed by Judge RIVARD seems in our opinion sufficient and informs better on demonstration of the abuse of picket line in view of the fact that Beninese regulation on the right to strike did not bother to seize the phenomenon.

However, some facts constituting abuse of picketing are understood by the Beninese legislator as coercion (see infra).

By observing trade union practices which happen in Benin during strike, it is permissible to note that turning to the non-peaceful form of pickets, is something common. It is not rare to see trade union officials and affiliated members going to places of strike with the aim of dissuading and this, sometimes by force or threats of all forms, workers who chose not to heed to the call for the strike whether unionized or not.

Before such a situation, there is the problem of protection for workers who chose not to heed to the call for strike.

b) PROTECTION AGAINST ABUSE OF PICKETING

Abuse of picketing in its constitutive facts, being a form of violation of the freedom of the other person not only to the freedom in relation to his right not to belong to any trade union organization but also to the freedom related to his right not take part in a strike, we can reasonably understand on the one hand, use of legitimate violence by public authorities against the picketer so as to prevent the abuses and on the other hand, the punishment system put in place so as to punish these same abuses.

Pertaining to preventive actions, they are above all work of the administrative police whose duty should consist of « *ensuring security of people and goods and maintaining law and order* »[322]. Thus, the response by law and order forces on the places of strike as noticed during the teachers strike (January 2012), to be legitimate, should satisfy two conditions mainly the need for coercive response and the adaptation of the coercive response.

On the need for use of force, it must be supported by the existence of risks which are likely to disturb law and order.

It therefore goes without saying that facts constituting arrests and beating striking teachers by law and order forces, for violating the ban on meetings at the places of work, for observing or for having had exchanges with colleagues on the strike[323], are clearly contrary to the

[321] A. RIVARD, « Notes sur certaines manœuvres qui accompagnent les grèves ouvrières », (1937) 16 R. du D., p. 258.
[322] TC 12 déc. 2005, Préfet de la région Champagne-Ardenne, AJDA 2006 p. 60).
[323] Letter from the Secretary General of the International Education Association to the President of the Republic Dr T. Boni Yayi dated 29th March 2012 whose subject was on violation of union rights of teachers in Benin and their unions. Taken

objectives of the administration police.

Concerning offenses of obstruction to the freedom of work[324] which can be occasioned by picket lines, they are punishable by a prison sentence or payment of damages[325].

Indeed, the unlawful nature of picket lines can lead to damages caused to movable and immovable property of the business or the public service or even adversely affecting the freedom of work for other employees by using means such as threats and violence.

When the strike becomes more and more unfathomable for the public authorities or for the employer and that social dialogue or union negotiation has gone to the dogs, to slow down its spread, the employer reacts, attempts to intimidate so as to break the walkout movements. What are therefore the legal measures which the employer can take in these dynamics?

B- INTIMIDATING REACTIONS BY THE EMPLOYER

Before unrelenting trade union force, reactions of the business entity or public authorities are often forceful but they cannot be exercised outside the established legal framework.

Thus the employer, more often than not brandishes the threat card which evolve from a simple salary deduction to outright termination of any contractual relations (1) and to ward off situations of abuse of power, recourses can be envisage by the workers under his sanctions (2).

1- THREAT CARD FOR SANCTION

Faced with endless strike movements, the employer has two drastic measures, the first touches on the remuneration of the striking employee under the form of salary deductions (a) and the second can be the beginning of termination of contractual relations if the legal conditions for its realization are satisfied (b).

a) SALARY DEDUCTIONS

Article 8 of the convention of n°95 of ILO established the principle that salary deductions are only authorized in accordance with the conditions and limits prescribed by the national

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into consideration this excerpt « We have also been informed that teachers were beaten with batons and arrested. This is why on Tuesday the 20th March 2012, Mr. Ganiou YESSOUFOU and his wife, teachers at CEG d'Akpakpa Centre in Cotonou, were arrested for violating the ban on meetings at the place of work. It is due to pressure from teachers that they were released. On 21st March, fourteen (14) teachers of CEG « Entente » in Cotonou were molested and arrested for observing the strike, on order from the director. They were released following pressure from pupils and trade unions. This same day, two union officials, Jules AMOUSSOUGA and Cécile AYADOKOUN, were arrested in Abomey for the reason of having had discussions with their colleagues on the follow up of the strike. It is also pressure from other teachers which led to their being released».

It is important to state here that this movement of strike which paralyzed the sector of nursery, primary and secondary education did keep the promise of flowers in view of the fact that it ended by a compromise. This compromise included return to the negotiation table where the claims would be discussed. If we need to admit that some concessions were made by the government, other questions were postponed indefinitely with the possibility of resurgence of union protests in the education sector.

[324] COEURET (A), FORTIS (E), Manuel de Droit Pénal du travail, Paris, Litec, 4ème ed, 2008,p.321.

[325] This mechanism is going to be integrated in the Criminal Code promulgated in 1810, still an integral part of the punishment system of Benin, in a chapter devoted to crimes and offences against property, with slight amendments relating to sanctions. Article 414 increases the fine for employers between 200 and 3 000 francs and imprisonment of six days to a month; article 415 provides for imprisonment of 1 to 3 months for workers (2 to 5 years for heads or leaders).

legislation or fixed by a collective agreement or by an arbitration decision, and provides that the workers must be duly informed of these conditions and limits.

For the sake of compliance with the abovementioned convention, the Beninese regulation on the right to strike of 2001 provides in Article 24 that « any *strike shall lead to a deduction proportional to the wage or salary and accessories* ». It is in substance, the legal basis of salary deductions which must be proportional to the time corresponding to the duration of the strike.

However, some limits were established so as to protect the employee against abuse of the right to salary deduction. This is why family allowances cannot be subjected to deduction. Moreover, « no *deduction is applied if the work interruption lasted for less than day* »[326].

Moreover, strikes called due to violation of fundamental freedoms and universally recognized trade union rights or non-payment of acquired rights[327] by workers, do not give rise to any salary or wage deduction[328].

In view of the legal provision supervising salary deductions due to strike, it would be important to ask questions on the legality of deductions done during the last strike movement in the education sector in March 2012. .

On this issue, two observations are to be raised: the first would consist of determining the legal nature of claims made by the teachers. Are they claiming for acquired rights or does not pertain to new rights in the perspective of improving working conditions?; the second would consist of verifying if the salary deductions did not go beyond the limit allowed by the regulation.

On the first point, in view of the elements we have, it is clear that the teachers claim pertained to acquired rights.

Indeed, they were claiming for enjoyment of the increment of grading decided through an agreement by parties in August 2011 between the government and national trade unions for the benefit of all the public sector officers and it is because the provisions contained in the said agreement were not applied to teachers in the public sector, they themselves state officers, that they, at the initiative of trade union groups, started the strike from 24th January 2012[329].

Consequently, the strike movement started on the abovementioned date, did not target a claim for a new right but rather recognition of a previously acquired right, a situation which prohibited any salary deduction due to the strike in conformity with the national regulation. On the second point, it is clear that the deductions done on the salaries of the striking teachers appear exaggerated because « *any salary deduction must (…) remain within the limits of transferable and attachable portion. Except for cases of transfers and attachments for payment of food debts which are alimony for divorced women, separated children* »[330]. There is no need of repeating that the "wild salary deductions" effected by the Government on the salaries of

[326] Art. 24 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin

[327] Rights recognized through agreement between workers and the employer are considered as acquired rights and in the absence of this agreement , those declared as such by a court decision putting into force the matter judged.

[328] Art. 25 of the law n°2001-09 on exercise of the right to strike in the Republic of Benin

[329] Letter from the Secretary General of the International education to the President of the Republic Dr T. Boni Yayi dated 29 March 2012 whose subject was on violation of union rights of Beninese teachers and their unions.

[330] MEDE (N), op cit, p. 86.

more than a hundred teachers were done with no regard to the rules enacted in this matter[331] What can we therefore retain from termination of contractual relationship envisaged as a sanction arising from a situation of strike?

b) TERMINATION OF CONTRACTUAL RELATIONSHIP

Here, two options are conceivable, it can either pertain to an employee of the private sector and who under some conditions, can be dismissed, or it pertains to a Permanent state employee whose special status calls for striking off rather than dismissal.

α –Gross misconduct as source of dismissal due to strike

In principle, the exercise of the right to strike, which is a constitutional right, cannot give rise to disciplinary sanctions to the extent where the exercise of this right suspends any contractual relations with the employer.

Thus, no dismissal of the striking employer can occur due to strike under penalty of being declared abusive and consequently lead to payment for the rights of the striking employee who would be a victim such an abuse.

On the other hand, the exercise of the right to strike by « its *collective and conflicting nature sometimes gives rise to serious excesses by some striking workers: threat, violence, illegal confinement etc.* »[332].

To the extent where « these excesses » can be analyzed as actions of special seriousness showing an intention of harm to the employer or to the business entity and cannot be excused by the circumstance[333], the employer who is a victim of such acts, shall still pronounce dismissal of the workers who will have been found guilty of the same, for **gross misconduct**[334].

On the other hand, when the occupation of the premises did not have any symbolic nature, without hindering the freedom of work and that the employees participated in writing and distributing leaflets criticizing their working conditions, these acts cannot constitute gross misconduct and would not valid any form of dismissal.

Ω – Striking off as a sanction for non-compliance with strike-ban measures

If we can question the grounds of threats for striking-off from public service uttered by the Government against teachers during the strike of January 2012, it is not nevertheless to be excluded that we can envisage striking-off of an officer from public service due to strike.

Indeed, the Act n°2011-25 of 1st October 2011 on general rules applicable to Military personnel, public security forces and other related forces in the Republic of Benin provides in Article 9 that military personnel, public security forces and other related forces, « (…) *cannot exercise the right to strike* ».
It pertains here, to a compulsory ban of the right to strike for all members of national

[331] Decree n°55-972 of 16th July 1955 fixes the portions which are transferable and can be seized.
[332] RAY (J-E), op cit, n°999.
[333] In this scope we can include obstacles to freedom of assembly, acts of confinement, violence on property and people.
[334] French court of appeal, order n° 08-40139 of 8th July 2009: exercise of the right to strike can only justify dismissal in case of gross misconduct.

gendarmerie, army, naval and aerial forces, including members of the national police, customs, water, forest and hunting police.

Consequently, any violation of this ban, put any officer or group of officers concerned, in a situation of being « *struck-off from public service* »[335].

Public authorities and private sector employers are clearly inclined towards arbitrariness, what are the remedies at law which the workers have to counter any authoritarian tendency?

2- LIMITS TO AUTHORITARIAN TENDENCY OF THE EMPLOYER

To obstruct authoritative or abusive measures taken by the employer with the aim of illegally restraining the exercise of the right to strike, a jurisdictional control was instituted by the laws of the Republic and the Constitution of 11th December 1990.

This control requires on the one hand, the services of the administrative judge as pertains to the legality of some administrative actions mainly the requisition (a) and the other, the profession of the constitutional judge both as judge of the constitutionality of the laws, human rights and fundamental freedoms (b).

a) GUARD TOWER OF THE ADMINISTRATIVE JUDGE

Essentially called upon to put to an end to abuses which the authorities with requisition power may commit, the judge conducts both control of formal legality and control of material legality.

α - Control of formal legality

Formal legality enforces respect of the forms prescribed by the law for the validity of administrative actions. Requisition of officers being an administrative action, it can be conducted in its formal control by the administrative judge if at all the provisions of Article 19 of the Act n°2001-09 on exercise of the right to strike in the Republic of Benin, are not adhered to in a scrupulous manner.

Consequently, any requisition which deviates from the rules established by the abovementioned provisions, must call for vigilance from the workers requisitioned (whether they are from the public or private sector) who have the obligation of bringing this irregularity to the attention of not their hierarchy but also to their trade union organization. Beyond this, the irregularity must be denounced before a competent administrative judge so the requisition action does not have any effect.

Ω – Control of material legality

The control of material legality of the requisition action can be perceptible through the exercise of an appeal for excess of power. It pertains to a full jurisdiction appeal which puts the administrative judge in control of not only the formal legality of the requisition order but also and especially its material legality or its opportunity.
In this perspective, the judge verifies if « *public authorities are empowered to ban the exercise of*

[335] Art 10 of the law n° 2011-25 of 1st October 2011.

the right to strike for the workers concerned through requisition and this ban would adversely affect law and order and public security »[336].

In this regard, the administrative judge under the former legislation had a discretionary power due to vagueness in the enumeration of the services whose continuity is indispensable to the life of the nation.

From then on, under the new legislation, the administrative judge has mandatory powers in view of the fact that he shall not deviate from the legal enumeration of essential services which are compelled to observation of a minimum service[337].

Outside the administrative judge who is the obvious body for the protection public freedoms, constitutional justice of Benin offers more protection as demonstrated by the vigilance exercised by the constitutional judge against arbitrariness and vague desires to curtail freedoms by public authorities.

A- VIGILANCE BY THE CONSTITUTIONAL JUDGE

The Constitutional court has mainly quadruple capacities, it is the judge for compliance of the laws to the Constitution[338], judge for conflicts between State institutions and public authorities[339], judge for human rights[340], and finally the judge for disputes arising from presidential and legislative elections.

In its role as the guardian of fundamental and public freedoms, two among the powers of the court as aforementioned, needs to be assessed. It pertains to the control of the constitutionality of laws (1) and ascertaining violations of rights and freedoms (2).

α - Treatment of laws curtailing freedoms

Before laws are promulgated, they are subjected to two types of referrals according to their nature. It pertains in this particular case compulsory referrals[341] and optional referrals. In this case our interest will be optional referral.

Indeed, optional referral is the one where the President of the Republic or any member of the National Assembly is free to subject all ordinary laws to constitutionality control[342].

The optional nature of this referral presents the risk, when the control of a government action by parliament is not rigorous, of letting enter into the system, laws which can curtail

[336] BACHABI (M), op cit, p. 57.

[337] Art 14 of the Law n°2001-09 on the exercise of the right to in the Republic of Benin: « *Are considered essential services those relating to health, safety, energy, water, air transport and telecommunications, except for private radio and television.* ».

[338] This prerogative enables it make the Beninese legal sequence coherent and participates in the consolidation of the hierarchy of standards as fundamental date of democratic state governed by the rule of law.

[339] In this capacity the Constitutional court officiates as an arbiter for disputes between the three instituted powers and other branches of the State so as to avoid situations of blockage.

[340] It is the argument for protection of fundamental freedoms which would have justified the choice of the constituent assembly of Benin to make the Constitutional Court a special court ruling on all issues touching on human rights.

[341] The Constitutional court shall compulsorily rule on organic laws before their promulgation (articles 97,117 of the Constitution and 19 of the organic law on the Constitutional Court). Similarly before their implementation, standing orders of the National Assembly, High Authority of Audiovisual and Communication, Social and Economic Council must be submitted to the Constitutional Court for control and their compliance to the Constitution (articles 120 of the Constitution and 21 of the Organic law).

[342] Article 121 de la Constitution and 20 of the Organic law on the Constitutional Court.

freedoms. It is therefore in order to remedy this risk that the constituent instituted ex-post control.

Immediately after entry of the laws in the legal sequencing, the constitutional court of Benin can be referred to by any citizen so as to verify the constitutionality of the same, if he/she feels that the laws enacted are contrary to the Constitution or are curtailing freedoms. Consequently he can move to court through a plea for action through a plea of unconstitutionality[343].

Better still; the constitutional court of Benin distinguishes itself by a revealing particularism of the extent of its powers for protection of fundamental freedoms. Indeed, it can not only « *automatically decide on the constitutionality of laws and any legal regulation which can adversely affect fundamental rights and public freedoms of the human person* »[344], but also self-refer, each time actions constituting violations of fundamental rights come to its knowledge.

Ω – Treatment of actions curtailing freedoms

The capacity of human rights and fundamental freedom, gives the constitutional court of Benin the power to rule and condemn any violation of these rights. Thus, according to the rules enacted by the Rules of procedure and the organic law on the Constitutional Court, any natural or legal person can seize the Constitutional Court to denounce any measures it would deem are curtailing freedoms.

Thus, the Constitutional Court of Benin was able to establish in protection of freedoms among other decisions that « *once an administrative authority…did not give reasons for its decision to ban one of these freedoms, and if it is not demonstrated that the enjoyment of the freedom can adversely affect law and order, then there is a violation of the Constitution* »[345].

Not exclusively confining himself to ascertaining violations of freedoms, the constitutional judge of Benin was audacious enough to grant right to compensation for victims of human rights violations, although no constitutional provision expressly establishes it[346].

CONCLUSION

Industrial action is a very powerful arm, so powerful that it was the origin of changes of Republics which characterized Benin, formerly Dahomey[347]. Besides, it takes the position of barometer par excellence for social unrest and translates according to its degree of development the political maturity of leaders in relation to their capacity to seek for social peace[348].

Indeed, three main perspectives clarify in a better way all strike movements experienced in Benin. They essentially touch on the reasons for the strike, the manner in which the strike is managed and the precariousness of social tranquility which the stakeholders manage to achieve.

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343 Art 122 of the Constitution of 11 December 1990 and 24 of the Organic Law.

344 Art 121 al 2 of the Constitution of 11 December 1990

345 DCC 00-003 of 20th January 2000; Law Reports, 2000, p.19 - DCC 03-134 of 21 August 2003 Law Reports and opinion, 2003, p. 543.

346 Décision DCC 02-052 du 31 mai 2002 Recueil des décisions et avis, 2002, p.217.

347 When we look at the history of the strike in Benin, we realize that it is strike movements which led to various revolutions which rocked the country (voir supra p. 1), cf. TCHIBOZO, op cit, p.3.

348 ODERO (A), GERNIGON (B), GUIDO (H), op cit, p. 33.

First, on the reasons for the strike, especially when the strike is legal, we shall hold that it arises in most cases due to unfulfilled promises by public authorities or by employers. Besides, we can note that trade union representatives in this particular those officiating in the public sector are manipulated by politicians and often demonstrate crave for industrial action at a point where hardly a year passes without a new claim which would end up into a long strike with its perverse effects.

Then, on the manner in which the strike is managed, « *failure of politicians and discontent of social interlocutors speak volume of what the future the fundamental right which is the right to strike is the stake of a balance of power. It has become more of an instrument in social negotiation and less as a means of action and expression of the workers* »[349]. The social tension therefore thrives on both the threats to paralysis of public service or business entity and on threats for dismissal or striking off, "balance of terror" progressively leaving room for some social lull.

Moreover, on the precariousness of social peace, in view of the fact no formal *modus vivendi* was at the basis of social tranquility found after the strike and that threats were still one step ahead on negotiations, strike movements remain suspended until the next season.

Furthermore, the constants alluded to above follow on from one another in the biggest contempt of the legislations with the consequence of declared determination for public authorities to find a good therapy for the « social virus » which is strike. The anti-retrovirals used by the public authorities are of legal origin (bans, requisition) and trade union stakeholders are denouncing the confiscation of the freedoms.

Whatever happens, the rule of law must prevail, the exercise of the right to strike is a public freedom which must tolerate restrictions and all social stakeholders must comply with it. Social order and general interest are requirements which the State must meet, only, the State itself must be subject to the rules it prescribed for itself and to ensure the citizen watch bodies must be permanent.

[349] DEMEZ (G), op cit, p. 49.

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- HOUSSOU (B), *" Le Père de Pierre DANGNIVO envoie une lettre de protestation à Yayi "* in Bulletin Fraternité n° 2940 du 06 Octobre 2011
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WHAT IS THE STATUS OF THE OPPOSITION IN THE REPUBLIC OF BENIN?

by **Pierre E. TOGBE***

INTRODUCTION

« *If you wish to enjoy the advantages provided for in the legal status of opposition politics, have the courage to show yourself clearly as supporters of the opposition, with the understanding that you have to suffer the consequences of being in the opposition ; if you dissociate yourself from the opposition, you will lose some advantages provided for the legal status of opposition politics but you know the best awaits for you on the side of power* »[350].

This is how the laws on the status of opposition politics in Africa in general can be summarized, and in Benin in particular laws which appear more like blackmail than an instrument of promoting multiparty democracy. In fact, as senior citizen Vedel says, « *Democracy is an executive supported on the Nation and controlled by a parliamentary opposition* »[351]. Similarly, Georges Burdeau, in his treatise of political science considers that « *the existence of a free and active opposition is held to the criterion for a real democracy* »[352]. Pascal Jan presents the opposition as « *the criteria for constitutional multiparty regimes…; the pedestal for multiparty democracy …; or the alpha and the omega of a democratic regime* »[353] ; and El Hadj Mbodj affirms that « *the opposition constitutes the guarantee for multipartism* »[354].

Opposition is therefore at the heart of the democratic game and balance of powers[355]. Indeed, the idea of opposition, very strongly linked to that of democracy, increasingly takes into account morals and political practices since the opening of democracy in Sub-Saharan Africa[356], while for long opposition was engulfed, and consequently absent from the political game, mainly under the era of iron fist years (1960-1989). Thus, the regimes of single party politics of those years « *used to reject the opposition, which was presented as n obstacle to economic development…a risk for slow down of social progress… a waste of energy in the construction of national unity* »[357]. Consequence, « ... *opposition supporters who were taken as opponents of the Nation, often only had the choice between suitcase which symbolized exile and*

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350 SOHOUENOU (E.), « Le statut juridique de l'opposition politique dans les nouvelles démocraties africaines », in Revue Béninoise des Sciences Juridiques et Administratives (RBSJA), n° 25/2011, p. 256.

351 VEDEL (G.), Entretien au journal le Monde, 1958.

352 BURDEAU (G.), *Traité de Sciences Politiques*, Tome 6, LGDJ, 1987, p. 612

353 JAN (P.), « Les oppositions », *Pouvoirs*, n° 106 : L'opposition, Janvier 2004, p. 23.

354 MBODJ (E. H.), « Les garanties et éventuels statuts de l'opposition en Afrique », in Proceedings of the fourth preparatory meeting in Bamako symposium on politics accessible on the address http://www.elhadjmbodj.com/index.php?2005/11/24/20-les -garanties-et-eventuels-statuts-de-l-opposition-en-afrique, p. 4 a printed copy from the site.

355 NABLI (B.), « L'opposition parlementaire : un contre-pouvoir politique saisi par le droit », *Pouvoirs*, n° 133, 2010, p. 136.

356 TEDGA (P.), *Ouverture démocratique en Afrique noire ?*, Paris, L'Harmattan, 1991, 251 p.

357 HOLO (Th.), The status of the opposition », in *Démocratie et élections dans l'espace francophone,* Bruylant, 2010, pp. 351-366. Voir aussi HOLO (Th.), « Démocratie revitalisée ou démocratie émasculée ? Les constitutions du Renouveau démocratique dans l'espace francophone africain : régimes juridiques et systèmes politiques » in Revue Béninoise des Sciences Juridiques et Administratives (RBSJA), n° 16/2006, pp. 16-41.

coffin which symbolized their physical elimination[358]*. The idea of opposition was unacceptable for supporters of single party rule who did not accept any possibility of criticizing those in power* »[359]. Benin did not escape this sad reality, making the opposition the evil to combat and to be hanged by the so called declared patriots.

But, the holding of National Conference[360] for Political Forces of the Nation in 1990, marked the opening of Benin to democracy. The people of Benin, who had for long been deprived of democratic discussions and freedom, therefore rediscovered the path towards political pluralism[361], liberalism and organization of open and competitive elections[362]. This adherence to political pluralism was materialized by the adoption of a constitution which recognizes in an explicit manner parties and their role in the consolidation of democracy in Benin[363]. The option of full multiparty democracy- and consequently recognition of the opposition- was thus done. This will was extended to the legislative level by the Act n° 90-023 of 13th August 1990 on Political Parties Charter and that of n° 2001-36 of 14th October 2002 on the status of the opposition. But is this the reason why the opposition became a physiological and natural element of the constitutional order in Benin[364] ? To answer this question, it is appropriate to conduct some terminological clarification.

The notion of opposition is first characterized by its multi-purpose nature. It can be of social nature, through trade unions for example, or even institutional, as an organ of the State[365]. It can also be an opposition to the government or an opposition to the entire regime[366]. But here, we are going to concentrate on political opposition, since, the discussion on the status is principally interested in political opposition, not necessarily all forms of oppositions[367].

A quite basic definition but worthwhile is proposed to us by the Glossary for legal terms. According to the authors of this *Glossary*, opposition means « *political party or parties opposed to the team in power by exercising a duty of supervision and criticism, by giving a different, or define an alternative leadership program* »[368]. This definition is interesting in this direction in that it describes the role and importance of the opposition in democracy, errs by the fact that it tends to present the opposition as just a function.

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[358] The President of Zambia at the time, Kenneth Kaunda, said that the opposition is alien to African tradition, while the Marechal Mobutu Sese Seko claimed that historically there was no Zairian village with two heads, one of which would be in the opposition. As for President Sekou Toure of Guinea, he said that there was no room for an opposition whose tactics serve only to distract popular energies from the tasks to be performed. See HOLO (Th.), Le statut de l'opposition », in *Démocratie et élections dans l'espace francophone,* Bruylant, 2010, pp. 351-366.

[359] HOLO (Th.), « Les défis de l'alternance démocratique en Afrique », Communication présentée à la Conférence internationale Les défis de l'alternance démocratique, Cotonou, 23-25 février 2009, p. 7.

[360] Voir HOUNTONDJI (P.), in La Nation, n°756, juin 1993, p.4. ; KAMTO (M.), « Les conférences nationales ou la création révolutionnaire des constitutions », in DARBON (D.), DUBOIS DE GAUDUSSON (J.)(dir.), *La création du droit en Afrique*, Paris, Karthala, 1997, p.177.

[361] ROUSSEAU, *Droit du contentieux constitutionnel*, Paris, Montchrestien, 7e éd., 2006, 536p. Pour l'auteur, le pluralisme politique est la base et la garantie de tous les droits et libertés. Selon Pierre PACTET, la démocratie « implique à la fois le pluralisme des formations politiques et la liberté des citoyens et des groupes. Voir PACTET (P.), *Institutions Politiques Droit Constitutionnel*, Paris, Armand Colin 20e éd. août 2001 p. 85.

[362] Voir TEDGA (P.-J.), *Ouverture démocratique en Afrique noire ?*, Paris, L'Harmattan, 1991 ; EBOUSSI BOULAGA (F.), *Les conférences nationales en Afrique noire,* Paris, Karthala, 1993.

[363] Thus Article 5 of this constitution provide: « Political parties contribute to the exercise of suffrage. They are formed and operate freely under the conditions determined by the Charter of Political Parties… »

[364] PONTHOREAU (M. C.), « L'opposition comme garantie constitutionnelle », RDP, n° 4-2004, pp. 1127-1160.

[365] VIVES (V.), Jean-Pierre Camby (dir.), Le statut de l'opposition à l'Assemblée nationale, Mémoire de Master 2 Droit Public interne, Paris I, 2004-2005.

[366] SADOUN (M.), « Opposition et démocratie », Pouvoirs, n° 108, 2004, p. 10.

[367] JAN (P.), « Les oppositions », Op. cit, p. 39.

[368] GUINCHARD (S.) et MONTAGNIER (G.), (dir), *Lexique des termes juridiques*, Paris, Dalloz, 17e éd., 2009, p. 246.

The status of the opposition as enshrined in Benin by the Act n°2001-36 of 14th October 2002 provides that « *all parties, coalition of parties or groups of political parties which in the existing legal framework, decides to essentially profess different opinions from those of the government in power and to give a concrete expression to their ideas within the perspective of a democratic change-over of political power* »[369]. This fairly detailed definition deserves to be retained for at least three reasons. First, it pertains to the definition retained by the positive law of Benin, Legal, the qualification established by the legislator which automatically all should follow as long as the law will not have been amended or removed from the legal order by its eventual repeal. Then, this definition serves to highlight the importance of the opposition in the perspective of a democratic change of government, defined by Senior citizen Ibrahima Fall as being « *legally organized option for political parties having different social projects to succeed one another in power through a set of democratic rules of devolution and exercise of power founded on the sovereignty of the people* »[370]. Finally, this definition is not contented with describing the opposition as being the party or parties which are against the party or parties in power as Olivier Duhamel and Yves Mény think in their *Constitutional dictionary*[371]. But it implies the role of the opposition, mainly the exercise of function of criticism and especially the preparation of an alternate government team.

Thus defined, the opposition an essential composition of a democratic regime, must be distinguished from parliamentary minority as highlighted by Professor Adama Kpodar, « *the opposition carries a political program meant to influence parliamentary deliberations* »[372] and it is characterized by « *its criticism of the majority and distinguishes itself by the consistency of its votes and its hostile behaviors* »[373]. Therefore following the definition retained by the legislator of Benin, it pertains to nothing more or less than a categorization ''*presidential camp/opposition to the executive*'', which should not be confused with ''*majority/minority*[374]''. As Professor Kpodar explains, « *parliamentary majority can be a majority in parliament, but be the opposition as compared to the presidential camp; similarly parliamentary minority can be in the presidential camp…* »[375].

Upholding stabilizing and non subversive values, the opposition must have a status placing it in a « *standardized* », « *immortalized* » framework which guarantees efficiency and enjoyment of rights and determine its obligations, because, in democracy, a status cannot be developed without obligations[376]. In reality, status is an amphibological notion. It can be understood in two ways: narrow and wide. In the wide meaning, status encompasses all rules of regulation of a body or of a given institution. These rules are of diverse character. They can be written or unwritten. In a narrow perspective, status alludes to a body of written rules determining all attributes, prerogatives and obligations of a determined subject of the law. In this framework, instituting « *a status of the opposition » therefore amounts to putting down in writing in a document, rights and subjections, means and responsibilities supposed to enable the opposition to carry out its function of alerting, criticizing and being an alternative to the majority which is exercising State power* ».
If the wide meaning is attractive due to the diversity of questions it raises, the methodological

[369] Article 2 de la loi 2001-36 du 14 octobre 2002.
[370] FALL (I.), *Sous-développement et démocratie multi partisane. L'expérience Sénégalaise*, N.E.A, Dakar, Abidjan 1977 p..71.
[371] DUHAMEL (O.), MENY (Y.) ; *Dictionnaire constitutionnel*, Paris, PUF, 1992, p. 677. Voir également JAN (P.), « Les oppositions », Op. cit, p. 28.
[372] KPODAR (A.), « Décision de la Cour constitutionnelle du Bénin DCC 09-002 du 8 janvier 2009 : une bonne année à la démocratie pluraliste », consulté sur http://www.la-constitution-enafrique.org/ le 24 décembre 2012
[373] Ibid
[374] AKEREKORO (H.), Opposition et démocratie au Bénin et au Togo, Thèse de doctorat en Droit Public, Chaire Unesco des droits de la Personne et de la Démocratie, Université d'Abomey-Calavi, 2010
[375] Ibid
[376] MBODJ (E. H.), « Les garanties et éventuels statuts de l'opposition en Afrique », Op. cit.

realism inherent to any research enterprise calls for classifying, privileging and finally choosing simply some aspects of this complex totality for their treatment in depth[377]. This why we will be contented with using the concept of status within the framework of this thinking rather than in its restrictive meaning. Besides, it is this narrow conception which is retained by the Act on status of the opposition in Benin, which is itself defined as being « *all legal rules enabling parties or coalition of parties or groups of political parties of the opposition to have an area of freedom which is necessary for them to participate fully and without hindrance to national political life*. »[378]. But the legal status of the opposition is not totally exhausted in the Act n°2001-36. It includes both the provisions of this Act and those contained in its implementation decree.

With the observation of the political life in Benin we can say that the role of the opposition in the consolidation of democratic skills remain theoretical since the recognition and especially the acceptance of this opposition by the majority in power are far from being really realized[379]. Indeed, political power as well as all these satellite parties continues to admit with difficulty to be submitted to the criticism of an opposition whose stake would be to reverse them. Consequently, a research dedicated to the status of the opposition seems to be worthwhile, since the recognition of the opposition « *is to be tied up to the human rights and fundamental freedoms movement: freedom of opinion, freedom of expression, free participation in the management of public affairs* »[380]. Besides, a study on the status of the opposition within the framework of modern democracy enables renewal of the theory of separation of powers. Indeed, in a presidential regime (like that of Benin) dominated by majority rule[381], the fusion of the couple executive/legislative presents a challenge to the theory of separation powers, as highlighted by Louis Favoreu[382].

Thus, the opposition must be recognized and granted a real status[383]. Consequently the analysis of this status enables us to ask ourselves on fundamental question: the capacity of the Act on the status of the opposition as well as the application done from these provisions can they allow a credible change-over of political power? It pertains in fact to seeing to what extent the legislation as it is today, creates the necessary conditions for a quality opposition in Benin, i.e. for an opposition capable of playing its roles which are made for it. This assessment shall be done in regards to some factors which, in our opinion, are important for the determination of the quality of a real status of the opposition.

Consequently, it should be noted that in spite of a strong innovative legislation with a foolproof ingenuity, the status of the opposition in Benin generates more problems than satisfactory solutions to the need of democratization of the country. The will to anchor the opposition in its rightful place in a multiparty democracy did not remove the pitfalls filling the efficiency of an opposition status which thus seems to fall under the writing done by

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377 BERGEL, (J.-L.), « Esquisse d'une approche méthodologique de la recherche juridique » in Revue Recherche Juridique, Droit prospectif, PUAM, 1996, p. 1076.

378 Loi n° 2001-36 du 14 octobre 2002 portant statut l'opposition au Bénin, in Journal Officiel de République du Bénin (JORB), n° 6 du 15 mars 2004, Articles 3, p. 178.

379 SOHOUENOU (E.), « Le statut juridique de l'opposition politique dans les nouvelles démocraties africaines », Op. cit, p. 224.

380 DIOP (O.), *Partis politiques et processus de transition démocratique en Afrique noire : recherches sur les enjeux juridiques et sociologiques du multipartisme dans quelques pays de l'espace francophone*, Paris, Publibook, 2006, p. 284.

381 Sur le sujet, voir MELEDJE DJEDJRO (F.), « Principe majoritaire et démocratie en Afrique », RID, n° 39, 2008, pp. 9-45

382 Cité par AVRIL (P.), « La majorité parlementaire », Pouvoirs, n° 68, 1994, p. 45 et s.

383 VIDAL-NAQUET (A.), « L'institutionnalisation de l'opposition. Quel statut pour quelle opposition ?, RFDC, n° 77, pp. 153-173.

Sisyphe[384]. What transpired from the analysis of the Act on the status of the opposition in Benin can be formulated as follows: to a real effort of establishing a full status (I) for the opposition, a different tune which almost regrettable, that of institutionalization of a completely different status (II).

I- A full status

The adoption by the Constituent Assembly of Benin of the democratic transition from the presidential regime involves the emergence of the opposition. In other words, the political regime claiming to be democratic, involves a power of competition and contest. It is therefore normal that public authorities define a framework enabling the opposition to exercise its activities without any obstacles so as to participate freely in the political game. By analyzing the provisions of the Act on status of the opposition in the Republic of Benin, we realize the enormous efforts of the legislator of Benin in promoting the opposition. This desire of the legislator was accompanied by the audacity of the government by putting in place an implementation decree. With this decree we can be in a position to say that, at least at the regulatory level, the status of the opposition is a reality in Benin (A) despite the political recognition (B) which follows it.

A- Definite normative completeness

The idea of a status of the opposition came up because the general rules appeared unsuitable to ensure satisfactory protection of the opposition. The status is therefore, theoretically envisaged as a specific legislation which « *necessarily involves an affirmative action* »[385] regarding the principle of equality. But on observation, it appears that the status of the opposition in Benin does not totally resolve the problem. From significant recognized rights (1) emerge restrictive required obligations (2).

1- Significant recognized rights

It is not enough to enshrine the recognition of the opposition in the constitution and laws; there is still need to give it the means to implement its objectives which are part of a duty of general interest. The role of the opposition, as stated by the status in Benin, being to « *(1) criticize government program, decisions and actions; (2) develop its own programs; (3) propose alternative solutions to the nation; and (4) work for change-over of political power through legal ways* »[386], the means of action of the opposition must be analyzed in terms of the prerogatives allocated to it.

Just like the right to life for a human being, the first right of the opposition is the right to existence[387] which enables the opposition party to be formed freely, to participate in political activities, in competition for political conquest and exercise of political power… etc. If opposition political parties enjoy all the fundamental freedoms enshrined in the constitution[388] and guaranteed by the constitutional court[389], some of the prerogatives granted to the opposition by the Act on the status of the opposition deserve a special attention.

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[384] MBODJ (E. H.), « Regard rétrospectif sur le statut de l'opposition dans les Etats africains d'expression francophone », in *Démocratie et élections dans l'espace francophone,* Bruylant, 2010, p. 336.

[385] AVRIL (P.), « L'improbable statut de l'opposition », in les Petites affiches, 12 juillet 2006, n° 138, p. 7.

[386] Article 4 du statut de l'opposition en République du Bénin

[387] PONTHOREAU (M.-C.), « Les droits de l'opposition en France. Penser une opposition présidentielle », pouvoirs, n° 108, 2004, pp. 101-114.

[388] Article 5 de la loi n° 2001-36 du 14 octobre 2002

[389] Article 114 de la constitution béninoise du 11 décembre 1990

Firstly, it pertains to the right to security and to non-discrimination of opposition parties. Indeed it is clear that the opposition assumes a public service duty, to the extent that it is accepted that a true democracy cannot be developed without the existence of an opposition[390]. Opposition supporters who had for long been proscribed from public life, regarded as enemies of the Nation[391], constrained to do their activities in a clandestine manner[392], must be granted protection to enable them carry out their activities. Besides, the legislation of Benin guarantees its security and prohibits any discrimination against supporters or sympathizers of opposition parties. In this regard, it is clearly provided that « *The State is required to take special measures to ensure the security of the national officials of parties, coalition of parties or groups of parties of the opposition in agreement with the latter. They must in the accomplishment of political duties, be protected from any measure which could adversely affect their integrity and their personal security* »[393]. Besides « *…any obstacle or any attempt to obstruct the exercise of the rights and political activities of opposition parties by an administrative official, by an individual or group of persons is prohibited and punishable by one (1) to two (2) years imprisonment and a fine of five hundred thousand (500.000) to five million (5.000.000) CFA Francs or one of these two sentences* [394]». Similarly « *any act of discrimination or exclusion against a citizen in his cultural, social, economic, professional and administrative activities due to his affiliation to the opposition, constitute an offence punishable by a prison sentence of one (1) month to two (2) months and a fine of five hundred thousand (500.000) to five million (5.000.000) CFA Francs or one of these two sentences* ».

This right to security and to non-discrimination supposes that opposition political parties can freely carry out their activities, campaign in any part of the national territory, if need be with the protection of the State. This provision is all the more important in view of the fact reflexes of the single party era still exist among some leaders or their supporters who have the tendency of locking out areas they consider as their strongholds which opposition parties cannot access[395].

The second vital prerogative for the existence of opposition political parties is funding of their political activities. Thus, the status of the opposition provides that « *Opposition political parties shall get assistance from the State for funding political parties in conformity with the Parties' Charter* »[396]. It therefore appears that this funding, necessarily function of the electoral weight and representation of opposition political parties[397] must enable them accomplish the duties assigned to political parties. Essentially, these duties consist, on the one hand to, mobilizing voters and supervising elected leaders; enlighten public opinion on the other hand.

The implementation of these prerogatives supposes free and equitable access for opposition political parties to State media which should no longer be considered as exclusive property of the party in power. This is why the Act on status of the opposition provides that: « *in conformity with Article 142 paragraph 2 of the Constitution, opposition political parties shall receive equitable access to official means of information and communication. They shall enjoy all public freedoms guaranteed by the Constitution* »[398].

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390 KELSEN (H.), La démocratie, sa nature, sa valeur, Dalloz, 2e éd., 2004, p. 63.

391 POKAM (H.), « L'opposition dans le jeu politique en Afrique depuis 1990 », Juridis Périodique, n°41, janvier-février-mars 2000, p. 53.

392 HOLO (Th.), Le statut de l'opposition », in *Démocratie et élections dans l'espace francophone,* p. 351.

393 Article 11 de la loi n° 2001-36 du 14 octobre 2002

394 Article 11 de la loi n° 2001-36 du 14 octobre 2002

395 For proof, in Benin, a minister of the Republic made a public declaration in his stronghold, that no opposition party should come do electoral campaigns

396 Article 13 de la loi n° 2001-36 du 14 octobre 2002

397 HOLO (Th.), « Le statut de l'opposition », Op. cit, p. 361.

398 Article 8 de la loi n° 2001-36 du 14 octobre 2002

But the law on the status of the opposition does not only grant rights. It also provides for obligations, which incidentally, appear to us as fairly restrictive.

2- Restrictive required obligations

In democracy, the opposition is by nature republican in that it performs its activities within the framework of the constitution, respects the laws of the republic and acknowledges power is acquired by the ballot not by the barrel of the gun, and less in the streets. In other words, to get power the opposition must prefer the ballot paper to Kalashnikov[399]. This requirement enshrined in the Constitution of Benin which provides that *People shall exercise their sovereignty through their elected representatives and by referendum*[400] is reinforced by regional conventions[401]. In the most radical manner, Germany even theorized the principle immediately after the Second World War[402]. According to the German Fundamental Law[403], « the parties which, according to their objectives or according to the behavior of their supporters, tend to adversely affect liberal and democratic constitutional order or overturn it or endanger the existence of the Federal Republic of Germany are unconstitutional. »[404]. This means that, providing obligations with regard to the opposition is not necessarily a proof of curtailing the rights of the opposition. But the nature of the requirements can appear as a measure aimed at making their realization difficulty.

Thus, Article 6 of the Beninese law, the cornerstone for measuring the standards of the opposition, determines strict conditions of eligibility to the status of opposition party by giving four conditions, which are cumulative, namely:

- *Be a political party, a coalition of parties or groups of political parties properly registered ;*
- *Make an official and public declaration of affiliation to the opposition and make it registered in the ministry in charge of the interior ;*
- *Develop essentially positions and opinions different from those of the government ;*
- *Not to accept a political position at whatever level of the executive power.*

If it is clear that the declaration of affiliation to the opposition is widely divided[405], then the intervention of the Ministry in charge of the interior in the procedure appears exaggerated. When we remember the misery and the inconveniences which the ministries in charge of the interior subjected to clandestine opposition parties in Benin and this in the recent past[406], we are allowed to have serious worries. Furthermore many countries are deviating from this option[407] by authorizing filing of the affiliation declaration either in the office of the

399 HOLO (Th.), Le statut de l'opposition », Op. cit, p. 364

400 Article 4 de la constitution béninoise du 11 décembre 1990

401 The Constitutive Act establishing the African Union condemns and rejects unconstitutional changes of power, that is to say, acquiring power by force or violation of rules consensual rules regulating electoral competition. From this requirement flows the obligation to participate in electoral competition, to work towards reaching a consensus to make elections honest, sincere and credible organization.

402 SADOUN (M.), « Opposition et démocratie », Pouvoirs, n° 108, 2004, p. 10.

403 Voir l'article 21 de la Loi fondamentale allemande

404 Voir BUIS (C.-L.), *L'Extrême Droite en Allemagne, figure de l'ennemi intérieur ? L'interdiction du NPD et la question du pluralisme dans un cadre démocratique*, mémoire de DEA, Institut d'études politiques de Paris, 2001

405 The proof is that many other countries have established a law on the status of the opposition after the Benin Law of 14 October 2002, seems to have been the inspiration. We can cite other cases in the Democratic Republic of Congo (Article 3 of Law No. 07/008 of 4 December 2007), Burkina Faso (through the law of 4 May 2009 amending the provisions of Law No. 007-2000/AN of 25 April 2000 on the status of the political opposition).

406 It concerns the Revolution period

407 In the DRC, for example, Article 3 above submits: "Political parties and political groupings in deliberative assemblies to an obligation to declare belonging to the majority or the opposition politics." Here, the Congolese legislator authorizes the filing of the statement to the Office of the National Assembly. The Ministry of Interior is completely excluded from the procedure.

National Assembly[408], or at the head office of the opposition.

Another difficulty is the requirement for the opposition party not to accept a political position at whatever level of the executive power. The relevance of this provision appears debatable. This provision contains inaccuracies in relation to some equivocal notions. What do we mean by political position at whatever level? What is a political position whose occupation would be incompatible with the status of the opposition supporter?

By excluding opposition supporters from occupying political positions, the legislator is adversely affecting the principle of equality and prohibition of discriminations[409], as well as to the equal right of the citizens to participate in the management of the affairs of the State and society. Worse still, through such a provision, we risk not only to dissuade senior administration officers from supporting opposition parties, but also encourage politicization of senior administration management, enhance putting in place a partisan administration ; among many evils denounced by several structures. These evils would partly be responsible for impunity, but especially for inefficiency of public service. If the presence of an opposition political party in a government is less justified, outside a crisis situation, the exclusion of opposition supporters in other political offices of the state is however much less. What will happen if for example an opposition supporter, due to his personal qualifications, is entrusted with special duties by the President without however this committing his party?[410]. There is therefore no incompatibility whatsoever between occupying management positions in government and the status of opposition supporter. Consequently, this provision appears like blackmail towards supporters of the opposition.

The effectiveness of the rights regarding the opposition cannot be a reality without enabling the opposition to exist on the political scene, the right place to deploy its activities. To this requirement, Act 2001-36 tries to give an answer not without some cold intolerance.

B- Involved political recognition

« *Although necessary, universal suffrage, collegial structure, limitation of terms and control of constitutionality of laws is not enough to sustainably pin the democratic movement. This is first characterized as an opposition movement to a power deemed intolerable and exercised by an individual or a group* »[411]. To enable the opposition to be able to drive structure and participate in driving the political life, it is important to assure it some political recognition. This is what tries, the best it can, to make the status by instituting a leader of the opposition (1) and by granting him material and financial benefits (2).

1- Fanciful institutionalization of an opposition leader

Association of the opposition for functioning of the affairs of the State not being able to performed in disorderliness or in environment of scattered opposition political parties, the

[408] In the DRC, for example, Article 3 above submits: "Political parties and political groupings in deliberative assemblies to an obligation to declare belonging to the majority or the opposition politics." Here, the Congolese legislator authorizes the filing of the statement to the Office of the National Assembly. The Ministry of Interior is completely excluded from the procedure.

[409] Article 26 of the Constitution of Benin of 11 December 1990.

[410] Dominique Strauss Khan was commissioned by President Sarkozy to reflect on the role of France in the world. The same is true of Jack Lang. Moreover the former became the Director of the International Monetary Fund with the support of President Sarkozy.

[411] CHEREUL (P.-Y.), *Construire la démocratie. Le contrat démocratique, des citoyens actifs*, Lyon, Chronique Sociale, 1993, p. 27.

existence of a leader[412] which is in line with the perspective of representation appears like a requirement of modern contemporary democracies. In these governments which hope to get opinion, the leader of the opposition is often clearly identified in this case because he represents the alternative or according to the words of Professor Mbodj the « *spare part* »[413] to leader of the governing majority.

It is therefore with the aim of avoiding heightening the sources of division in the political class prejudicial to the expected change that the legislator of Benin of 2002 by adopting the law on the status of the opposition, opted for a wider solution and provided for appointment of the opposition leader. In this regard, « *any leader of an opposition political party whose number of members of parliament in the National Assembly constitute in an independent manner a parliamentary group, is considered as one of the leaders of the opposition. Any leader of a group of opposition parties constituted into a parliamentary group in the National Assembly is also considered as leader of the opposition. And finally, any leader of a party, coalition of parties of group opposition political parties whether represented or not in the National Assembly but having garnered from the last legislative elections 10% of the votes cast is considered as one of the leaders of the opposition. The opposition leaders shall choose one among them to their spokes person* »[414].

But this mode of appointment of opposition leaders is not without consequences. The institution of a « leader of the opposition » has tendency of dividing the opposition instead of uniting it. Generally, this exercise cannot be easy because this depends on the extent and the depth of the differences from the point of principles between opposition parties, but also and especially in regards to the nature of the regime. As Yves Surel states very judiciously, « *it is natural to suppose that the form of political regime can constitute the first determining variable in the definition of the leader of the opposition* »[415]. Indeed, the leadership of the opposition, understood as the « *capacity of a representative to manage in a dynamic manner power relationships within a group* »[416] is strongly conditioned by the nature of the regime. It generally finds its perfect ground in parliamentary regimes. In Benin the plurality and multiplicity of parties in general and those of the opposition in particular, just as the presidential nature of the regime can make the method proposed by the Beninese legislator difficult.

But, when we know how the appointment of the officials, leaders is subject to all sorts of negotiations, intrigues and bargaining in Benin, we can get worried in advance for the conditions in which the spokesperson will be chosen and accomplish his duty. To resolve this problem in several democracies, turn to criteria for choosing one of the opposition leaders as leader of the opposition or official opposition. For example in Burkina Faso, it is provided in their status of the opposition, the position of the « leader of the opposition » which is reserved for the first official of the opposition party having the highest number of elected members in the National Assembly[417].

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[412] To raise mortgages draping the institutionalization of the opposition, some laws watered down the naming through more unifying titles. Thus, the opposition leader is the" head of the opposition" in Burkina Faso, while in the Democratic Republic of Congo he is only "spokesman" of the opposition. In Benin it is the name of Leader of the Opposition is chosen, even if in reality it is to atomize the leadership of the opposition so broken out between different leaders determined by the legislature. Voir MBODJ (E. H.), « Regard rétrospectif sur le statut de l'opposition dans les Etats africains d'expression francophone », Op. cit, p. 342.

[413] MBODJ (E. H.), « Regard rétrospectif sur le statut de l'opposition dans les Etats africains d'expression francophone », Op. cit, p. 342.

[414] Article 7 de la loi n°2001-36 du 14 octobre 2002 portant statut de l'opposition.

[415] SUREL (Y.), « Le chef de l'opposition », Pouvoirs, n° 108, p. 66.

[416] BRAUD (Ph.), *Sociologie politique*, Paris, LGDJ, 2002, 6e éd., p. 650

[417] Article 12 de la loi burkinabè portant statut de l'opposition

By choosing a diffuse method, the choice of the legislator of Benin therefore appears an illusion and hard to implement. As proof, under the second and the third parliaments (1995-2003), it is Rosine Vieira Soglo, chairperson of *Renaissance du Bénin*, the main opposition party to the government in the National Assembly declared herself the leader of the opposition without consulting with other political forces of the parliamentary majority which led to contestations from other formations claiming to be the opposition[418]. This is why we fully subscribe to the idea of Professor Holo who suggested that in a presidential regime like the one in Benin, the leader of the opposition be the candidate who finished second in the presidential elections[419]. Since in this type of regime, the President of the Republic is both the head of State[420] and head of government[421], and in this regard it is him who determines and drives the policy of the Nation.

2- Granting material and financial benefits

According to the law on the status of the opposition in the Republic of Benin, « *Opposition leaders as provided by Article 7 above, shall receive protocol benefits and* other benefits which are defined by a decree adopted by the council of ministers. These benefits shall not be lower than those granted to members of the government »[422].

In conformity with the provisions of the law, the head of State adopted the implementation decree of the status of the opposition. Thus, as it is currently, big material benefits were granted to heads of political formations meeting the criteria of affiliation to the opposition as defined by Article 6 and 7 of the Act N° 2001-36 of 14th October 2002 on the status of the opposition. Article 3 of the legislation provides for the leaders of opposition parties to be granted protocol benefits like invitations to some negotiations and agreements involving the Republic of Benin both internally and externally as an observer, invitation to official events and receptions with the rank immediately after chairpersons of the institutions of the Republic, reception and assistance by diplomatic representations upon arrival and departure in the countries of their jurisdiction as much as it is possible, mission expenses for their official outings both outside and inside the country, VIP lounge, official travels in conditions at least equivalent to those granted to members of the government and diplomatic passport. The leader of the opposition can, at his own initiative, request to be received by the President of the Republic on issues of national interest.

The leader or leaders of the opposition shall in addition be entitled to an office to serve as the national headquarter, a vehicle, a driver, a security officer (body guard), domestic staff (watch man, cook), public relations expenses (for cases where the party has representations in other countries), secret funds, housing with amenities like water, telephone, electricity etc.), an office with advisors, official representatives, personal and administrative secretaries, office director and his deputy and a press attaché. The benefit related with the possession of an office with all its divisions is acquired as a matter of right. However, it shall be assessed in cash and deposited in a sovereignty fund. The allocation of an office vehicle is done under the same conditions as members of the government. Mission expenses for official outings abroad and within the country shall be fixed under the same conditions as those granted to members of the government.

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418 SOMALI (K.), Le parlement dans le nouveau constitutionnalisme africain, Op. cit, p. 74.
419 HOLO (Th.), Le statut de l'opposition », Op. cit, p. 354.
420 Article 41 de la constitution béninoise du 11 décembre 1990
421 Article 54 de la constitution béninoise du 11 décembre 1990
422 Article 15 de la loi portant statut de l'opposition au Bénin

Thus the legislator of Benin and the government are expected to avail to the opposition the means to truly perform the role expected of it in a democratic system. However, these enormous efforts should not lead to loss of sight the real limits of institutionalization of a true status of opposition politics which remains a completely separate status.

II- A completely separate status

By adopting a law on the status of the opposition expected to confer to the latter « *a rigorous protection which makes it an important component of democracy* »[423]. It not only pertains to recognizing the prerogatives of the opposition as well as its obligations but also grants it permanent protection[424], guarantee for it an area of freedom, security as well as respect and consideration indispensable for its full participation in national politics. But, this same law, in view of some of its provisions, proves to be intrinsically unsuitable to guarantee full operation of the opposition. In this regard, the undertaking appears as a rather incomplete series[425](A). Worse still, enormous and restrictive obligations of the status which weigh on the opposition would lead to compromising the opposition with the power in place (B).

A- A rather incomplete series

When Professor Pierre Avril considered that the institution of a status of the opposition, in favor of the constitutional reform of 2008 which occurred in France, appears as an incomplete series, would not have put it so well. Thorough analysis of the status of the opposition in Benin points out this status boils down to a powder poured on the eyes of the opposition, thus a ''window dressing status'' (1). Consequently, it is important, in view of making this status more efficient to necessarily examine its constitutionalization (2).

1- « A window dressing » status

The undertaking of the legislator of Benin in the promotion of the opposition appears incomplete at essentially two levels: on the one hand at the level of legislative function, and on the field of control of government action on the other hand.

Indeed, the role played by the opposition in the legislative function has not been upgraded. The opposition should be granted a place, even if minimum, in the determination of the agenda for the sessions of the National Assembly. Thus legislative procedure could be reviewed in a manner favorable to the opposition. The opposition has no role in setting the agenda which is the prerogative of the executive and its parliamentary majority which can overload it in a manner to prevent proposals of the opposition being discussed in plenary. The agenda of each parliamentary session must be planned in a way to enable periodic registration and examination in plenary of proposals filed by the opposition. In France for example, this right was granted to the opposition so as to fight against monopolization of the agenda by the Government and its majority. Thus, Article 48 of the constitution is amended to henceforth provide that « one day of session per month is reserved for an agenda set by the assembly at the initiative of opposition groups of the assembly concerned as well as that of minority groups». This window granted to the opposition supposes an agreement between opposition groups and minority groups whose respective roles will have to be stated.

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[423] C'est ce qui transparaît à la lecture de la loi congolaise n° 07/008 du 4 décembre 2007

[424] CABRILLAC (R.) (Sous la dir de.), *Dictionnaire du vocabulaire juridique,* Paris, Edition du Juris-classeur, 2002, p. 283.

[425] This expression was given by Professeur Pierre Avril. See, AVRIL (P.), « Le statut de l'opposition : un feuilleton inachevé », in Petites affiches, n° 254 of 19 December 2008, pp. 9 et suivants.

The opposition should also be granted a new role within the framework of its duty of control. But, on this point, the achievements of the Act 2001-36 of 14th October 2002 are non-existent. We should have allocated equal contribution time to the majority and the opposition in sessions for questions of the day, a mechanism which is instituted by the constitution[426]. This institutionalization of equality between the majority and the opposition in question to the Government would have enabled the debates to be more well-grounded.

Participating in counterbalance organs contributes to the enhancement of legitimacy of opposition parties and to prepare them to carry out their future political responsibilities. If it is normal that the government be composed of the majority party except in cyclical hypothesis of a cyclical government of national union, it goes without saying that collective organs like the National Assembly must ensure representation of political forces[427]. Thus in Burkina-Faso the law guarantees the representation of members of the opposition in the office of the National Assembly.

In Benin, the law on the status of the opposition provides that « *in conformity with Article 15.2 b of the Standing-orders of the National Assembly, election of two (02) vice-presidents, two (02) parliamentary administrators and two (02) parliamentary secretaries takes place, by endeavoring as much as possible to reproduce in the office the* ***political configuration of the parliamentary institution*** »[428]. But, this hypothetical possibility of opposition representation is often circumvented by the majority group notwithstanding the emblematic decision DCC 09-002 of 8th January 2009 of the Constitutional Court of Benin[429].

Thus, pertaining to commissions of inquiry, the role of the opposition in this framework should be improved. We could for example choose the chairperson, or if not, the rapporteur from among members of the opposition. In brief, the achievements of the law on the status of the opposition remains extremely limited.

2- A necessary constitutionalization

The opposition must be of public utility. The rights related to its existence and to its struggle for acquiring power should be sacred, inalienable and indefeasible. In this regard, the constituent assembly could formally constitutionalize the opposition which, formally recorded in the fundamental charter, as parliamentary minority, could see its rights solemnly enshrined and get protection for the same reasons as institutions of the Republic or fundamental rights of individual person. Considered as an essential wheel of multiparty democracy, its existence should be enshrined in the Constitution. This technique has furthermore the capacity to facilitate a bigger respect for legal norm and can easily integrate

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[426] Article 113 of the Constitution of Benin of 11 December 1990 :
«The government is required to provide the National Assembly with all the explanations that will be required on its management and its activities. The means of information and control of the National Assembly on the government are: The Inquiry, in accordance with Article 71;
Written Question, oral questions with or without debate, not followed by a vote, the parliamentary commission of inquiry; These means shall be exercised under the conditions laid down by the Rules of Procedure of the National Assembly. »

[427] HOLO (Th.), « Le statut de l'opposition », Op. cit, p. 363.

[428] Article 14 de la loi portant statut de l'opposition au Bénin

[429] For more details, see TOGBE (P.), « Benin's constitutional court-proof reversals jurisprudence Communication at the international conference on the theme of Cotonou Benin's constitution of 11 December 1990: a model for Africa, Cotonou 8, 9 and 10 August 2012. But mostly KPODAR (A.), "Decision of the Constitutional Court of Benin DCC 09-002 of 8 January 2009: a good year for multiparty democracy", accessible at», http://www.la-constitution-enafrique.org/ 24 December 2012 et SALAMI (I.), « Le pouvoir constituant dérivé à l'épreuve de la justice constitutionnelle », RTSJ, n° 0000/2012.

collective consciousness of the stakeholders. In this framework, some Francophone African countries integrated in their constitutions the recognition of the opposition. In the case of Senegal which is usually mentioned, we need to add the case of Gabon and the Democratic Republic of Congo.

Once the opposition is recorded in the constitution, the constituent assembly could then be send back to the legislator so as to determine the rules organizing the rights and obligations of the opposition. The law on the status of the opposition would then define a general framework, come up with new rules (the status of the leader of the opposition for example) and would send back, concerning the modalities for the exercise of the existing rights and obligations, to other legislations in force in the legal order and sequence. The legislator would then adopt a legislation which only poses some flexible general principles according to the historical circumstances, political climate and personality of the leaders of the executive and of the opposition of the moment. Such an approach would enable avoiding freezing the status of the leader of the opposition whose content will therefore be adopted to all political situations and to all protagonists, regardless of their temperament.

Such a status can however only be beneficial in multiparty democracies if the opposition is embodied in the person of a leader who represents it. This explains the origin of the haunting question of the status of the opposition leader. Better still, this can constitute from time to time a slowing down the compromise of the opposition with power.

B- A disconcerting compromise with power

The inefficiency of the provisions of the status of the opposition brings about quite regrettable consequences on the role of the opposition in the consolidation of the political regime in Benin. Indeed, the ruling classes have the tendency, outside the ''*stick*'' which corresponds to the methods of persecution, of also using the ''*carrot*'' representing seduction techniques for taking over the opposition[430]. This state of things undoubtedly encourages political nomadism (1); which calls, as a therapy the institution of a rule on loyalty clause to political parties (2).

1- An established promotion of political nomadism

Considered as the attitude of a politician who migrates from the political party to which belongs at the time of his election to another party for personal interests. Just like periodic migration of cattle in search of greener pastures for their food and growth, political nomadism also qualified as political transhumance appears like a pathology of democracy to the extent where it weakens the opposition and prevents democratic change-over of power[431].

Political nomadism puts on various clothes according to the circumstances. Indeed, in some cases, parliamentary nomad may not really feel connected to the party through which he was elected, either because the ideology, principle and the program driven by the party are of little importance to him, or because the party does not true ideology or common program which can justify his membership to the party. The parliamentarian can even think, wrongly or rightly, that he gives more to the party than the other way round and for this reason, he owes nothing to his original party.

[430] SOHOUENOU (E.), « Le statut juridique de l'opposition politique dans les nouvelles démocraties africaines », Op. cit, p. 262.
[431] HOLO (Th.), « Les défis de l'alternance démocratique », Op.cit, p. 6.

Moreover, political transhumance reflecting more often than not parties which are more directed and managed by their members than the other way round, it can happen that a parliamentarian seeks to impose such or such condition to his party, and that the party refuses and for this reason the parliamentarian allows himself to leave the party. He will then be able to « cross the floor of the house », according to the expression commonly used, with a view, for example, to look for some financial stability. In other cases, the nomad parliamentarian who belongs to a weakened party as compared to the party in power can want to move with a view to get the benefits enjoyed by the majority and thus join a more stable party and more likely to be called into the government. It also happens that an elected leader can qualify to be a nomad for less noble reasons like the desire to get privileges[432].

Regardless of the reasons for changing parties, political transhumance appears today, according to the opinion of Professor Holo like « a dreadful plague, which not only discredits and destabilizes political parties, but still prevents the realization of democratic change-over of power »[433]. This is why some States do not hesitate in banning in their constitutions political nomadism »[434].

The Constitution of Benin of 11th December 1990, despite the fact that it prohibits compulsory term of office[435], it does not in any way proscribe resignation of a member of parliament from a political party with a view to join another. And a fairly common practice of political transhumance was established in Benin. In this perspective, it was therefore expected of the law on the status of the opposition to seize this phenomenon with a view to eradicate it. But what do we note? Some provisions of this status are likely to encourage the plague. By considering for example Article 21 of this law, we find: « *Any party is free to leave the opposition. In this case, it shall make an official declaration for change of position. This declaration shall be registered in the ministry in charge of the interior, who will publish the registration in the official gazette. The publication in the official gazette shall be done under the same conditions as Article 6 above. This change of status shall lead, for the political party, to loss of all rights acquired by virtue of this law* »[436].

We can legitimately question ourselves on the introduction of this second last article in the law on the status of the opposition. The legislator was certainly careful to state that the resigning party losses the benefit of all rights and benefits attached to its capacity as an opposition party. But when we know that in general rule all the resigning opposition parties systematically find themselves in the presidential majority, we understand easily the reasons behind the introduction of such an article.

2- The need to put in place a ''loyalty clause''

In view of the negative consequences of political nomadism on the existence of the opposition and consolidation of democracy, it is therefore necessary to provide for a constitutional clause of loyalty for elected leaders to their political party. Such as a provision would not adversely affect the prohibition of mandatory instructions included in most constitutions to the extent where it would be the expression of the will of the sovereign people.

[432] Many of the ideas discussed here are taken from the report "political transhumance presented through facts mentioned in some countries," Association of Secretaries General of Francophone Parliaments (ASGPF), réunion tenue Bruxelles et au Luxembourg, 9-12 septembre 2009.
[433] HOLO (Th.), « Les défis de l'alternance démocratique », Op.cit, p. 6.
[434] Ibid.
[435] Article 80 of the Constitution of Benin 11 December 1990.
[436] Article 21

First, experience proofs that prohibition of mandatory instructions in the Constitution is neither absolute nor indisputable. Indeed, political transhumance appears today as a dreadful plague which, not only discredits and destabilizes political parties- especially the opposition- but also, prevents the realization of democratic change-over of power. But, it is clear that voters choose their representatives by voting for a political party. It is the party which commits the candidates, organizes their electoral campaign. The trust of the voters goes in the first place to the political party. The weight of political parties whose existence and activities are constitutionally recognized is particularly higher that some formally exclude independent candidacies.

Then, the prohibition of mandatory instructions is more concerned with the relationships between the elected leader and his voters than the relationships he has with his political party. It is for this reason that, in practice, parliamentary work is supervised by parliamentary groups organized by and around political parties. In the place of expression par excellence of the popular will which is parliament, it seems legitimate the vote of the member of parliament be determined by the instructions of his political party or of the parliamentary group to which he belongs. Vote discipline even applies today in democratic regimes as an essential pillar of stability, efficiency and cohesion of debates and parliamentary life. This is incidentally the opinion of Mr. Bakary Sogoba when he writes : « …under the cover of representative mandatory, the member of parliament votes as well as he is heard in parliament, but does this grant him the right to be elected on the list of a political party and to disengage from the party as and when he so wishes ? The answer is a categorical no. It would pertain here to an unhealthy confusion between representative mandate and betrayal, brought about by nomadism»[437]. He thereafter adds : « Lets suppose, as this has already happened to the rest, that a member of parliament registers and is elected on the list of a party and that before the first sitting of the National Assembly, this member of parliament leaves this party to join another one. Our nomad member of parliament cannot claim to explain his attitude by any application of representative mandate: he is simply a traitor. He commits not only his moral responsibility before the nation and his own conscience, but also his civil responsibility, if not criminal»

Moreover, without opposition, it is hard to affirm with Aristotle that democracy is the option for each citizen to alternate rulers and the ruled. The fight against political transhumance in these conditions stands out as a requirement of democracy, because it is political change-over which creates on the voter the conviction that sovereignty belongs to the people, that the ruling class, not only comes from the will and trust of the electoral body, but exercise for a time a mandate on behalf of and in the interest of the sovereign people.

CONCLUSION

« the opposition always makes the glory of a country: the most distinguished persons of a country are those it puts to death »[438]. These words of Ernest Renan sound like a reminder that questioning ourselves on the status of the opposition, in a democratic system under construction like the one in Benin, is not in futile. Indeed, and as Bertrand de Jouvenel in a very judicious manner « from free competition of opinions, a majority opinion stands out and commands, but its command would not be an obstacle to *the game* of freedom of opinions *which follows* and leads to a different majority opinion which commands in its

[437] *See the collective Alliance for Rebuilding Governance in Africa, edited by Falilou Mbacké Cissé*
[438] RENAN (E.), *Discours et Conférences*, Paris, Calmann-Lévy, 1887.

turn. Interrupt this process, and you immediately come out of the regime of freedom »[439]. This philosophy seems to be understood by the legislator of Benin who institutionalizes the opposition through the Act n° 2001-36 of 14th October 2002.

But what is more important is to note that despite the adoption of a specific legislation on the status of the opposition and putting in place implementation measures, the status of the opposition in Benin, essentially remains fanciful. The solutions brought about by the Act n° 2001-36 of 14th October 2002 are not convincing enough. Frankly speaking, if it is realized on the normative level, the status of the opposition, in its current state, does not give real means to potential opposition parties to make the contribution expected of them within the framework of a democratic system[440]. What is promising is that, the most courageous and the strongest are going to fight and try as best as they can to be heard by the people[441].

But there is need all the same to agree that it is not the status which can make the opposition. All depends on the conscience of the majority in power and the opposition parties taking their responsibility[442]. For instance, in the United Kingdom, which is rightly considered as the historical cradle of the opposition, which was recognized and institutionalized since 1926, the status of the opposition does not find its source in written legislations, but essentially in customary rules, uses as well as social practices in the collective consciences of all political stakeholders[443]. Democracy in Benin has a duty to take up the challenge of the effectiveness of the status of the opposition, which not only consolidates multiparty democracy, but also and especially contributes, to « preventing conflicts in Africa »[444].

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439 DE JOUVENEL (B.), *De la souveraineté*, Paris, Éd. Génin, 1955, p. 349

440 BOLLE(S.), « Statut de l'opposition au Bénin : pour quoi faire ? », consulté sur http://www.la-constitution-rn-afrique.org

441 This is especially true as the implementing decree, taken six years after the passage of the law on the status of the opposition, seemed emblematic of a desire to ease political life. This measure should calm down the opponents of the authority who had pressed the authority to take it, especially in their Cotonou Declaration of 12 March 2008. Only the very limited scope of the Decree of 20 November 2008 can not hide the shortcomings of the law n ° 2001-36 of 14 October 2002. And the status of the opposition does not seem to be, in itself, a guarantee for peace for very tense relations between the regime and its opponents.

442 RULLIER (B.), « Status of the opposition ensures accountability, "Le Monde 21 June 2007. For the author, the maturity of a democracy is measured by the height of the responsibilities of parliamentary opposition. Less opposition MPs are, the more the parliamentary machine is awry. Because the whole parliamentary mechanism is based on the proportional allocation: in addition to physical division of members between the committees, it is the number of current issues, the time to speak in the general debate, the possibility of requesting for the creation of a commission of Inquiry and parliamentary representation in administrative bodies that vary in the number of parliamentary groups. The challenge lies in the actual content of the "status of the opposition," illustration of a "perfect democracy".".

443 It is also the case in the Federal Republic of Germany, Canada, Australia, Japan, Israel, and New Zealand…etc.

444 TSAKADI (K.), « Quel statut de l'opposition pour prévenir les conflits en Afrique ? », in *Démocratie et élections dans l'espace francophone,* Bruylant, 2010, pp. 367-397.

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INTERNATIONAL OBSERVATION OF ELECTIONS AND ELECTORAL ASSISTANCE IN AFRICA

By Iréné **ACLOMBESSI**[*]

INTRODUCTION

The third thief[445], rather than being one, always happens to transform the first two into a fair[446] ? The role was assigned to observation which, according to the French language dictionary, could be confused, to some extent with the role of assistance; and yet, in electoral matters, the former in most cases succeeded the latter even though overlapping of roles can be possible *in fine*.

Since December 1948, the Universal Declaration of Human Rights proclaimed in Article 21 the right to free elections. It is true that it took several decades to generalize its implementation, but progressively, it steadfastly stood out in national constitutional legislations as one of the fundamental guarantees of democracy. As President Abdou DIOUF used to say, if election has for long been the exception, or even the privilege of western democracies, it is the absence of election, impossibility for the people to freely express their will, which is henceforth beyond standard[447]. It is here a significant progress.

The observer is the person whose duty is to look at the course of certain events with a view to report on the same. In a wider meaning, he appoints the representative of a state or international organization who, without being party to the negotiations and to the works of an international conference, attends it so as to be informed of their conduct, with sometimes the power to intervene in the discussions without the right to vote. In the narrow meaning, it pertains to an *officer assigned by an international organization (United Nations) to collect information, to follow closely on the spot the conduct of operations for popular consultation*[448]. International observer thus presents himself as an envoy, a « *missi dominici » entrusted to see, judge, observer so as witness and make a report*[449]. In this framework, international observers are « *competent people in electoral matters who have the duty of monitoring closely the conduct, in a country, of the electoral process to verify that it is conducted in the conditions of freedom, conform entirely to the relevant standards of human rights*».[450]

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[445] The third thief the one who just capitalizes on the quarrel between two other people, including the two main protagonists in an election observer and acts as the third character.

[446] We talk of thieves to designate those who agree perfectly, speaking of parties in elections for which the agreement is on key issues is necessary for the proper conduct of operations, which is not always obvious. In the history of the Catholic Christian religion, we must distinguish between the good and the bad thief, alluding to the two thieves who, according to the Gospels, were crucified with Jesus Christ and who first repented before he died.

[447] Abdou DIOUF, Préface à l'ouvrage ''Démocratie et élections dans l'espace francophone'', Bruylant, Bruxelles 2010, p. XV.

[448] Gérard CORNU, Vocabulaire juridique, PUF, Paris 2009, voir « *observateur* ».

[449] Dodzi KOKOROKO, Contribution à l'étude de l'observation internationale des élections, Thèse, Poitier, 2005, p. 25.

[450] VASAK (K.), « Etude d'introduction », Liberté des élections et observation internationale des élections, Conférence internationale, La Laguna, Ténérife, Bruylant, Bruxelles, 1995, p. 56.

In the understanding of the African Union, ***observation of elections*** is the « *action of collecting information and expressing a judicious opinion on the basis of the information collected*[451]. It is often very quickly assimilated to a close activity whose understanding is however different: it pertains to monitoring elections. Indeed ***monitoring elections*** constitute the right to intervene in the elections to enforce adherence to known rules of law.

As for ***electoral assistance***, it is on the other hand understood as purely technical intervention or in terms of advice to electoral institutions of members of countries who are entitled to receive this advice[452]. There nevertheless arises a methodological and linguistic distinction between the concept of ***assistance to elections*** and that of electoral ***assistance***. This distinction defines the first concept as assistance targeting the Election Day and the second as assistance more integrated and more holistic, to the electoral system, to the electoral process and to institutions. Our study will be based on this last concept.

The objective of this study is the couple ***''observation and assistance''***, entered in the assumption of free, transparent and fair elections, with the direct participation of all citizens in choosing the ruling class. It is a source of legitimacy for the latter, legitimacy without which sustainable democracy is not possible at all.

This assumption in relation to electoral operations has a history. If in Benin and in most African countries, international observation and electoral assistance fall under the desire for legitimacy of the Heads of state during the period of dictatorships after the 1960s, electoral mechanisms go back to ancient Greek and Roman, even if it did not pertain to universal suffrage. In the Roman Catholic Church, an institution which has behind it more than twenty centuries of existence, election, at least for supreme organs, of the Pope[453] or of the official of Religious Community, is a part of the church traditions[454]. In the 1960s and 1970s, help to political parties constituted the first form of electoral assistance in many countries of Southern Europe and Latin America by the American Government or by other authorities, such as English and German political foundations[455].

In its development, free and fair elections, the foundation for this legal framework in electoral observation and assistance originated with the Universal Declarations of Human Rights in Article 21 paragraph 3: « *The will of the people shall be the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be by universal suffrage and shall be held by secret vote or by equivalent free voting procedures* ». This provision certainly, in view of international law, has only a declaration value, and in view of national law very rarely normative value, but it sanctions, since the beginning of the UNO, the main principles which establish the link between democracy and election[456]. For more than fifty years, these precepts have not changed and can be found in various titles in all national or international legislations made for elections.

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[451] See Point 2.1.1 Guidelines of the African Union for observation and monitoring missions of elections adopted on 8 July 2002 in Durban, South Africa.

[452] Léonard-Emile OGNIMBA, Le cadre juridique de l'observation et de l'assistance électorales de l'Union Africaine, In Démocratie et élection dans l'espace francophone, Bruylant 2010, p. 89.

[453] There is a real similarity between the conditions for the election of the Pope (need for two-thirds majority) and those of the election of the President of the French Republic between 1875 and 1958 (absolute majority of the votes).

[454] Didier MAUS, Elections et constitutionnalisme : vers un droit international des élections ? In Prévention des crises et promotion de la paix, Démocratie et élections dans l'espace francophone, Bruylant, Bruxelles 2010, p. 51.

[455] Voir "Aiding Democracy Abroad, the Learning Curve" Carothers, 1999.

[456] These are three in number: legitimacy is based on direct or indirect choice of leaders, but always chosen freely, elections must take place periodically at a rate that is obviously impossible to determine in advance, but must ensure a regular turnover of elected leaders, the rules relating to elections, whether constitutional, statutory or otherwise, must respect the universal, equal suffrage, the secret ballot and its freedom.

If the right to free elections had not been enshrined by the European Convention on Human Rights and Fundamental Freedoms signed in London on 4th November 1950, then the failure was cured quickly with the signing in 1952 of Protocol n°1 whose Article 3 is entitled« *right to free elections* »[457].

Whether in Europe, in America or in Africa, the real development of free and transparent elections leading to international observation and assistance was attained in 1990. In Africa, the African Union (AU) which succeeded the Organization of African Unity (OAU) is interested since mid-1990s in electoral processes organized by Member Countries. This desire led to the adoption of an African Charter for popular participation in development and transformation known as *The Arusha Charter* followed by several other instruments among them *The Cairo Declaration on creation of the OAU mechanism for the Prevention, Management and Settlement of disputes of 1993*; *The Algiers Declaration on un-constitutional changes of 1999,; the Declaration on the Framework for a the OAU reaction against unconstitutional change of governments* done in Lomé.

These different legislations and documents as enumerated deserved a deeper analysis so as to identify the common points, differences, their compulsory or incentive character and try to assess their effectiveness. But this study, it will not in any way be a question of this approach. Since this enumeration shows that elections no longer depend only on the constitution framework of one nation, there is a real international dimension of elections, even if this phenomenon is national by its nature. It is from this wave that progressively arises what we would qualify as *interference* in electoral matters; it is a substantial interference with the sovereignty of the State[458].

Through this state of supervision, they caution the State concerned by preventing, to some extent, the operations from being conducted in a manner which is against the criteria of transparency, freedom, sincerity and thus form the canons of reference for contemporary democracy, and this is where the interest of this study lies and which does not also lack a rationale.

The main rationale for the emergence of these institutions resides in the suspicion which affects the mode of organization of elections[459], unable to guarantee trust, transparency and sincerity of the vote, in view of very big proximity of the electoral structures with the power and subservience of the administration to the party in power.

At the beginning, independent observation of elections was carried by big international institutions like ***United Nations*** and the ***Organization for Economic Cooperation and Development*** (OECD). The first independent observations were organized in **Korea and in Germany** just after the Second World War. Thereafter, due to increasing number of elections in the countries, the need to involve other non-institutional stakeholders was felt and groups of independent experts and civil society organizations became observers. But the question which arises: **If the institution of electoral observation and assistance missions is legally founded, what is its concrete contribution in consolidating peace and democracy in Africa?** The question deserves to be asked especially that several African experiences for

[457] Under this provision, "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.
[458] Dodzi KOKOROKO, Op. Cit. p. 26.
[459] Jean du BOIS de GAUDUSSON, Les structures de gestion des opérations électorales : Bilan et perspectives en 2000 et… dix ans après, In Prévention des crises et promotion de la paix, Vol. II, Bruylant 2010, p. 260.

elections observed and assisted at the international level led to protests and even conflicts. The experiences in Benin certainly did not once lead to confrontations. But this mode of assistance by international institutions during the 2011 elections is subject to question; did it pertain here to electoral assistance or to assistance to elections? the shudders experienced by the funding of the said elections is an illustration of the relevance of this concern. Besides, strong protests arose most of the time, even after elections organized under the supervision of international observers. Finally, should we do without this third person of the electoral process?

At the political level, international observation and electoral assistance lives up to the upsurge of multiparty democracy following the disappearance of monolithic regimes which for long characterized elections « without choice »[460] of the southern hemisphere and especially in Africa. Independent observation finds its legal basis in the Constitutions of countries where the observation missions are conducted, but also in international instruments like Universal Declaration of Human Rights, the UNO Treaty of 1945 and the Declaration of the Summit for the Organization of Security and Cooperation in Europe (OSCE) of Istanbul in 1999 which affirms that « *electoral observation can play an important role in the enhancement of people's trust in the electoral process* ». This basis justifies the legally organized nature (**I**) with a largely accepted practice (**II**) for operations relating to electoral observation and assistance.

I) A legally organized operation

Legal framework means all rules arising from various instruments which govern a matter in a given field. Due to what is in existence of the same both at the universal and African levels, universally protected standards (**A**) and those produced by African instances (**B**) shall be envisaged.

A- Standards under universal protection

Electoral observation operations were for long been done in the absence of uniform standards or commonly approved guidelines. We had to wait for the initiative of the United Nation Division of Electoral Assistance and two American NGOs[461] so that a *Declaration of principles for international observation of elections*, accompanied by a *Code of conduct for use by international election observers* to be put in place with a precise and universally accepted content. But this universality is also as diversified **(1)** as tempered **(2)** by conditions which take into consideration both universally accepted objectives and those subjective of the country in question.

1- A diversified universality

International standards for electoral observation and assistance are diverse. They concern the vast domain of international law and range from the declaration of the principle for international observation of elections to the Code of Conduct for use by international elections observers through the legislations enacted by the UNO, even though they lie under the sovereign jurisdiction of States. This is why their conduct is subjected to some standards included in the international legislations of which some advocate, among others, for the right for a democratic representative government. But this provision is not expressly

[460] Dodzi KOKOROKO, Op. Cit. p. 24.
[461] It is Carter Center et National Democratic Institute.

recognized at the international level, international law does not prescribe less than that an election must reflect the free will of the people through the exercise of a certain number of fundamental freedoms related to the criteria mentioned in the general definition of the concept which was proposed[462].

The provisions governing the field of observation are as for them contained in the principles of 2005 and to be efficient, it needed adherence by intergovernmental organizations the most affected by the issue[463]. It pertains to, for example, UNO, African Union, Organization of American States, Commonwealth Secretariat, some institutions of the Council of Europe[464], European Union and Office for Democratic Institutions and Human Rights (BIDDH), Organization for Security and Cooperation in Europe (OSCE)…which undertake in this way to cooperate between themselves within the framework of international electoral observation missions[465].

Through the Declaration of the principles of 2005, international observation of elections is defined as « systematic, exact and exhaustive collection of information relating to legislation, institutions and mechanisms governing the conduct of elections and other factors in relation to the electoral process in general ; the professional and impartial analysis of this information and coming up with conclusions concerning the nature of the electoral mechanism satisfies the highest requirements of accuracy of the information and impartiality of the analysis »[466]. It is conducted in the interest of the citizens of the host country and the international community[467] and enables assessment of the situation before and after the elections as well the election day itself[468], all this in respect of the sovereignty of the country[469].

As concerns the Code of Conduct for international election observers, it is constituted by standards which encourage integrity of the international observation of elections, including long term and short term observers, specialized election teams and leaders of the mission.

It takes into account the respect of the sovereignty of the host country through its legislation and its morals, respect and protection of the integrity of the observation mission without hindering the electoral process.

Concerning the assistance, it is first the ***Universal Declaration of Human Rights*** which brings the legal and moral justification in favor of electoral assistance. Since the adoption and proclamation of the declaration, in 1948, the notion of international electoral assistance has undergone several transformations and interpretations. Nevertheless, it has always drawn its roots in the values of the cast field of assistance to democracy.

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462 Victor-Yves GHEBALI et Ntolé KAZADI, Op. Cit., pp. 107-108. « these mainly pertain to the criteria for frequency, universality, equality of suffrage by secret ballot, transparency and admissibility contained mostly in the Copenhagen Document on the Human Dimension of the CSCE in 1990, the Declaration of the Inter-Parliamentary Union on the criteria for free and fair elections in 1994, the Code of Good Practice in Electoral Matters of the Council of Europe in 2002, the Convention on the standards of democratic Elections, electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States in 2002, and the principles and guidelines governing democratic elections adopted by the South African development Community in 2004.

463 Victor-Yves GHEBALI et Ntole KAZADI, La Déclaration de principe pour l'observation internationale d'élection de l'UNEAD du 7 juillet 2005, suivie des commentaires de l'OIF, In démocratie et élections dans l'espace francophone, Bruylant 2010, p. 104.

464 Il s'agit de l'Assemblée parlementaire et de la Commission de Venise du Conseil de l'Europe.

465 Paragraph 8 of the Declaration of Principles for International Election Observation.

466 Paragraph 4 of the Declaration of Principles for International Election Observation .

467 Paragraph 6 of the Declaration of Principles for International Election Observation.

468 Paragraph 5 of the Declaration of Principles for International Election Observation.

469 Paragraph 9 of the Declaration of Principles for International Election Observation.

It is then followed by the ***Resolution 46/137 taken in December 1991 by the General Assembly (GA) of the UNO*** which serves as the major legal basis for electoral assistance[470]. Since then, the Secretary General of the UNO presented a semester report to the General Assembly on "the appropriate means for purposes of enhancing the efficiency of the principle of periodic and honest elections, in total respect of the sovereignty of Member States." Resolution 46/137 of the GA also entrusted the UNO to appoint a senior official whose function, among others, is to be the focal point concerning the operations of electoral assistance, so as to ensure coherence in the treatment of requests of members states during organization of elections, assistance of the Secretary General in the coordination and study of the requests for electoral verification and conveying the requests for electoral assistance towards the office or the adequate program.

It is finally ***the Regulation 976 of the European dated 1999*** as well as ***the Communication 191 of the EC « Electoral Observation and Assistance » of April 2000*** which marked a significant advancement in the conceptualization of electoral assistance.

In as much as it pertains to an international observer, he should not be considered as a spy, an intruder and his activity seen as some form of interference. On the contrary, the observer shall peacefully exercise his activity as long as it is held at certain conditions, on the basis of the will formally expressed by the host country, which is meant to temperate the universal character of international standards.

2- A tempered universality

In matters of electoral observation, the rules previously mentioned are first of interest to the State in question, even if those in charge of the observer are not the least.

Thus, the country in question must express its desire to receive international observers through an express agreement, and this, sufficiently in advance so as to enable adequate planning of the activities to be carried on the field. But there exists a peace agreement where the mandate normally arises from an option invitation[471]. At the same time, the host country is required to provide to the observation mission, all the guarantees necessary in terms of security and freedom at different stages of the process through official accreditation, access to technologies and electoral officials, freedom of movement on the entire territory, publication without hindering the conclusions and recommendations,…[472]

Other situations which cannot be consistent with international observation are on one hand the default of some conditions of a democratic consultation reported by a *needs assessment mission*, this leads to sending on the spot of a restrained observation missions who will leave the country before the election day; on the other hand, if the criteria of the rule of law are fundamentally lacking in the country, no observation will be sent[473].

Concerning the observer, he is required to provide, according to the Code, appropriate identification means through display of his identification document provided by the

[470] The resolution focuses on "Strengthening the effectiveness of the principle of periodic and genuine elections ".

[471] It is alluded to the UN peacekeeping operations. But this exclusion does not extend to the OSCE region whose members are required to invite international observers and NGOs, this, in paragraph 8 of the Copenhagen Document.

[472] All of these obligations for the State concerned are subject to a memorandum of agreement that must be approved by the main candidates for election.

[473] Application made of the legal framework for international observation of elections by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE).

observation mission and other means of identification required by national authorities. He oversees the accuracy of observations and show professionalism in coming with the conclusions, abstain from making observations in public or on media before the declaration of the mission, cooperate with other observers, maintain an appropriate personal behavior, undertake to abide by the Code of Conduct. He must also comply with instructions emanating from the officials of the mission and inform them of any conflict of interests. The observer can lose his accreditation and even be kicked out of the mission for non-adherence to the Code of Conduct attached to the 2005 Declaration.

For what pertains to electoral assistance, any electoral assistance of UNO must follow a procedure of request presented by a recognized national authority. Since then, majority of assistance missions given, in collaboration with national stakeholders, in normal situations, in the absence of crisis, were mostly taken care of by the department of Finance and Human Resources of UNDP. The officials of UNDP in the country establish permanent relationships with the government, bilateral development agencies, non-governmental organizations and political parties; they ensure logistics infrastructure, acquire knowledge of the country and provide financial resources for putting in place operations assistance in accordance with all standards in the matter, including those of African production.

B- Rules of African production

The commitment of the African Union for democracy very quickly took the form and the ways both in implementation and development of an activity for electoral observation and assistance[474]. More than eighty elections of different nature and extent were observed in over twenty years, either at the initiative or in consultation with the States concerned on the basis of African Union Guidelines which come to assert the legal value of the standards **(1)** or ECOWAS principles which have only one limited cover **(2)** according to the extent and geographical position of the host country.

1- Productions with asserted legal value

In their Declaration on the principles governing democratic elections in Africa of 2002, the African Heads of State and Government decided to engage the African Union in observation and monitoring of elections in Africa on the basis of strict Guidelines[475]. While relying on the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966, they recognized free elections as the basis of legitimacy for Government authority[476]. This commitment is in conformity with a number of instruments among them the African Charter on Human and Peoples' Rights adopted in 1981 in Kenya, declaration of the OAU Conference of the Heads of State and Government on the political and socio-economic situation in Africa and on fundamental changes which happened in the world of July 1990, African Charter for Popular Participation in Development adopted in Addis-Ababa in July 1990 and Cairo Action Program adopted in 1995. Through these regional instruments at regional level, we can already note the distinction between those which are the basis of a political will by giving major directions and those which advocate for their implementation in a precise field, in this case, in relation to elections. These legal texts constitute the legal basis for electoral observation and assistance in Africa.

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[474] Léonard-Emile OGNIMBA, Legal framework for electoral observation and assistance of the African Union, In Democracy and election within Francophone area, Bruylant 2010, p. 89.

[475] See mainly paragraph V, entitled « Observation and monitoring of elections by OAU », of this declaration.

[476] Cf. points 3.1 to 3.7 Guidelines of the African Union for observation missions and monitoring of elections.

We can now be able to examine the extent of these different legal texts and note that they constitute the real criteria for legitimacy of state power, the power of command. The limiting character is not in principle so asserted through Charters, Guidelines, Declarations, Notes… this situation could make the matters they govern less efficient. But in practice the fear for isolation is not less dissuasive. Indeed the reflection can lead to a sort of classification of the said instruments to note that the constitutional instrument and the Charter would at the summit of the hierarchy due, both, their conventional nature and their mode of coming into force. The conventional nature, enshrined by the constitutional documents of organizations bringing together several states, reside in negotiations, talks, discussions, debates, leading to agreements and especially ratification of these agreements.

As it pertains to the Declarations, we can ask ourselves the question to know if the terminology used is not subjectively related to the remarkable success experienced by the Universal Declarations of Human Rights and the French Declaration for Human and Citizens' Rights after several controversies on their legal value. Indeed, L. DUGUIT noted that rights Declarations are truly real laws, because a constituent assembly was not able to make them into law[477]. It is the 1789 declaration which is the Constitution of France. This development shows all important legal value which is granted to declarations, similarly to Charter through insertion in some constitutions[478].

In Africa, Declarations which are the basis of electoral observation and assistance activities and even the Universal Declarations of Human Rights do not have the same connotation as the French ones developed under the academy of popular sovereignty within a single state. Although emanating from the Supreme organ of the Union[479] whose policies they define[480], they should, if we find ourselves in a strictly legal perspective, have only one moral value and should remain in this regard simple general policy documents meant for directing the action or policy of member states and the work of the commission. But in practice, with the confusion which exists within the legal sequence of the deeds of the Union, some among them take the character of a real legal instrument in their implementation[481].

As for the Guidelines, they constitute a regulatory act applying a decision of Head of States and Government and applying to the Commission[482].

In Benin and in Togo it is a simple practical guide which acts a legal instrument for observation of elections. It pertains to the ***''Practical guide of an election observer''***. The notes for the observation of the electoral process are only an administrative document which clarifies the practical work of observers.

Within the framework of electoral assistance, paragraph 1 of Article 18 of the Charter provides that « the State parties can seek from the Commission, through the Unity and support Fund for democracy and electoral assistance, consultancy services or assistance to strengthen and

[477] Léon DUGUIT, Traité de droit constitutionnel, 3e éd., Tome 2, De Broccard, 1928, p. 184

[478] This is the case for the Constitution of 11 December 1990, to which the African Charter on Human and Peoples' Rights is fully incérée, this is also the case of the Environmental Charter in 2004, which is part of the Constitution of the Fifth Republic of France of 1958.

[479] See Article 6.2 of the Constitution of the African Union.

[480] See Article 9.1 (a) of the Constitution of the African Union.

[481] This is the case for the OAU Declaration on the Principles Governing Democratic Elections in Africa, on which the Union initiatives on electoral matters are based. This is also the case of the 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of government. It can also refer to the relevant Security Council communiqués the Union ultimately appear as binding for member states.

[482] Léonard-Emile OGNINBA, op. Cit. p. 92.

develop their institutions and electoral processes ». Here it pertains to a provision which formally makes a clear reference to an institution in charge of electoral assistance. The problem for the creation of this institution had arisen during the 38th ordinary session of the Organization in Durban. A suggestion to put in place an electoral assistance unit within the Commission was made to help the commission carry out assistance missions sought by Member states[483]. The unit became effective only in 2006 after validation by a committee of experts and adoption by the Executive Council of the Union[484].

Whether it pertains to observation or electoral assistance, other specific rules govern the two activities at a reduced scale at the West African Sub-Region and are only in charge of a limited cover.

2- Principles with a limited cover

The ECOWAS Treaty offers an appropriate legal framework to developing a set of rules relating to electoral observation and assistance. Despite real progress observed at the Sub-regional level, states remain unwilling to abandon a part of the sovereignty, in view of the fact that observation and assistance calls for foreign intervention on their territory. But the most decisive instruments in the organization and management process of election issues remain without doubt the Protocol relating to mechanism for Conflict Prevention, Management and Resolution, Peace-keeping and Security adopted on 10th December 1999 by Heads of State and Government of ECOWAS and, its additional Protocol on democracy and good governance of 21st December 2001 through a section entitled « Observation of elections and assistance by ECOWAS ». They constitute a restrictive and fundamental legal reference for Member States[485]. These two instruments are quite clear on the mandates of ECOWAS in the consolidation of democracy and particularly management of elections organized in the member countries[486]. They specify the conditions of their own implementation. But who can do more can do less. This is why international instruments which are the basis for international electoral observations and assistances are still the legal framework in West African Sub-Region.

During the last few years, high level international stakeholders in the field of electoral assistance in West Africa, such as European Commission (EC) and United Nations Development Program (UNDP) undertook concrete actions so as to confer to the electoral assistance approach a more holistic character, applicable in the implementation of electoral programs. The immediate objective of the initiatives arising from EC and UNDP, is on the rationalization of their interventions in the electoral field by harmonizing them with their general objectives for promotion and development of democracy; such as the one assigned to the implementation of international electoral observation and assistance which are and remain widely accepted practice.

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[483] See paragraph VI (d) of the OAU Declaration on principles governing Democratic Elections in Africa.

[484] See minutes of the meeting of the Executive Council of the African Union held in Banjul in 2006.

[485] According to Article 12 of the Additional Protocol, ECOWAS can provide support and assistance in the organization and conduct of elections and may send a mission for supervision or observation of elections in the country concerned.

[486] Gorée Institute 2010, Elections, paix et sécurité en Afrique de l'ouest, Sénégal 2010, pp. 67-68 « These texts prescribe for example that ECOWAS should be involved in the preparation, organization and supervision of elections in member countries of the Community. It can provide support and assistance in any form useful to the organization and conduct of the elections in that country. It pertains sending in the country, before an election, a mission of information which can be followed by an exploratory mission followed and finally by an election observation mission in question. « ».

II) An accepted practice

International observation and electoral assistance in fact constitute a tendency for universalization of democratic structures in internal orders[487].

Today, observation of elections has become a systematic practice for African States. This activity consists of observing the conduct of elections so as to prevent and detect errors or attempts for manipulation. In practice, financial and human resources available are rarely sufficient to ensure long-term observation. The most efficient method therefore consists of reducing the range of long-term observation while maintaining a sustained attention to all the activities or to a representative sample on the Election Day and during vote counting and tallying[488].

Concerning electoral assistance, it is defined as a technical or material support provided by inter-governmental organizations or NGOs to the electoral process. It is to be noted that electoral assistance goes up to electoral observation which is indeed a political complement of electoral assistance. Recommendations made by observers are determinant on the maintenance or not of the electoral assistance after the voting. Electoral assistance, as a means of promoting and strengthening democracy, experienced its rapid growth after the fall of the Berlin Wall[489]. UDHR and PIDCP affirm that political regimes must draw their legitimacy from free, period and genuine elections[490]. It is this political and ideological conception on which it is structured the electoral assistance already put in place by the UNO during the decolonization period.

In practice, we can be concerned with the reliability of the observation and with the efficiency of the electoral assistance. Beyond all this, the acceptance of the host country must be free **(A)** and objective **(B)**.

A- A freely agreed acceptance

International observation of elections and electoral assistance are done on the basis of a memorandum of understanding between the government of the host country and the international organization which assists or supports an observation mission. This memorandum is both a means of maintaining electoral integrity **(1)** and support electoral activities **(2)**.

1- A means for maintenance of electoral integrity

Upon request by the country organizing the elections, United Nations, African Union, ECOWAS or even European Union, etc. send international observer teams in the host country. International elections observation missions are preceded by assessment missions (the case for African Union) or exploratory missions (the case for United Nations and also ECOWAS) whose reports are relied upon by observation missions. These assessment missions enable among others international organizations which prepare a supervision or observation program to study the general context which prevails in the country as well its

[487] Dodzi KOKOROKO, Op. Cit., p. 22
[488] BRIDGE 2nde version, Bâtir des ressources en démocratie, gouvernance et élections, Gorée Institute, page 90.
[489] SONON (E.), Chaire de recherche du Canada en politiques étrangère et de défense canadiennes, UQAM ''Assistance électorale'', 28 juillet 2009.
[490] 'Résolution 46/137 des Nations (Assemblée Générale de l'ONU, 1991).

resources and its internal structure. We also note the size of the country, its infrastructure, its economic development and its population. In this regard, we also consider the maturity and visibility of political parties, the legal and administrative frameworks, freedom of expression in respect to electoral stakes granted to the media and to the population.

Moreover, observation groups must take into consideration factors related to elections, mainly the type of election and the circumstances in which it is held. The observation methods must be adapted to the importance of election and the powers the elected leaders will have. The observation method differs depending on whether the election takes place in a ''regular'' and stable environment or it constitutes a stage of major political transition process, for example when it is for resolving a conflict, ensuring legitimacy of structures of a government after a war, establishing sovereignty of a new State or consolidating recent democratic bases[491].

As for the observation team, the factors to take into consideration in the chapter of internal resources are the capacity to exercise a continuous or long-term supervision, permanent or short-term nature of the observation infrastructure: staff, logistics and facilities and, electoral skills and number of observers available. The objectives of the observation mission and the extent of their activities must be clearly defined and understood by all the members of the team. They must be communicated to the management organs of elections, political participants and the public. A free and equitable rigorous assessment of the electoral processes is hard to obtain in the absence of long-term observers or if the observation is only touching of some aspects of the voting or vote counting and tallying.

At the communication level, observation missions must consult the authorities responsible for elections, administrators, public, political participants and interest groups concerned so as to obtain information and propagate their conclusions in an efficient manner. Observation programs vary from one country to another, but regardless of the country, observation missions must follow certain principles: *the right to access information on the election and participants, and the prior definition of information networks*.

The important role of international observation in protecting the electoral integrity can be compromised if the abovementioned rules are not adhered to. A serious and professional observation can, indeed, contribute to maintaining the integrity of the electoral process in several ways:

- *Spreading good practices*: electoral administrators and national observers can understand well the international standards for holding free and fair elections by cooperating with foreign observers and by studying their reports. It is the time to exchange professional knowledge with other experts on integrity mechanisms used in other regimes.
- *Preventing integrity problems*: presence of international observers who supervise the electoral process can discourage those who have the intention of manipulating or disturbing the process. There is a public perception in most countries that international observers can detect fraud during the Election Day[492].
- *Testing integrity problems:* experienced observers can detect problems or fraudulent activities and bring to the attention of the electoral body and to the public issues which arise during the electoral process.

[491] BRIDGE *op cit.*, page 91.
[492] Carothers, Thomas, « The Observers Observed », Journal of Democracy, 8 (3), 1997, p.19.

- *Consolidating a fragile process:* in cases of conflicts or in countries in the process of transition, the presence of international observers can, to some extent, discourage resorting to violence and intimidation. Their presence can assure the candidates, supervisors and voters that they can participate in the process in full security[493].
- *Enhancing the credibility and the legitimacy of the process:* observers can, through their reports and analyses, confirm the legitimacy or lack of legitimacy of the electoral process and the results of the election.
- *Developing national observers' abilities:* if international and national observations are done jointly, international observers can help in developing and improving the abilities of national observers. This can be on parallel vote counting or analysis of observation reports received from the field.

This area of action is preceded by that of electoral assistance which constitutes a means of supporting electoral activities still provided in the memorandum of understanding.

2- A means for supporting electoral activities

The need justifies electoral assistance. It pertains to a political need and an economic need wiped out by electoral activities which need big funding.

From the political point of view, as an expression of a certain national cohesion, elections appear as a part which cannot be overlooked in peace operations of the United Nations, ECOWAS, and other international organizations. Holding democratic elections constitute a primary means of pacifying societies destroyed by war. Helping countries in democratic transition or in a post-conflict context, to organize free and fair elections, therefore contribute to consolidation of peace, promotion and enhancement of democracy. The United Nations attach a high priority to the electoral window within the framework of peace operations. Henceforth it is rare to have peace operations with a mandate which does not explicitly provide a window for electoral assistance[494].

Electoral assistance as it appears today, and we saw it before, should not overlook the fact that it is a result of a long process. It is indeed the tradition for controlling the process of self-determination for colonial territories or under trusteeship which goes on to give birth to the new form of electoral assistance in "sovereign" countries. Organization of free and regular elections when they fall due becomes a principle of international law which applies to all states of the international community. But generally elections essentially fall under the exclusive jurisdiction of the States, the consent of the host state constituting the prior condition to the implementation of the international electoral assistance. The overwhelming power of the State in the implementation of the assistance remains a real prerogative but it is not absolute in practice. In situations of crisis, the request for assistance and observation does not emanate from the free initiative of the state authorities but rather arises from an order from the international community. Indeed, when the structures are almost collapsing, the international community reacts by orders made to parties in conflict to resort to elections certified as the mode of resolving the crisis.

Currently we are witnessing a new approach to electoral assistance. The risks of hastening conflicts of resurgence of the same, linked to inexistence of a truly democratic political

[493] *Ibid,* p.20.
[494] SONON (E.), *op cit*.

framework, forces the big stakeholders of the electoral assistance to a more comprehensive strategy. The adoption of this strategy explains the passage from a notion of« ***assistance to elections*** » to a notion of « ***electoral assistance*** » which not only aims at elections as a one event but also takes into account the entire electoral cycle i.e. all the mechanisms falling under its organization and conduct. Indeed, the main objective of international electoral assistance is to equip the countries in democratic transition with the institutional capacity to organize in the end their different elections in a genuine and periodic manner without external support. This approach aims at creating the necessary legal and political conditions for instituting confidence and consolidating national peace and stability. Democratic electoral consultations are a means for peaceful settlement of the competition for power and are essential for maintaining peace and stability in a country. To be free, participation in elections must take place in a climate characterized by absence of intimidation and by respect of fundamental human rights. Holding elections in situations of crisis or post-conflict needs assistance and the presence of international observers to guarantee transparency and credibility of the electoral process and ensure a peaceful transition.

To achieve these two objectives of sustainable peace and development of democracy, the recognition of the notions such as 'efficiency', 'sustainability' and 'capacity building' as the way to follow in the field of electoral assistance[495], was proclaimed by development agencies i.e. by big international stakeholders in electoral assistance (United Nations, European Union, International IDEA, NDI, IFES, OIF, Commonwealth etc.).

The extent of electoral assistance is in line with the type and level of elections. Most of electoral assistance missions provided by UNO in normal situations, in the absence of crisis, are mainly done through UNDP. This is why Democratic Republic of Congo which regularly receives joint assistance from the United Nations Mission in Congo (UNOMC) and UNDP which takes into account not only the electoral event but also and especially the electoral cycle within the framework of Support Project for electoral cycle (SPEC), so as to enhance the electoral system and support the organization future elections so as to guarantee sustainability of the electoral system. It is the case for MINUL which had assumed a similar role during the presidential elections in Liberia in 2005.

From the economic point of view, the situation in Benin is an illustration. Benin a West African country with limited financial resources thus finds herself in a constrained situation as pertains to resorting to external funding. Indeed over a period of sixteen years of democratic practice (1990 to 2013), the number of elections organized by Benin is about a dozen with costs which differ from one year to another. The constant is that these elections are as costly as any other as can be noted in the Table below.

[495] See in this regard: Practical Guides of UNDP on assistance and electoral processes in 2001 and 2004 and the Communication 191/2000 of the EC on assistance and election observation missions of the EU.

Elections	Total amount spent in FCFA	Percentage of the national budget
Presidential 1996	3 192 538 322	1.2%
Legislatives 1999	4 449 827 175	1. 13%
Presidential 2001	9 704 371 515	2 .39%
Communales 2002	9 700 568 800	2.03%
Legislatives 2003	6 668 061 636	1.5%
Presidential 2006	11 541 415 178	……
Presidentielles & legislatives 2011	8 858 778 250	……

Source: *Communication of Mr. Isidore TOSSOU on the theme: « Funding of the electoral process in Benin », Cotonou, Palais des congrès, 19 September 2006, Page 6.*

A simple reading of this table shows incongruity in threefold.

First it is true that elections are becoming increasingly costly, in the Sub-region the situation in Benin is much more special. Indeed the increase in costs in Burkina Faso for example, which is geographically bigger and with a population higher than that of Benin shows that the average cost of elections is 7 Billion in Benin against 2 Billion in Burkina Faso[496].

Then, the insufficiency of funds allocated by the state for elections is linked on the one hand to lack of resources and on the other hand, to lack of policy for budgetary estimates for elections. Concentrating on the electoral year all the cost of an election is an error to correct. This is what explains the strong assistance from partners. Indeed, Benin has always received international assistance for elections. But the last elections of 2006 and 2011 were marked by increased involvement of partners. If there were involvement of donors these elections would have been seriously mortgaged and, this is the reason for the importance of electoral assistance for Benin, at least for now, and surely for a good part in future. This is why for the 2006 elections, contribution of different partners in F CFA was as follows: European Commission: 3 279 785 000; Netherlands: 655 957 000; Belgium: 327 978 500; United States of America: 181 207970; UNDP: 162 546 000. For the last elections of 2011, the same partners in addition to Denmark and excluding the United States of America, contributed to the budget of CENA for an amount of about Four Billion of F CFA (4. 000.000.000F CFA).

Lastly, the specificity of 2011 appears to be in sharp contrast with the norm from the point of view funding the previous elections. Indeed, after organizing the 2006 elections with more than 11 Billion, the same CENA was able to organize two elections (presidential and legislative) at less than nine Billion in 2011. This presentation of the report can appear shortened, at least under some analysis. At the beginning the budget of CENA for the same elections was estimated at more than thirteen Billion. Moreover, operations related to these elections experienced more unexpected events than others, as witnessed by the ill-timed interventions by the Resident Representative of UNDP. On the other hand, it pertains to a misleading drop if we know that the budget of different institutions of the State among

[496] Isidore TOSSOU, Funding of the electoral process in Benin, Communication, Cotonou, Palais des congrès, 19 septembre 2006, Page 6.

the Constitutional Court, Ministry of Interior, that of the national defense…experienced a net increase. Just a figure for illustration: the budget of the Constitutional Court is about 12 billion F CFA for the 2011 elections against about two billion F CFA for the previous elections.

There is need to note that electoral assistance is not only financial, but also material and technical. Thus, for the 2006 elections in Benin, Germany and Denmark having not taken part in the common basket, brought their contribution in kind by taking care of a good part of the necessary materials thorough supply of photocopiers, photocopying paper, computers, printers, seals, transparent ballot boxes, indelible ink, [497] . In total, international assistance to this election is about 37% of its budget.

Within the framework of presidential and legislative elections of 2011, UNDP and European Union assisted Benin financially, technically and materially in the coming up with LEPI (Permanent Electronic Voter Register)[498]. Except for noting that the conduct of the assistance by donors seemed to undergo pressure from the authorities in place to a point of leading a LEPI almost useless and subjected to almost inevitable repeat. Which poses the problem of reliability of different missions in the matter?

B- An objectively reliable acceptance

In Benin like in most African countries, the reliability of electoral assistance and international observation missions offered by the United Nations, European Union, African Union, ECOWAS and other international organizations can already be noticed through the increasingly pronounced need for organization of elections. But this reliability does not always go along with efficiency. Loss of trust in different structures entrusted with the responsibility of organizing elections remains obvious and protests are common occurrence. Political parties and their candidates declared losers after elections almost never concede defeat. Faced with this state of affairs, how can we affirm that electoral observation and assistance achieve their objectives? Is there need to rethink on the methods of electoral observation and assistance which are not without involvement on even the soul of the State? We therefore need not a relative **(1)** but perfect **(2)** reliability.

1- A relative reliability

International observations of elections have become an important mechanism for ensuring electoral integrity in countries in transition towards democracy or countries in post-conflict situation. Today it enjoys almost universal acceptance and contributes to raising confidence of the voters and assess the legitimacy of an electoral process and its results[499]. Resorting to international observation usually arises from concerns relating to the freedom and fairness of an election. International observation cannot detect and discourage in an efficient manner problems of integrity that if it is adapted to the type of electoral system and to the elections in question. But results arising from this operation are not those always expected from such an option, and it is its reliability which takes a beating.

Majority of the international observers intervene on invitation. In these conditions one would wonder if an electoral process must respect the basic criteria of a free and fair election

[497] Evaluation Report of the electoral process of the Presidential election of March 2006 in Benin.
[498] Evaluation Report of the electoral process of March-April 2011 in Benin.
[499] Institut international pour la démocratie et l'assistance électorale (IDEA), *The future of International Electoral Observation: Lessons Learned and Recommendations*, 1999.

to deserve to be observed by experts of an international organization. Some organizations believe that a country must be in conformity with some basic criteria before they decide to send an international observation mission. It is the position which is founded on the fear that international observation can be perceived as granting some legitimacy to an illegitimate election. But, on the other hand, countries whose electoral process cannot meet the basic requirements would also be in need of international observation to help them discover illegal and dishonest practices, and therefore try to improve. This is to say that the presence of international observation of elections does not mean in all cases the election is perfect.

However, the conditions necessary for a reliable international observation of elections are contained both in international[500] and in national[501] instruments. Through these various instruments, one can note that in order to supervise in an efficient manner the integrity of an election, international observation should target the entire electoral process and not only a specific aspect like voting or counting of the votes. The observers should be qualified and adequately trained. Because, one of the main complaints made in terms of international observation is that it has become an occasion of doing ''electoral tourism''. Observers are sometimes perceived as being without professional experience and only arrive in the country a few days before the election date.

In order to ensure efficiency and reliability of observation missions, several other conditions are provided in the *Practical Guide for an elections observer* of Benin. Observation missions should have sufficient time to organize themselves and to observe the stages which precede the elections (like registration of candidates and registration of voters) as well as those which follow the voting itself (such as vote counting, vote tallying as well as application of the electoral law in matter). The observers should observe the electoral process in the most complete manner so as to be to give a credible judgment. Large scale verifications which cover the entire electoral process, which have a national scope, rather than regional and which cover all the areas rather than only the problematic areas are the most efficient. International observers must be accredited in time by organs in charge of management of elections and bodies for development of electoral policies so as to have access to electoral sites and carry out a credible observation. It should be noted that selective accreditation or lack of accreditation raises questions of integrity.

Despite all these expectations, we are witnessing what we can call international complicity in the final assessment of the voting operations done by observers often followed in their final declaration by the international community. Indeed, bad practices like ballot stuffing, pressures and violence exercised on the voters and other massaging of results have previously been analyzed as minor acts which do not affect in any way the credibility of the results of the election regardless of what they are. Looking at it closely, it is like the international community would not certainly want to take note of the inefficiency of its investments within the framework of its assistance. Similarly, observers sent by the civil society are afraid, for their lives for fear of meeting the wrath of a power for whom loosing the elections would be inconceivable. On the other hand, there is need to note that to regret the absence, through the national codes, requirement for publication of the observations and remarks of different missions as well as available them in the perspective of improving future electoral processes. We can also regret lack of coordination between different missions present through contradictory reports as was the case in the elections of 21st June 1998 in

[500] See Manual of EU Election Observation, 2nd edition, European Commission, Belgium, 2008.

[501] *In Benin it pertains to« Practical Guide for election observer ", in Togo, the" Guide for observation of elections in Togo ", in other countries, it is a" Code concerning election observation "or" Declaration on election Observation*

Togo[502] ; it pertained to the contradiction between observers of the European Union which denounced the «massaging of results » and those of the OAU –Francophone mission which only made a neutral call for social peace[503].

Concerning electoral assistance during the 2006 presidential elections and especially those of 2011, are we not very often in situations of '*too much assistance too late*''? The question comes to knowing how to make electoral assistance efficient beyond technical assistance to the electoral event. The analysis here consists to indicating clearly to the stake holders (Governments and other political stakeholders) and to agencies representing international organizations (UN, EU, AU, ECOWAS, etc.) who are not always aware of the real situation, or which feigns not to be aware, that when their contributions only serve "makeshift solutions" without tackling structural problems, they give a lot of quick assistance. The case of Benin in 2011 with LEPI, as abovementioned, never ended and was almost impractical is a typical example of '*too much assistance too late*''. Since in this particular case, it was visible and real that the assistance was meant for the event ''*2011 elections in Benin* and not the electoral cycle in Benin in its entirety. In these conditions, the efficiency of the electoral assistance took a big beating. What do we do?

2- A perfect reliability

Despite an appropriate legal framework serving as the basis of international observation of elections and electoral assistance, the elections results in African countries are in particular not accepted by the candidates declared losers. This state of affairs means that the political will, legal instruments, institutional mechanisms and support given are not enough. A more responsible attitude from different stakeholders is the guarantee for enhancement of the electoral processes on the African continent. Such an attitude should be translated among others by conducting genuine elections and acceptance by the stakeholders, with the necessary ''fair play'', of the results arising therefrom, as soon as their credibility and authenticity will have been established.

Moreover, what is brought by a system of electoral assistance as has been described above necessarily leads to a series of extremely delicate and complex interactions between Elections management organs , international organizations offering their assistance, multilateral and bilateral development agencies, governments of development partners, OSC, political parties and suppliers. The delicate character of this operation, inherent to this series of relationships, requires acquisition specific skills which are largely beyond the framework a simple technical opinion. An "*Efficient electoral assistance*'' in effect means any initiative and any activity meant to improve the quality and influence of electoral assistance to institutions of partner countries. In this case, electoral assistance falls under a bigger democratic development, in conformity with five key principles: "*appropriation, alignment, harmonization, results, mutual responsibility*" adopted by Paris Declaration on efficiency of the assistance.

For the electoral assistance to be efficient, it is therefore recommended that the assistance system goes through an important and often neglected step which consists of inviting the stakeholders to define the needs before and after the electoral events. It is desirable that

[502] Dodzi KOKOROKO, Eléments communs des Codes nationaux de l'observation électorale et mise en perspective avec les Codes de l'UA et la déclaration de l'UNEAD du 7 juillet 2005, In Démocratie et élections dans l'espace francophone, Bruylant, Bruxelles, 2010, pp. 574-584.

[503] Observation Mission Report OAU-OIF.

there is a deep consultation procedure and a wide consensus between all the stakeholders (including governments, political parties of the majority like the opposition, media, civil society organizations, activists in democratic governance, university students and focus groups) acting within legal, political frameworks and within the electoral systems and corresponding activities. This precaution shall enhance the commitment and the availability of stakeholders, acting in the political and electoral field, before and after the electoral event. Thus, organizations which offer their support shall assume the responsibility of ensuring that the objectives of the electoral assistance programs have long-term objectives falling under a strategy democratization of the countries concerned.

CONCLUSION

International observation and electoral assistance are two institutions which are legally supervised at the international level through periodically updated manuals and codes. But it should be noted that those governing them inside African countries in general and Benin in particular are almost non-existent and have been reduced to simple guides of four or five pages developed by the organ in charge of organizing elections. The practice of these two institutions, which were in the past used as a source of legitimizing dictatorial regimes in Africa, leads to distorted results in Benin. This is demonstrated by several challenges faced when violent protests always arise after elections (in Kenya, in Côte d'Ivoire, in Gabon, and very recently in Benin) which were however observed by foreign institutions. These situation shows that framework put in place by the leaders remain insufficient to face political and technical difficulties which hinder the proper conduct of electoral processes in Africa in general and in Benin in particular, although cases have been recorded.

Varied experience of different countries shows that it is neither easy nor fast to build democracy. Development of electoral assistance and international observation of elections cannot itself alone guarantee the genuineness of elections. Each one knows that free, genuine and regular elections above all rests on political consensus, enabling at the same time organizing the elections and accepting in advance the results regardless of what they will have been.

We can already consider that, better be the enemy of good, the existence of international electoral observation and assistance constitute a progress, otherwise a progress which is for good irreversible to the detriment of immoral satisfaction of politicians, who, after all, are seeking for legitimacy.

The processes are to be enhanced for consolidation of democracy and good governance.

The role of observation missions is certainly subject to caution. Moreover, we can allow ourselves to talk of ''*assistance to elections*'' instead of '' an electoral assistance''; of '' *too much assistance too late*'' rather than ''support to electoral cycle'' for a long-term enhancement of the electoral processes. The most recent case of the presidential elections of 2011 in Benin is an illustration of this situation, with an assistance to election instead and in place of electoral assistance on the basis of funding for coming up with, a few days before the election day, a permanent electronic voter register, and this, on the basis of a suggestion made by the ruling party[504]. What do we suggest? If it is not patriotism, the truth!

[504] Note that even a year after those elections, the permanent electronic voters list is always subject of_ correction amid controversy and intense debate in Parliament.

STAKEHOLDERS OF THE ELECTORAL PROCESS IN BENIN

By **Miss Caludia TOGBE YEWADAN***

INTRODUCTION

The democratic renewal that started at the beginning of 1990s in Africa undoubtedly led to a renewal of institutions. This renewal of original institutions was almost general in countries where it had been observed[505]. The voluntary attitude of the stakeholders, but also confrontation of ideas and sometimes between different political forces was the Trojan horse for these democratic skills. This aggregate of elements was enough for the creation of elections management organs, ultimate guarantors for phasing out the presidential power option and institutions which had for long been « prejudicial to the functional and organic separation of powers[506] ».

Two decades later, the electoral democratic practices certainly call for an assessment, especially bearing in mind several changes which have taken place since then. This appears to be particularly necessary given the pessimism of several authors on the capacity of African States to manage electoral democracy which remained obvious for long. According to Stéphane Bolle for example, « It is widely known (…) that there are questions on elections in societies where illiteracy and poverty are rampant ; that organization of multiparty elections appears like an illusion, everywhere democratic change-over is compromised and by manipulation of legislations, and through massive frauds, and when an election is contested is the occasion for widespread legal and political protests, when it does not provoke violence, when it does not degenerate into a civil war[507] ».

In the same breathe, René Otayek, thinking along the same lines asks « are elections in Africa a relevant scientific object?» indicates that « the task appears arduous since « ordinary » representation of Africa continue to carry a long the same xenophobia hints which were there twenty or thirty years ago; they would by definition be rigged, fraudulent, ethnicised and especially, would not constitute a mechanism change of elites via authentic political change-overs »[508].

However, both the quality and quantity of studies and books on the institutions and African political and public stakeholders and Benin in particular are enough to slow down this impetus, this assessment on the electoral process stakeholders. The jurisprudence of the constitutional court of Benin, just like the productions of the National Assembly or even

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505 In Benin it concerns constitutional institutions, regulation of media, parliament, etc.

506 **Kokoroko (K. D.)**, L'apport de la jurisprudence constitutionnelle africaine à la consolidation des acquis démocratiques, les cas du Bénin, du Mali, du Sénégal et du Togo, in Revue Béninoise des Sciences Juridiques et Administratives (RBSJA), n°18, juin 2007, p. 97.

507 **Bolle (S.)**, Les juridictions constitutionnelles africaines et les crises électorales, Association des Cours Constitutionnelles ayant en Partage l'Usage du Français, 5ème Congrès de Cotonou, 22-28 juin 2009, p.13.

508 **Otayek (R.)**, Les élections en Afrique sont-elles un objet scientifique pertinent? Politique africaine, n°69, mars 1998, .p.9.

the functioning of National Independent Electoral Commission (*Commission Electorale Nationale Autonome* (CENA), have been at almost all stages supervised, monitored, analysed, encouraged and criticized, sometimes harshly[509]. Besides, when there were more negative assessment reports than positive ones, many wished for the killing of the democratic system of Benin, alluding to supposing just an incompatibility with the endogenous realities[510].

Nevertheless there is need to note that contrary to other contexts, it is not the institutions of Benin which are necessarily the origin of these drifts. Certainly, lack of independence for some of these institutions is one of the causes[511]. But the said institutions are not necessarily the only ones to be subjected to a deep crisis, even more so the system. Errors made by the stakeholders can sometimes be due to lack of understanding of the legislations, inability of the individual himself, or simply due to personal or group logics[512]. For sociologists there are for instance power logics which in strict sense do not fall within the jurisdiction of public authority. And when the actions taken in this case, thanks to this scope of action of the player taken individually, are prejudicial to the system and are not reprimanded as much, there will always be, despite the improvement in the operations of the institutions, failures in the system. The role of the stakeholders in the electoral process is therefore both delicate and determinant. It is almost obvious that all the ways of analysing the phenomenon have certainly not been explored.

Etymology of the word « actor » is linked to Latin word « actor » which means « the one who makes things move forward »[513]. But also means « player » and it is the definition which will be retained here as, «a person, a group, an organization or an institution »[514]. Outside the player taken in strict sense, sociologists allude to systems of stakeholders, which are constituted in groups, have strategies and logics which condition their actions[515].
Concerning the « electoral process », it can be considered as being « a process of selecting political representatives by and in a given community[516]. Alluding to electoral process stakeholders refers to different people, in an institution, in group or in networks, who intervene in the mechanism leading to choosing people through a political election[517].

The question which arises here is that of knowing if it is not rather the stakeholders who remained a bit disconnected with the institutions they themselves created, on their own,

[509] **Ahadzi-Nonou (K.),** « Les nouvelles tendances du constitutionnalisme africain : cas des Etats d'Afrique noire francophone », in La Revue du CERDIP, vol.1, n°2, juillet-décembre 2002, p.40 ; **Kpodar (A.),** « Réflexions sur la justice constitutionnelle à travers le contrôle de constitutionnalité de la loi dans le nouveau constitutionnalisme : les cas du Bénin, du Mali, du Sénégal et du Togo », in R.B.S.J.A, n°16, 2006, p.118 ; **Atangana Amougou (J.L.)**, « Les révisions constitutionnelles dans le nouveau constitutionnalisme africain », in Politeia, n°7, printemps 2005, p.588 ; **Kokoroko (K. D.)**, sur L'apport de la jurisprudence constitutionnelle africaine à la consolidation des acquis démocratiques, op.cit, passim;

[510] **Kokoroko (K. D.)**, L'apport de la jurisprudence constitutionnelle africaine à la consolidation des acquis démocratiques, op.cit, p. 91.

[511] Idem.

[512] To better understand some of the choices, sociology offers for example to analyze social representations that influence the logic of action of these stakeholders and which can be caused by affiliation to an institution, , company or to various networks.

[513] In a broad sense, the word in relation to on an agent, the person who is actively involved in a case, a political event, or an adventure.

[514] Centre d'Études sur les réseaux, les transports, l'urbanisme et les constructions publiques (CERTU), L'analyse des systèmes d'acteurs, Cahier n°1, diagnostics de territoires, Lyon, 2001, p. 6.

[515] The analysis of the collective action of a group of stakeholders can be, for example for the sociologist, an opportunity to make a sociogram, which is a schematic representation of power relations between individuals in this group.

[516] Fondation Friedrich-Naumann, Le contrôle électoral et les systèmes électoraux – Un guide sommaire -, Bruxelles, 1994, P. 3 ; voir aussi sur le processus électoral, **Perrineau (P.) et Reynie (D.)**, (Dir.), Dictionnaire du Vote, Paris, PUF, 2001, P. 348.

[517] Unlike sociologists, political scientists refer to the notion of "networks" to explain the logic of the stakeholders in their environment. This idea comes from the observation that a stakeholder does not act in isolation but in a complex tissue interactions with other stakeholders.

or by the phenomenon circularity of ideas[518]. As constructors, members and guarantors of democratic principles, Beninese stakeholders remarkably participated in the maintenance of democratic skills. This is may otherwise be one of the reasons for which they were able to avoid up to day deep and destructive political crisis. Nevertheless, the same stakeholders also, voluntarily or not, engaged in deconstruction actions, even destruction of these skills, for various reasons and in different ways.

The practice of electoral democracy by Benin seems to be a rough test for consistence and stability of democratic institutions and even for the stakeholders. Whether it pertains to the pre-electoral, electoral and post-electoral stage, there is Benin positive law, a distinction of skills, but also a real overlapping of roles of different stakeholders. This overlapping of roles and skills, in some cases, was prejudicial to the electoral processes and remain in a certain way a threat[519].

The main objective of this study is to do an inventory of the presence and action of stakeholders in the electoral process in Benin. The diversity of these stakeholders is observed at all levels of organization of an election, both within state institutions and within non-state institutions. The increased awakening of civil society, besides government institutions is not without interest in view of their role. The multifaceted presence of external stakeholders is also not ordinary.

To guide this thinking, institutional approach would have been privileged. It would have enabled emphasis on a descriptive option of the nature of the stakeholders, their qualities and their functions in the electoral system. However, it is the organizational approach of the process which is chosen, with a view to putting a particular emphasis on the successes and especially on some limits of the Beninese system. It will somehow remain in competition with the ideological approach.

Electoral process in Benin highlighted since the first multiparty elections, original stakeholders, which we can also find in most first electoral systems of the world (I). But the phases which are mostly keeping the electoral observers in place, may wrongly, be those during which the regularity and genuineness of elections are monitored. With a view of improving the organization of the same, other stakeholders were instituted; which are part of the specific character of the electoral system of Benin (II).

I- Inherent stakeholders

It essentially pertains to invariable stakeholders, since the institution of the democratic process in Benin. The electoral cycle is thus governed by a plurality of organs which could easily be qualified as primary organs of the electoral cycle. It pertains to the legislature on the one hand, who is the determinant player in coming up with legislations governing the electoral process, the electoral court the guarantor of the regularity and genuineness of the election, the executive, responsible, among other things, for security of the elections. On the other hand, we find other types of stakeholders who can be considered as being the protagonists of the election.

[518] We voluntarily refuse here to mention the idea of mimicry as compared to the west.

[519] This was induced either by silence, lack of clarity of the constituent assembly or electoral laws, or by misunderstanding or elusiveness of texts by electoral stakeholders.

A- Invariant organs of electoral cycles

The development and reorganization of electoral standards in priority fall under the responsibility of the legislature. Contrary to other legal systems, the field covered by the Legislature of Benin is somehow wide. In many ways, the legislature of Benin was able to distinguish itself by the originality of its production. In terms of Articles 79, 81 and 98, the National Assembly of Benin is the organ in charge of legislation in general and electoral laws in particular[520]. The General Assembly therefore exercises in matters of enactment of legal standards, full powers.

But the legislative function is not the prerogative of the legislature only[521]. This implied that electoral standards are part of the block of rules which can also originate from a bill from the Government. At this level, a question arises on the impartiality of the originators of the law and the significance of general interest on the one subjective to people of groups of people having the prerogative of enacting an electoral legislation. For example, one of the aspects of the electoral field which is rarely a subject of protests, at least not like other issues as the voter register, remains delimitation of electoral constituencies, done by the national Assembly[522].

The stakeholder to be praised most in this particular case will remain the Beninese Constituent member, who incorporated this function among the duties of the legislature, by not omitting its function from control by itself, allowing a more consensual participation of different political forces, contrary to the cases in other countries like Guinea and Côte d'Ivoire[523]. Indeed, In Guinea, the responsibility of electoral boundaries delimitation falls under the Minister for Territorial Administration. In Côte d'Ivoire, it is for the Independent Electoral Commission to propose delimitation electoral areas. But in reality, the decision for constituency delimitation belongs to the Ivorian Government which is almost exclusive ultimate decision maker on the matter[524]. Moreover, there is still no restrictive legal basis concerning delimitation of constituencies in Côte d'Ivoire[525].

The legislature and the executive are nevertheless the only ones to be promoters of the electoral law in Benin. There is another type unsuspected stakeholders, who also intervene at this stage of electoral cycle. In this particular case it pertains to Technical and Financial

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[520] **Article 79** provides: « Parliament consists of a single Assembly called National Assembly whose members are called deputies. It exercises legislative power. "Article 81 itself states that "the law sets the number of members of the National Assembly." However, the author of the law is none other than the legislator. Article 98 itself states: "are the domain of law rules regarding: citizenship, civic rights and the fundamental guarantees granted to citizens for the exercise of civil liberties, (...) the electoral system of the President of the Republic, members of the National Assembly and Local Assemblies, (...) the general organization of the administration, territorial organization, the creation and modification for administrative as well as electoral divisions' ».

[521] Article 105 of the Basic Law of Benin enacts that "the legislative initiative belongs jointly to the President of the Republic and to the members of the National Assembly».

[522] Indeed, the wording of Article 98 provides that "are in the field of law rules relating to: (...) the territorial organization, creation and modification for administrative divisions as well as electoral constituencies."».

[523] The electoral redistribution made by the Council of Ministers of 28 September 2011 initiated the creation of thirty (30) electoral districts in addition to those that existed, 21 of which were created in the north of the country or in the region of origin of President Ouattara and this shows how the mix can be made between actions without intent to defraud (where appropriate) by the executive and those carried out deliberately to promote the perpetrator of the action. It is therefore more difficult to distinguish fraud from error in such circumstances. In Bernard Owen, Les fraudes électorales, Le Seuil, Pouvoirs, n° 120, 2007, pages 133 à 147.

[524] Whatever the proposal from the Election Commission, the President of the Republic of Côte d'Ivoire has no obligation to make it public. It is therefore not possible to objectively assess the extent of changes made by the government in relation to the types of delimitation proposed by the Commission.

[525] Unlike the situation in the United Kingdom. Indeed, "Boundary Commissioners" have an obligation to define the boundaries, according to well determined criteria by the electoral standards.

Partners (PTF) who have supported African countries in their approach for democratization, since the elections of the first generation[526]. These partners proposed, as they were giving assistance, solutions with a view to improving the legislative framework of elections in Benin[527]. This is the case for recommendations relating to an adaptation of the legal texts, so as to cure the malfunctions noted during the presidential election of 2001 for example[528], concerning the time limits for appeals[529]. There is also need to note that these are the recommendations among others from international missions which enabled the adoption of the Permanent Electronic Voter Register (LEPI)[530].

All this does not also exclude infringements done sometimes to the democratic principles and which have proven prejudicial to the electoral democracy in Benin. Violations of democratic principles under discussion are of two levels. The first is due to the silence of the legislature or to its own will and the second due to non-application of the laws enacted.

Concerning the limits of the Beninese electoral process due to the responsibility of the legislature, there is for instance display of posters as propaganda means, which is not codified by the Beninese legislator. This lack of legislation due to the silence of the legislature therefore leaves room for drifts among supporters, candidates and political parties. However, in France, this aspect of electoral propaganda is rigorously regulated by the electoral code, through Article L.51. It is expressly prohibited to display campaign posters outside the position reserved for different candidates, similarly « beyond billboards of free expression when there is one in existence ». The sanction provided for contravening this provision by the French legislature can go up to cancellation of the election, in case of irregular and massive display of campaign posters.

There is also the problem of instability of the laws, raised several times by the civil society like PTF. The Beninese legislature adopted since 1990, a plurality of laws relating to elections, without being able to insert them in an electoral code. Quite often, the standards enacted are like this for the special case of election in sight, leaving fear for the superiority of personal interest of restrained groups, over general interest[531].

Then finally, there are cases where the Beninese legislator, just like other Africans, is the cause, in a deliberate manner, of laws which form what Gilles Badet calls « a legislation of electoral war» and, « discriminatory provisions »[532].

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[526] There could also be behind the government bills or proposals of the National Assembly, shadowy stakeholders as there was in Senegal, with European constitutional experts who were corroborating the sprains introduced by the Government of Wade to the electoral standards, so that he can seek reelection in the presidential election, despite his age. There was also the case in Chad, Idriss Deby who made use of French "experts" in the elections, with the implicit mission of making Deby win at all costs, including through the use of deceit, manipulation, or use "laws of election war n ». In **Bangui-Rombaye (A.)**, *Tchad : Elections sous contrôle*, l'Harmattan, Paris, 1999, p. 8.

[527] The same behavior is observed in other African countries. This is why the European Union, which proposed in Togo, after the presidential election in March 2010, to revise the electoral code, improve the electoral register, conduct administrative review of electoral boundaries. Other more technical measures were proposed to improve the organization of the next elections.

[528] Report of the observation mission of the International Organisation of the Francophone for first and second rounds of the presidential election in March 2001.

[529] It is the same concerning the financing by public capital, elections in Benin, or regarding the permanence of the electoral management body, just as the absence of an electoral code.

[530] Report of the observation mission of the International Organization of the Francophone in the legislative elections of March 30, 2003 in Benin.

[531] **Badet (G.)**, « Election codes tested on management of electoral disputes, "Communication at the Regional Seminar on" Application of electoral codes in West Africa: Lessons Learned, Challenges and Prospects ", Cotonou from 20 to 21 February 2012, p. 6.

[532] There, among other Ivorian case, the concept of the "ivoirité". The aim of the authors of this initiative (the Constitution of 1 August 2000, Article 35) to exclude from the race for the presidential election, a specific class or rather a targeted

There are in other instances, obstacles to the role of the legislature. It pertains indeed to aspects of the electoral process which are codified, but whose implementation remains hollow. It is the case for the existence of laws for regulating display of electoral lists. However, during the last elections organized on the basis of electronic electoral file, the problem of displaying the list remained a reality.

There is need to state that the work of the National Assembly is done in line with a doubly controlled legislative mechanism: positive for one, negative for the other. The two types of control occur before promulgation of the law and therefore upstream to its application. It pertains in the first place to the control of the constitutional court and in the second place, the hidden tight grip of the executive on Parliament.

The control of government stakeholders is generally done thanks to the parliamentary majority acquired in the National Assembly. And one of the most disastrous consequences which can arise from it is the manipulation of electoral legislation and obviously the entire process which can get falsified.

The procedural itinerary of parliamentary bills is certainly controlled « Bills are deliberated upon by Council of Ministers, after a reasoned opinion by the Supreme Court seized in conformity with Article 131 of this Constitution and deposited in the Office of the National Assembly »[533]. On the other hand, the implementation of the power conferred to the National Assembly can pose a real legal problem. This is not necessarily observed in Benin, thanks to the vigilance of the Constitutional Court, but in several African countries and even beyond. Indeed the risk relating to this postulate is linked to the parliamentary majority held by one political party, in this particular case the ruling party, or by a coalition of parties. It is strongly easy from this moment, for the majority to impose their views. Referring to this form of vice in the electoral system, El Hadj Mbodj talks of « infiltration of the entire chain of the electoral process by the government and territorial divisions »[534].

The sovereignty exercised since then by parliament can stop from being a national sovereignty, that of general interest, to become a « sovereignty of parliamentary majority », free to think and put in place a legislation of electoral war, as is the case in several African countries[535]. Indeed for many, election would not necessarily be won at the ballot, but rather by controlling electoral legislation by one or the other camp.

One of the direct consequences of these drifts represent the elimination of competitors immediately after developing the standards, whether originating from the legislature , or from the constituent[536]. This is the case in Article 44 of the Constitution of Benin, which

candidate. The same is true of recent case in Senegal, where Wade tried to amend the legislation in order to seek reelection, in spite of the age limit imposed by the electoral laws Stéphane Bolle African constitutional courts and electoral crises, Communication to the 5th Congress of the Association of Constitutional Courts using the French Language, Cotonou, from 22 to 28 June 2009, p. 6; Badet (G.), "The electoral code tested on management of electoral disputes," op. cit..

533 This, in terms of Article 105 of the Constitution of Benin of 11December 1990.

534 **El Hadj Mbodj** fait sens à plus d'un titre dans son **article «** Faut-il avoir peur de l'indépendance des institutions électorales en Afrique ? », p. 2.

535 Cours de systèmes électoraux et partisans du professeur Mengue, Chaire Unesco des Droits de la Personne Humaine et de la Démocratie 27 février 2012.

536 According to Congolese President Pascal Lissouba on his experience, "we do not organize elections to lose"; in Holo (T.), Beninese Journal on Legal and Administrative Sciences, No. 17, p. 32. The situation is particularly worrying in the case of frequent changes of the constitutional norm. Thus, it is easy for the constituent assembly to flow into a personalized legal mould, standards in line with its own interests. It is thus a question of "legislate to do the election," in Stéphane Bolle African constitutional courts and electoral crises, op. cit., p. 5.

establishes the condition of eligibility to the position of the President of the Republic and which has mostly led to the elimination of candidates and therefore it is of jurisprudential interest[537].

Nevertheless, the presence and supervision carried out by the constitutional court, for purposes of controlling the constitutionality of laws somehow intervenes as a guarantee against this all powerful parliament[538]. It thus intervenes as "inter-power "[539], exercising a specific supervisory power and « *in situ* », on legislative and executive authorities. Still there is need to have the guarantee that the constitutional judge himself, is really independent and not manipulated by the ruling party[540].

B- Protagonists of the election

« Protagonists of the election », refers mainly to people who primarily take part on the election day. It pertains in this particular case the candidates for various posts in the election and the voters.

In African countries, the former generally face, obstacles targeted on issues pertaining to eligibility. In Benin, it once pertained to President Nicéphore Soglo and President Boni Yayi[541]. The reaction of the constitutional guarantee was in the two cases strong and favorable to possible hints of manipulation of the said provisions, in view of the precedents created by the Court[542].

Women candidates have also faced a lot of difficulties. It does not pertain to being barred here, but historic discrimination related to the position of women in African societies. In order to improve their participation in exercise of power, two methods are generally used[543]. That of

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[537] « No person may be a candidate for President of the Republic if he is not: - a Beninese nationality from birth or for at least ten years (...)."The Beninese legislator on the basis of this provision, attempted to exclude candidates in a presidential election, namely Nicephore Soglo, who had already been president in 1996, Yayi Boni, during the presidential election in 2006. Before the Constitutional Court allowed these attempts do not succeed and thus safeguard the electoral process, in contrast to the situation in Côte d'Ivoire, where the concept of ivoirité was one of the factors triggering the crisis. See Badet (G.) The electoral code tested on management of electoral disputes, op. cit.

[538] The Constitution of Benin enshrines this principle in Article 114 which states: "The Constitutional Court is the highest court of the State in constitutional matters. It judges the constitutionality of the law».

[539] In the words of Kasim BEGIC, former President of the Constitutional Court of Bosnia and Herzegovina, in the Books of the Constitutional Council No. 11 (File: Bosnia and Herzegovina), December 2001.

[540] The judgment of the Ivorian Supreme Court of 6 October 2000 to this effect is significant. Lack of jurisdiction for the judge may be a limit to its power control, as it was the case in Central Africa in 2004, or in the E-002/03 decision of 6 May 2003 through which the court upheld the dismissal of the candidacy of Mr. Gilchrist Olympio. In Kessougbo (K.) The Constitutional Court and the regulation of democracy in Togo, RBSJA, No. 15, 2005, pp.70-72.

[541] Regarding President Nicephore Soglo in 1995, the Beninese Parliament adopted the Law No. 95-015 concerning specific rules for the election of the President of the Republic, Article 5 provided: " if a citizen has several nationalities, it is required when filing his candidacy for the office of President of the Republic, to officially renounce any other nationality other than that of Benin and provide proof by for record in all official documents that can be faith." At the initiative of two deputies, however, seizing the Constitutional Court, the Court declares unconstitutional the article on the grounds that the terms create an additional condition regarding nationality for the election of the first magistrate of the country, going far beyond the intention of the legislator .As for the case of President Boni Yayi , the appearance of electoral laws dispute was on his residence while he was a candidate in 2006 for the presidency. DCC May 69 to 25 and 26 July 2005.

[542] Benin's Constitutional Court is the highest court of the State in constitutional matters. It judges the constitutionality of the law and guarantees the fundamental rights of the individual and public freedoms (Article 114 of the Constitution). It also ensures, and among other things, the management of electoral disputes in accordance with Title VIII of the 2010-33 Law of January 7, 2011..

[543] In Uganda, women's representation in politics has improved by 13%, thanks to the 1995 Constitution, which expressly reserves a seat for women in each district. In India, the law also requires a 33% quota of seats reserved for women in municipal councils. In France in 1999, equality between men and women in elections requires that 50% of the candidates be women. Parties that do not comply with this provision are financially penalized.

promoting of equality in all institutions done through lobbying and quota methods[544]. The Beninese legislature, just like its Italian counterpart, thus attempted to initiate the principle of « rose quotas »[545]. The Beninese court for the constitutionality of the laws nevertheless was more sensible to the principle of formal equality between men and women[546]. The objective was certainly to avoid as well « reverse discrimination », a phenomenon which arose in mid-1990s in California from « positive discrimination », or even from « affirmative action », as formulated by Professor Michel Rosenfeld[547]. However, the contrary would have enabled to correct the obvious absence of women on the political scene in Benin.

We need all the same to note that it would be somehow rushed to consider as negative this position of the judge. Indeed, outside the fact that a reverse discrimination would in the end infringe on the principle of equity, it is admitted that, through the prism of a legal-political analysis, that the imposition of this kind of postulates would lead to collateral effects within the political parties[548]. This is to say that this would lead to ousting men (in favor of women) within parties, who had been preparing themselves for many years, hoping to rise to a position of leadership at the crucial moment.

Should we really opt at this time for a woman candidacy, knowing that this candidate may not be having the required capacity for the said post, contrary to the man? For some, the lists known as « tic-tac » should not be drawn in favor of women, in the name of vulnerability not in kind, but pure fact. And in view of almost non-existence of trainings within political groups in Benin, the question still remains of knowing if the parties or alliances in Benin would really bear the cost of equality.

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[544] **Gaspard (F.)**, 1994, « Parity: genesis of a concept, the birth of a movement, "New Feminist Questions. Vol. 15, No. 4. p. 31, the lobbying is both in state institutions and in terms of political parties, so that they initiate involvement and compensate for the presence of women, including the management level. The principle of the quota of women inserted into the institutions, based on the idea that the presence of women should be a priority in terms of affirmative action, as a percentage, to improve the forceps, their numbers.

[545] It is an instrument (described by Jean-Marie and Bruno Megret Lepen has being "undemocratic"), aimed at ensuring that in nomination for election, neither of the sexes is excluded; Groppi (T.) and Meoli (C.) Constitutionality of gender quotas for elections under observations, Italian Constitutional Court, Decision No. 422/1995 of 12 September 1995, in Gilles Badet, op. cit..

[546] Pursuant to Article 26 of the Constitution of Benin. Paragraphs 1 and 2 provide that in fact: "The State shall ensure equality for all before the law regardless of origin, race, sex, religion, political opinion or social status The man and woman are equal before the law ... "And similarly, Articles 2 and 3 of the African Charter on Human Rights and Peoples state respectively: "Everyone has the right to enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind, including (...), sex, language, religion, (...), or any other status. "; "1 - All persons enjoy complete equality before the law. 2 - All persons are entitled to equal protection of the law».
For the judge, "the role of the legislature in its jurisdiction is to ensure equal access for men and women to elective positions; that by reserving for women a quota of twenty percent (20%) at least on the lists of candidates, the legislature established a disparity based on sex between male and female candidates eligible for same function , such distribution will not respond to the letter or the spirit of the aforementioned constitutional provisions; it follows that paragraph 4 of Article 3 of the law under review is contrary to the provisions cited above»;
In fact, the Beninese constitutional court already in a 1991 decision, had ruled unconstitutional, the resolution of the National Assembly which was simply to introduce positive discrimination in favor of women. It was expected that " the first session of the National Assembly be chaired by an old member of parliament assisted by the youngest member of each sex. " It therefore arises in the continuity of this case, during another decision in 2010 on electoral matters. Benin's constitutional court is however not the only opt for such a position , since the Swiss Federal Court had already held, in a decision in 1990, that the provision was intended to impose within authorities township proportion of women who had to be equal to their proportion in the population (51%) had removed the flexibility that the legislature must have. In fact, the Federal Court ruled the opportunity to make such distinctions, albeit positive order.

[547] In many jurisprudences, the principles of equality should not in fact go so far against the requirements of fairness in a society, even if we recognize that equality and equity are complementary postulates DCC 10 -117 08 September 2010..

[548] Robert (J.), The principle of equality in the Francophone constitutional law, the Constitutional Council Papers No. 3, November 1997. There are number of these collateral effects on political parties, the risks of dissent, for the candidates who would have been ousted in favor of women, the risk of depletion activists of other political parties, and then a mechanism of window-dressing parity.

But finally, the constitutional court of Benin would really have shown legal acrobatics which would have been in its honour. It would have, thanks to the rule of duality of legal standards, been able to open a small window in favor of compensating inequality for women who are very few on the political scene. He would have even, to avoid after the reverse discrimination, been able to opt for a threefold solution. Either it chooses a time limit for preferential treatment for women; or it follows the method of quotas, until it attains a predefined objective; or even, it decided not accept an absolute and unconditional priority for women. A safeguarding clause would have therefore been a guarantee for this last solution, like in other systems, to be able to tilt the balance in favor of a male candidate in precise circumstances. The constitutional court would have thus avoided being a blind « egalitarian » while abiding by the provisions of Article 26 of the Constitution of Benin.

Another legal problem which arises, but this time, at the level of the second category protagonists of the election are the voters. It pertains to the right to vote. While the right to vote is supposed to be universal, in Benin, like in Burkina Faso, this does not seem to be the systematic rule. Beyond positions which are far from being concordant on the question, in line with countries, it appears important not to cover-up the history and development of the right to vote, similarly with progressive intrusion in matter, of the international law of human rights.

Indeed, discrimination is done in respect to suspects, on the enjoyment of their right to vote. Moreover, inequality affects international standards. Besides, a case by case comparison shows the position of the constitutional court of Bosnia Herzegovina, in its decision on constituent people. It states that « the importance of non-discrimination principles and effective participation of all individuals in a democratic society ».

The electoral incapacity should only take effect on condition that the sentencing of a suspect is final, i.e. from the moment when all the channels of appeal have been exhausted, or the time limits for appeal have expired. It therefore pertains, for the case of Benin, in view of the international law, to an illegal withdrawal of the right to vote for suspects who have not been tried[549]. On the contrary, the Italian judge, referring to the order issued by the European Court of Human Rights (ECHR) on 6th October 2005, in the **matter of Hirst vs. United Kingdom**[550] (n°2), counters the undifferentiated application of electoral incapacity for suspects[551]. The ECHR in this decision qualifies such discrimination as moral prejudice

[549] In **Eudes (M.)**, Towards abolition of remaining restrictions to the right to vote? Study of the borders of the electoral body, p. 581, in France, the situation has changed since the adoption in 1992 of the new Criminal Code, which abandoned the automatic nature of an additional penalty of deprivation of the right to vote to prisoners, except in cases of conviction for breach of the duty of probity or to interfere with the public administration (Articles L 6 and L 7 of the Electoral Code): this is also the position adopted by the Committee of human Rights in its General Comment No. 25, adopted July 12, 1996 § 4.

[550] ECtHR G.C. 6 October 2005, Hirst v. United Kingdom (no. 2), Appl. No. 74025/01, § 82. In this case, Mr. John Hirst, a citizen of the United Kingdom of Great Britain and Northern Ireland approached the European Court, in accordance with Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Mr. Hirst complained in fact, of being struck in his capacity as a sentenced prisoner serving a sentence of being deprived of the right to vote. In its decision, the ECHR did not hesitate to sanction the British legislation denying access to the right to vote of Inmates, for the sole reason of their conviction. This means that even those who have already been convicted, even for a life sentence may be granted the right to vote, from the time they have already served the incompressible part of their sentence, as was the case of Mr. Hirst. There is finally the case of convicted forbidden to vote, even after serving their sentences, highlighted the 14 November 2005, in Johnson et al. v. Bush. On the occasion, the Supreme Court of the United States had consistently rejected the appeal that had been presented to it with respect to the constitutionality of the law of the State of Florida, preventing any convicted person from voting, including having served his sentence. In Centre for Research and Studies on Fundamental Rights (CREDOF), Towards elimination of remaining restrictions to the right to vote? Study of the borders of the electorate, by Marina Eudes. .

[551] Canadian jurisprudence goes in the same direction of broadening its borders of the electoral body, insofar as it pertains

against the suspect systematically deprived of his right to vote[552].

The universal right to weigh on the manner in which the country is supposed to be governed is therefore jeopardized in Benin, through the discretionary position of the Beninese judge, this, separate from suspects not yet tried and the types of sentences meted against suspects whose guilt is established. But at the same time, we must recognize that in the face of an application dated 31st October 2005, filed by a suspect, Mr. Efiotodji Noumagnon Achi, attempting to ask the Court to recognize the unconstitutionality of a **law on the borders of the electoral body**, the constitutional judge sought refuge behind the express content and the letter of the law in question[553].

Consequently all the people incarcerated under any form whatsoever, find themselves, in conformity with the law, in confinement and deprived of their political rights, same as in cases where final sentence has been issued, while it pertains to different characters of legal principles[554].

One of the arguments attributed to the Beninese judge which could support such a position of systematic exclusion of suspects could be given by the classical theory of social contract with the idea according to which an individual could be automatically excluded from the society and from participating in mechanisms of electoral democracy, for the simple reason that he is not in a position to respect the rules of the society[555]. In our view for at least to show steadfastness in their approaches, it is the principle of proportionality which should be retained by the judge and upstream, by the legislature, in the enactment of standards relating to the electoral body[556]. In other words, this form of «general, automatic and

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to compliance with the universality of the vote, combining both non-discrimination and respect for legality. Thus, in the decision of the Supreme Court of Canada in Sauvé v. Canada (No. 1) [1992] 2 SCR 438, the withdrawal of the right to vote to all inmates had been canceled on the grounds that it was obviously much too broad and significantly violated the rule of minimum adverse effect.

552 It has also been closely followed by the Council of Europe, inviting member states to put an end to discrimination related to restrictions of the right to vote. Parliamentary Assembly Recommendation 1714 (2005), 24 June 2005.

553 DCC 05-148 of 1 December 2005, in its application, Mr. Efiotodji NOUMAGNON ACHI, detained in the civil prison of Cotonou, complained of systematic exclusion of inmates from the electoral lists and from the right to vote. The Act in question is No. 2005-14 of 28 July 2005 laying down general rules for elections in the Republic of Benin. Declared to be constitutional by the High court, the law did not take into account the means of exercising the right to vote for persons in custody, an aspect of the right to universal suffrage, faced with legislative silence in Benin. The same applies to Law No. 2010-33 of 7 January 2011, laying down general rules for elections in the Republic of Benin, Article 9 concerning those excluded from voting remain permanently silent about the fate of people in remand. It should be understood also on reading these instruments in Benin, the stakeholders determining the limits of the electoral body chose automatically to exclude all persons sentenced to imprisonment without any distinction.
In the judgment questioning the UK legislation on the right to vote for Inmates through his concurring opinion, Judge Caflisch, believes that all forms of deprivation of the right to vote should be required by law and ordered by a judge. Similarly, it should affect only serious offenders, and be limited to the duration of the punitive part of the detention.

554 **Lamoury (D.)**, L'affaiblissement des pouvoirs du juge d'instruction en matière de détention provisoire, mémoire de master II, Lille 2, 2004-2005 ; **Samet (C.)**, Les aveux d'un juge d'instruction, Mesnil-sur-l'Estrée : Flammarion, 2001, pp. 104-105.

555 Another classic argument amounts to argue that the detainees because of their confinement, would be unable to make a political decision through voting, not being aware of current public events, positions which the Supreme Court of Canada considers to be outdated, especially since they give the right to vote in question, the limited status of privilege, which can be eradicated in bad citizens in Judgment of 31 October 2002, Sauvé v.. The Attorney General of Canada (No. 2) ([2002] 3 SCR 519 et seq.). Here, the Supreme Court was asked about the constitutionality of a legislative provision denying the right to vote all individuals sentenced to two years' imprisonment or more. In this case, for the Attorney General of Canada, such deprivation would negatively deprive society means to inculcate democratic values in detainees, as well as social values, with the aim of their reintegration. finally the Supreme Court of Israel ruled this exclusion was further attack on democracy itself, that the individual would seek to sanction it, in case involving Yitzhak Rabin H. C. 2757/96, v Alrai Hilla. Minister of Interior et al., 50 (2) P. D. 18 (1996), § 24 et seq.

556 European Court of Human Rights, established case law since its judgment in principle Mathieu-Mohin and Clerfayt v.. Belgium.

undifferentiated» restriction is not only disproportional, but also leads to « civil killing» of individuals in prison[557].

Finally, questioning remains, on the idea of knowing if this kind of general and undifferentiated discrimination is not commonly practices in societies mainly composed of illiterate people.

II- Instituted stakeholders

Instituted stakeholders are those put in place as the electoral cycles in Benin develops. Here as well, there are many of them. It pertains to CENA, electoral officials, authority for regulation of media, observers and new officials in charge of the security of the elections. However, the voting operations are not without difficulties, which for some, in the absence of consensus between political stakeholders, do not cease from recurring during every elections.

A- CENA : a bullied arbitrator

Before the creation of CENA, it was for the Ministry of the Interior and for its divisions at the local level, to operationalize the elections[558]. The Ministry of the Interior as a classical player, as is always the case in several countries, was traditionally responsible for preparation, organization and management of electoral operations[559]. But several interferences within the perimeter of jurisdiction of other institutions appeared prejudicial for the electoral process and cohesion between different stakeholders, the role of preparation, organization and management of elections was from then devolved to the CENA[560].

The CENA of Benin, contrary to others, marked its capacity in smooth management of the electoral process over the years[561]. On the other hand, it is, due to its status, confronted with serious difficulties[562].

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[557] **Arrêt Hirst v. Royaume-Uni**, aforementioned in §82.

[558] The Independent National Electoral Commission was established in 1995. Not permanent, it was established in principle 90 days prior to the holding of elections.

[559] The reflection in this regard of El Hadj MBodj in his article is striking "Should we be afraid of the independence of electoral institutions in Africa? ". For him, "the Minister of the Interior, in fact, politically responsible for the electoral victory of his political family. Political accountability hanging over him also extends to its representatives in the administrative districts in charge of steering at the local level, the electoral process».

[560] DCC 34-94 decision of 23 December 1994, the Court considers that the mission entrusted to CENA, replacing the traditional administration, promotes both a guarantee in terms of stability and transparency of the process and voter confidence and political stakeholders, Article 24 of Law No. 2010-33 of 7 January 2011 on general rules of elections in the Republic of Benin, the African Union, following the plea of Professor Kokoroko, at the same time encouraged by its Member States to adopt legislation, principles and mechanisms along the lines of free, democratic and transparent process; in Dodzi Kokoroko, "The right to free and democratic elections in the African regional level in» ; in Legal and policy review of French-speaking countries, January-March 2004, No. 2, p. 152-166, "The Durban Declaration" of July 2002 on the Principles Governing Democratic Elections in Africa which calls on member states of the African Union to establish "impartial institutions, without exception, have a competent and well trained and equipped with adequate logistics "as a guarantee for genuine transparency in the organization of elections staff. Decision EX.CL/301 (X) adopted by the Eighth Ordinary Session of the Assembly of Heads of State and Government of the African Union, held January 30, 2007 in Addis Ababa (Ethiopia) in turn gives a legal scope to the instrument of Durban and encourages under Article 17, enhancement of the electoral bodies.

[561] **Champin (C.), Perret (T.)**, « Elections en Afrique francophone : des progrès relatifs »; in revue internationale et stratégique, n°33, 1999, pp.183-217

[562] Professor Holo evokes the image of a CENA manipulated. For him, "the most important in this system is not the one who puts the ballot in the ballot box, but he who counts the ballots and announces the results." Holo (T.), Democracy revitalized or emasculated, RBSJA, No. 17, p. 34, see also the general report summarizing the work of the third preparatory meeting - Elections – of the « *Symposium international sur les pratiques de la démocratie, des droits et des libertés dans l'espace francophone »,* Paris, 25 - 27 avril 2000, in « *Recueil des rapports généraux introductifs et de synthèse des travaux*

It is in this situation firstly because of its status, which confers upon it an administrative role of the circumstance of the elections. Secondly its implementation, similarly to the appointment of its members, (by the formal authority for appointment who is the Head of State, in consultation with Parliament) who are more politicians than technocrats, is often subject to polemics and aroused the mistrust of political stakeholders[563]. Members of CENA being appointed by the Executive and the majority Parliament of Benin, when these two institutions arrives at getting allies within the institution in charge of elections, it is very easy for political institutions to place this electoral in a supervisory relationship.

Thirdly, the delays noticed in the process of starting its activities often put into question several steps of the electoral process. And fourthly, it still does not have the required freedom to exercise the responsibility entrusted to it. Consequently, despite its existential legal independence, it is still subordinate at the financial level to the executive, which does not miss to erode its functional independence, by taking advantage of this prerogative in its favor[564]. It should also be noted that Benin having not found adequate formula for self-financing her elections, since the organization of the first elections of the democratic renewal, turn to PTF, outside the funds available internally, given to the CENA by the Ministry of Finance. The delays in disbursements of PTF have also put into question the promptness of CENA to efficiently manage its responsibility. Independence of CENA therefore remains doubtful in several respects.

Lastly, CENA like other organs for management of elections can turn to stakeholders working the scenes, international and national experts, for electoral assistance. It can also turn to service providers for purely technical activities, such as preparation of an electoral file[565].

Internally, the organ for management of elections uses different stakeholders who take part in proper functioning of the electoral process. It mainly pertains to officers recruited by CENA and who are charged with the responsibility of voter registering in view of coming up with a voter register. Officers in charge of operations in the elections office are also included in this category. These officers are often people who were beforehand proposed by candidates and political parties[566]. It therefore happens that some voluntarily manipulate the reports, in view of making them useless or invalid for judging the results, in vote counting[567]. It also

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», publications of the International Association of the Francophone, p. 93.

563 DCC 00-078 of 7 December 2000, Professor Holo recalls, referring to the stakeholders involved in the complexity of the operations of CENA, the idea of "tyranosaures (...) that lock the political game." For him, elections in Benin would become the "overused transmission channel of power by the people."». For other observers, however, the appointment of political appointees would be rather an advantage, in that it helps to empower politicians, given the importance of the issue which is assumed by the practice of electoral democracy. With a view to prevent widespread suspicion among stakeholders El Hadj MBodj states that "electoral institutions must therefore be organized to place equidistant from the protagonists of elections and attempts to monopolize and recovery other policies, in particular institutions, the executive which lost its powers in electoral matters ».

564 CENA is an administrative body that has, according to the text, a real autonomy in relation to other institutions of the Republic. It should therefore enjoy in particular to autonomy in managing its budget. The accusations of mismanagement of funds for the organization of elections, from the executive in respect to the Commission are nevertheless one of the reasons why the funds are often not consistently allocated to it for its operation.

565 Article 17 of Law No. 2010-33 adopting general rules for elections in the Republic of Benin; electoral assistance can also be provided by the African Union, through the establishment of the Unit and Support Fund for democracy and electoral assistance offering consultation services or assistance to electoral institutions and processes of the States Parties: Article 18 - 1 of the African Charter on democracy, Elections and Governance; DecisionEX.CL/301 (X) adopted by the Eighth Ordinary Session of the Assembly of Heads of State and Government of the African Union held on 30 January 2007 in Addis Ababa (Ethiopia).).

566 Article 58 of the Law n° 2010-33 on general rules for Elections in the Republic of Benin.

567 The case is more critical in other countries like Senegal and the Central African Republic, in which the members of the

happens that, that they refuse political party representatives during the Election Day from indicating in the report, irregularities noticed. Even if Benin is on the right to finally adopt a permanent CENA like other states in the Sub-region like Ghana, she still has to put a lot of effort towards realization of the same.

B- Stakeholders losing steam

Some stakeholders of the electoral process of Benin are concerned as such due to decline of their space for action in the organization of the elections. Very often, this distance as compared to their initial prerogatives is mainly due to non-application of the electoral standards.

First, the Ministry of the Interior saw his role in the process reduced to the core of the security of the process. This indeed involves the deployment of the army by the said ministry, in view of securing the process. Among other tasks of securing the elections, the army is in charge of transporting electoral materials, with all forms of suspicion this might lead to and possible manipulations which the executive can have on the army in African countries.

Then, the Ministry of Foreign Affairs also experienced several limits on the part concerning it in terms of organization of the electoral process. In reality, in Benin, its role is almost exclusively confined to search for funds to finance the process and management of relations with international observers together with CENA which has the responsibility of giving formal accreditation to observers. In reality, the Ministry of Foreign Affairs of Benin is more of a facilitator of the mechanism. However, on this last point, it should be acknowledged that rushed organization of elections in Benin significantly limit the role of this ministry.

Besides, there is another player of the process, but powerless this time, at least for the moment, mainly due to lack of fairly restrictive legislation or non-application of the standards. It pertains to Chamber of Accounts of the Supreme Court, whose duty is to monitor the funding of political parties and electoral campaign expenses. The chamber has already exercised this power several times, in particular during the legislative elections of 1995 and presidential elections of 1996. It is supposed to make public the data relating to funding electoral campaign in the month which follows receipt of the same. It is a very active institution, even if it is, among other things, accused of administrative slowness[568].in view of the failures of the funding system of political parties, it had taken the initiative of submitting to the National Assembly in July 1998, a series of proposals, meant for amending and improving the Acts 90-023, 94-013, 94-015 and 95-015 on political parties. Some proposals however very relevant were not retained by the legislature. The Chamber of Accounts since then appears powerless to exercise thorough and transparent, in the absence of sufficiently restrictive standards, which makes some observers think that it is inactive, or that electoral expenses which reach it are similar to « financial arrangements ».

Lastly, the regime of electoral observation in Benin is least honored for several reasons. Among them, in relation to the limited number of international observers and to the limited period of their presence. The democratic system in Benin being considered by several international partners as a model in the Sub-region and even in the African continent, they progressively limited, otherwise ended their observation missions. The only missions who

polling officials are appointed by the central government, often among public officials, which can be pushed to act in a partial manner and not following the instructions of the Election Commission.

[568] It was published in February 1999 a « User Manuel for officers in finances of political parties »

continue to observe elections in Benin in a direct manner are those from the Francophone community[569].

In the other cases, preference is mostly going towards formation, by foreign NGOs, of civil society of Benin, so that the observation can be done and interiorized by nationals of Benin. It has been for several years now, a question of increased interest, granted by the Beninese civil society, for the observation of elections, in Benin, like elsewhere. These same stakeholders of the civil society also got the merit of being at the beginning of coming up with a certain number of standards to be respected by political parties during the entire process, similar to a code of ethics for political parties.

In the same vein, we can note the presence of « delegates » of the Constitutional Court. This is a credit to this organ, which certainly appears to be a distinctive character of Benin. The legal basis of this prerogative it organized is found in Article 117 of the fundamental law of Benin[570]. It is in conformity with this power granted to the Court by the Constituent Assembly that the Court deploys on the field of elections, delegates, who play the same role as observers. They indeed have an advantage in that they can not only dissuade fraudulent maneuvers, but also note on behalf of the Court, irregularities they would be able to establish. Nevertheless, during the electoral processes, the number of delegates deployed has shown to be largely insufficient and they do not also remain in the polling stations, they are content with visiting them. This represents a significant limit concerning the efficiency of the mechanism.

CONCLUSION

Due to their big number, it would have been fairly complex to mention all stakeholders, as well as their prerogatives and their contributions in the operations of the electoral process in Benin. Some of them were highlighted, particularly the executive, legislature and the judiciary, who form the invincible stakeholders of electoral systems in the world. There are on the other hand new stakeholders, instituted in some systems like in Benin and not in others. Even if no massive violence was able to alter the electoral cycles in Benin, oppositions have not lacked from among the stakeholders, some to guarantee respect and development of the process, others in favor of their personal interests, facilitating quite often the deconstruction or destruction of the system.

But finally, two stakeholders of the same category need to paid attention, due to contradictions they were able to raise during electoral processes. It pertains to voters in general, women and prisoners in particular. Thus despite socio-historic discrimination which is the cause of insignificant number of women on the political arena and mainly on political parties' lists, the election judge refused to see the harm of this formal equality. At least some legal changes would have been necessary, even minor on the legal system, with a real effect in practice. Concerning the special case of suspects during electoral systems, contrary to other countries, Benin opted for their systematic, general and undifferentiated exclusion, in defiance of international standards. The stakeholders of electoral process in Benin are consequently and in several respects, far from attaining at least the ideal juridico-political system, on the electoral level.

[569] Many also blame it due to its bias and end-use which is made of observation reports.

[570] The "Constitutional Court oversees the conduct of the election of the President of the Republic (...), decides on the irregularities that could by itself take (...) ».

PUBLIC WATER SUPPLY IN BENIN: LEGAL FRAMEWORK AND RIGHT TO ACCESS

By **Fiacre Sourou LOKO HOUNKPATIN***

Water constitutes a commodity considered just like air, as essential for life[571]. It is also a rare and indispensable resource to life and to socio-economic development of a country. Food, health and all human activities depend on its availability in sufficient quantity and quality[572]. Access to this resource poses enormous difficulties in several regions of the world[573]. Thus, more than a billion people in the world have no access to drinking water, among them more than 90% are found in developing countries and more than 80% in rural areas[574]. Sub-Saharan Africa is the most fragile area, with hardly 60% of the population having access to water[575]. She is thus a victim of sometimes deadly pathologies, which slow down development[576].

Like in most of her neighbors in West Africa, Benin classified by UNDP in 2004 as among the Least Developed Countries (LDC) is therefore not an exception to this situation. In Benin like elsewhere, water services are market services of general interest for which universal access however remains a priority for governments[577]. These governments have therefore the responsibility of providing these services qualified as public services, and which must be accessible to all citizens regardless.

Indeed, « *Public administration of Benin is neither focused on the results nor focused on the clients. This seriously hampers its efficiency and its contribution to the development of the country*[578] ».

The Minister for Administrative and Institutional Reform said during the national week of public service. A strong remark in which the Minister made to add on what follows*: « complexity of circuits and procedures, lack of proximity, difficulties in accessing information, poor reception, unethical machinations*[579] ».

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[571] B. G. HOUNMENOU, « Gouvernance de l'eau potable et dynamiques locales en zone rurale au Bénin », *Développement durable et territoires* [En ligne], Dossier 6 : Les territoires de l'eau, mis en ligne le 12 mai 2006, consulté le 07 janvier 2013. URL: http://developpementdurable.revues.org/1763 ;

[572] See the Document of the Steering Committee of « Stratégie Nationale de l'Approvisionnement en Eau Potable en Milieu Urbain 2006 – 2015 », Ministère des Mines, de l'Énergie et de l'Eau (MMEE), Janvier 2007. p. 4.

[573] HOUNMENOU (B. G.), op. cit,

[574] S. CARCAS, *Amélioration des performances des services d'eau et d'électricité en Afrique subsaharienne : bilan et perspectives des partenariats entre le secteur public et le secteur privé*, Mastère d'action publique, Thèse professionnelle, École Nationale des Ponts et Chaussées, Paris 12è, 2005, p. 2

[575] S. CARCAS, idem, P. 5

[576] See in this regard the press article, SOLIDARITES INTERNATIONALES, Accès à l'eau potable dans le monde, online on www.solidarites.org (Consulté le 10 Janvier 2013)

[577] Programme Solidarité Eau « La gestion du service de l'eau dans les petites villes », Synthesis Report of inter-state meeting of West-African states, Nouakchott, from 11 to 14 March 2001, p. 15.

[578] Remarks by the Minister of Administrative and Institutional Reform, Mr. Martial SOUTON, from the start of the National Public Service Week, Co-organized by his Ministry with the Ministry of Public Service and the Ministry of Decentralization from 16 April to 20 April 2012.

[579] See the Column written by Jérôme Carlos and published on mercredi 18 April 2012 à 06:40 on the website of La Nouvelle Tribune http://www.lanouvelletribune.info/index.php/reflexions/chronique/10629-le-service-public-pour-qui-pour-quoi (Consulté le 22 Décembre 2012)

The most important role of administrative action consists of ensuring the functioning of public services, which are the reason for the existence of the administration[580]. This administration is principally at the service of citizens, and in particular the most fragile citizens, those who are in most need of its assistance and its support[581]. This is what justifies its name of public service. According to a traditional formula[582], public service is considered as the cornerstone of administrative law. It is at the centre of the latter of which it constitutes a fundamental notion.

Public service dons in the first place a concrete and familiar dimension. There are activities characterized by their end result, satisfaction of general interest, which are public service activities[583]. The latter provides material[584] (security, transports, distribution of water, electricity or gas), financial (aids, grants, university scholarships) or intellectual (education, permanent training) services. It is what is called material approach of public service. But it is analyzed in one mission of general interest narrowly falling under public entity[585].

Public service, is also a part, a component of the administrative machinery of the State or other public entities[586] (local authorities, public institutions), which provides the abovementioned activities. It is what is called organic approach of public service. There is also a more technical dimension of public service, which refers to a specific legal regime[587].

In the field of public service, as is the case in others fields of administrative law, neither the legislator, nor the holder of regulatory power, really bothered to define the notion of public service[588]. The difficulty where we find ourselves in giving a precise and indisputable definition of public service is, finally, heavy not only with legal consequences but also political ones if we reflect that public service constitutes, in many respects, « the contemporary legitimacy of power »[589].

It is therefore indicative that the French legal doctrine never found a precise and consensual definition of public service[590]. Didier TRUCHET says it very well when he states that « *[…] Nobody ever succeeded in giving public service an indisputable definition: the legislator did not bother, the judge did not want to do it, doctrine was unable to do it […]* »[591]. This problem of definition explains in part the ills public services are suffering in French law and indirectly the Beninese law. Thus public service has been « *[…] tackled in terms of crisis, decline, vicissitude, […], crisis which will continue causing more problems. Public service has thus, over the years, become a « legal*

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[580] I. SALAMI, *Droit Administratif*, Cotonou, Edition CeDAT 2013, à paraitre.

[581] R. ADJAKPA ABILE, « S'engager sur la qualité du service dans l'administration publique africaine : le devoir d'une démocratie réelle », en ligne.

[582] G. JEZE, « Le service public », Rev. Hist. Faculté de droit, n° 12, 1992, p. 93. Cité par Etienne S. AHOUANKA ''Réflexion sur la crise du service public en Afrique de l'ouest francophone'', In Revue Béninoise des Sciences Juridiques et Administratives (R.B.S.J.A.), N°16, Abomey-Calavi 2006, p. 45.

[583] I. SALAMI, op, cit.

[584] Idem.

[585] J.-F. LACHAUME, H. PAULIAT, C. BOITEAU et C. DEFFIGIER, *Droit des services publics*, Paris, LexisNexis, 2012, p. 5.

[586] Ibidem, p. 6.

[587] I. SALAMI, op, cit.

[588] J.-F. LACHAUME, H. PAULIAT, C. BOITEAU et C. DEFFIGIER, op. Cit., p.5.

[589] Idem, p. 5.et 6.

[590] Some like the example of René CHAPUS refute this position. "The best minds come together to profess that the functional concept of public service is indefinable. In reality, there is nothing, and it would be surprising if the structure of administrative law could be built on something intangible. "Since it defines the public service as "an activity [...] assured or assumed by a public entity to the public interest». R. CHAPUS, Droit administratif général, Tome 1, 15e Édition, Montchrestien, Paris 2001. p. 579.

[591] D. TRUCHET, *Label de service public et statut de service public,* AJDA 1982, p. 427.

Lazarus », an « illustrious old man » […] »[592]. The idea of public seems to be characterized by some scattered data extracted from normative legal texts and judicial acts, from judgments or from orders, which characterize such or such activity[593]. It can therefore be defined as an activity of general interest, to be directly undertaken by a public entity and subjected, at various degrees, to a specific legal regime[594]. As for public supply of water[595], it is an activity of general interest exercised directly by the State and/or its subordinates, subjected to requirements of regularity, continuity, permanence and equality of treatment, with a view to ensuring economic viability of the activity of supplying drinking water.

The existence of a public service is indeed conditioned by a meeting of three indexes. A functional element in relation to a more or less visible presence of a public entity at the head of the service or attachment to a public entity. Then, a legal element determining its submission to a specific regime, and finally, a material element justified by its mission of general interest[596].

The access to some services like water being considered as part of « basic requirements[597] », we can therefore consider that both urban and rural populations need and wish to be provided with clean water. But the statement leads to observing that public service is very disparaged by the users, on issues pertaining to its lack of efficiency and its ineffectiveness, while its cost in the national budget is inexorably increasing[598]. The user, often subject to frustrations and even humiliations by public service officers, does not have a positive image of the public service, which is a source of tensions and even conflicts. It therefore appears necessary to institute the quality of service in public administrations. Such is the stake for modernization of services provided by the State at a time when rationalization of the means is of pressing urgency, and where the obligation of results should correlate human, material and financial means implemented: require for good governance. It is without any doubt clear that the issue of public service is crystallized around two major challenges, namely funding and consistency of public service.

In the view of these observations, it is evident that the right of public services is not a full science. To study it, it should fall under legal science in general, administrative law in particular. It therefore pertains, in this thinking, presentation and studying of the legal framework of the right of public services in Benin. To get the measure of such a scientific approach, it shall try to answer two questions: Does a right to public services exist in Benin? If yes, does it facilitate users to have access to public services, in particular that of water and what is its future? In summary, should it pertain to verifying the effectiveness of the right to water in Benin?

The answers to these questions are going to be supported by the work of the legislature like that of the regulatory power to analyze the standards which are enacted in the matter of public service, more precisely public service of water in Benin.

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592 A.-S. MESCHERIAKOFF, *Droit des services publics,* novembre 1997, 2ème édition PUF, Paris, p. 12.

593 I. SALAMI, op. Cit.,

594 Ibidem.

595 This definition is given in the Strategy Paper for achieving Target 10 of Goal 7 entitled "ensure environmental sustainability" of the MDGs in Benin, December 2006. p. 12.

596 Arrêt CE, sect. 28 Juin 1963, Narcy, GADA (COLIN F.), 3è édition lextenso, 2011-2012. p. 25

597 Terme employé dans les actes de la déclaration finale du Sommet mondial pour le développement durable (SMDD) qui s'est tenu à Johannesburg en 2002.

598 R. ADJAKPA ABILE, *« S'engager sur la qualité du service dans l'administration publique africaine : le devoir d'une démocratie réelle»,* Article publié dans le Magazine «**Politiques Publiques**», le 16 Juillet 2010, disponible en ligne sur http://adjakpaabile.unblog.fr/2010/10/08/sengager-sur-la-qualite-du-service-dans-ladministration-publique-africaine-le-devoir-dune-democratie-reelle/ (consulté le 22 décembre 2012).

The analysis, essentially legal, shall present the interest, at least at the theoretical level, to draw the rules which govern public service. One of the criteria for the analysis is therefore the normative criteria, without overlooking the institutional criterion, since law does not come down to rules, but also to effective institutions charged with the responsibility of applying the rules enacted by the society[599]. The institutional criterion shall enable clarification on the management of public water supply in Benin. By inserting these two criteria of analysis in the comprehensive system of the right to public services in Benin, there will be need to successively reflect on the inefficiency of the legal framework (I) which makes it hard to realize this right to water (II).

I- AN INEFFICIENT LEGAL FRAMEWORK

In the beginning of 1990s, the assessment for development of needs and demands of water and available resources at the global level, led to fears in specialized fields for the beginning, at more or less term, of a generalized conflict or a third world war on water[600]. This fear, largely propagated by advocacy, facilitation and sensitization, spread rapidly to all parts of the planet. It is currently shared by all policy makers and officials at various levels. Benin has not been spared by these dynamics.

Public service being the expression of the State, lies on a precise legal basis, mainly the one centered on water management, which is defined by both the legislature and the holder of regulatory power. It determines the conditions and modalities in which public supply of water are created, organized and function.

Thus, the normative framework of public water supply shall be tackled to clarify institutional management for provision of clean water in Benin.

A- Normative framework of water sector

It is currently acknowledged that rational and sustainable management of water resources is a major challenge for humanity. It is under this framework that there is need to talk about the numerous meetings held at global, regional, sub-regional and national levels during the last twenty years.

1- At the international and regional level

Keeping with the broader movement of sustainable management of water resources, Benin played an active role in big consultative and reflection meetings which marked the road for Integrated Management of Water Resources (IMWR), considered as the only optimum and efficient approach of water resources. Benin thus signed and/or ratified most of the international agreements and conventions both at the international and African regional level, of which some have impacts on water management. For most of them, they touch of fundamental principles of environmental law, mainly in the area of water.

Before 1990, several legal texts had been signed and/or ratified at the international level. It pertains among others the Universal Declaration of Human Rights of 1948[601] ; International

[599] H. AKEREKORO, *Prolégomènes sur le droit public économique béninois,* Cahier du CeDAT N°1, « Les métamorphoses du droit public », p. 29.

[600] See in this regard the press article, SOLIDARITES INTERNATIONALES, Accès à l'eau potable dans le monde, online on www.solidarites.org (Consulté le 10 Janvier 2013).

[601] The Universal Declaration of Human Rights (UDHR) of 1948 stipulates in Article 25 that "Everyone has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing,

Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966[602] ; Stockholm Conference on Environment of 1972[603] ; United Nations Conference on Water (Mar del Plata) of 1977[604]. Following these meetings, United Nations launched in 1981, an international decade of clean water and sanitation[605].

Towards the end of this decade, in 1990 international NGOs adopted the Montreal Charter[606] on clean water and sanitation followed in the same year, by the World Conference on clean water and sanitation during which the New Delhi Declaration of September 1990[607] was adopted.

In 1992 the International Conference on water and environment followed which adopted the Dublin Declaration[608] and the United Nations Conference on Environment and Development[609] (UNCED) held in Rio. These meetings were devoted to examination of conditions relating to environmental and water management. This membership was certainly the decisive act for the entry of Benin in the process of Integrated Water Resource Management (IERM) even if in reality, the concept, content and the implications only started to be well understood and identified with the birth of Global Water Partnership (GWP) in 1996[610]. They also adopted the Agenda 21 which includes multiple references to elements of the right to water for all, sanctioned by particularly relevant citations. Thus, "the basic principle, mutually accepted, was that all people, regardless of their level of development and their social and economic situation, have the right to have access to drinking water whose quantity and quality is equal to their essential needs[611]". In the development and use of water resources, we must give priority to the satisfaction of basic needs and protection of ecosystems. However, beyond these requirements, users should pay a fair price[612].

In the same vein of showing the importance of water in people's lives, the International Conference on Water and Sustainable Development (ICWSD), held in Paris at UNESCO, adopted in March 1998, a declaration[613].

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medical as well as the necessary social services ".".

602 Article 11.1 of the Covenant, which stipulates that "States ... recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing."

603 States adopt the Stockholm Declaration that: "Man has the fundamental right ..... to living in an environment of quality that permits a life of dignity and well-being "

604 At this important meeting, it was agreed that all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their essential needs ..

605 During this decade, it will implement the objective that "all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs. "".

606 According to the Montreal Charter on Drinking Water and Sanitation, "Everyone has the right to have access to sufficient water to ensure their basic needs

607 Item 18.48 of the New Delhi Declaration on safe water and sanitation. it stressed the need to provide in a sustainable manner sufficient drinking water and adequate sanitation to all, and focused on the approach to ensure "minimum for all rather than more for some.

608 It enshrined the principle according to which: "Water used for multiple purposes, has an economic value and should be recognized as an economic good. Under this principle, it is important to recognize the fundamental human right to clean water and sanitation at an affordable price."

609 During this conference, governments adopted the Rio Declaration that "Human beings ... are entitled to a healthy and productive life in harmony with nature. "".

610 Or the Final Report of the study on the inventory, typology and description of the various practices related to water use in Benin, initiated by the National Water Partnership of Benin, June 2005, p. 11

611 Citation 18.47 of Agenda 21 of the Rio Declaration on Environment and Development.

612 Citation 18.15 of Agenda 21 of the Rio Declaration on Environment and Development: It is now recognized that water is a social and economic good, the various options that are available to charge the various groups of users should be discussed before being tested.

613 Declaration that: "We, the Ministers and Heads of Delegations ... are committed to supporting the implementation of recovery of direct and indirect costs of services, while protecting low-income users, should be encouraged.""

Lastly in March 2000, the Ministerial Declaration of the Hague on water security in the 21st Century fixed an objective[614]. The Ministers also decided to bear in mind "basic needs of the poor and the disadvantaged". In September 2000, the General Assembly[615] adopted as for it, the Millenium Declaration. In respect of the relevance or assessment which drove the world's ruling class towards the restrictive mode of water resources management, all the States joined the queue very early, because they still hold on the survival of their population. In this regard, there is need to underline the participation or the support of Benin in the conclusions of regional meetings dedicated to the same questions and presenting humanitarian interests. We have: African Charter on Human and Peoples' Rights adopted in Banjul in 1981[616] ; African Charter on the Rights and Welfare of the Child of 1990[617] (Addis-Ababa). In December 1997, the Ministers in charge of water, urbanization and environment in the African region adopted the Cape Town Declaration[618].

In January 1998, the Harare Conference[619] on "Strategy of Water Management" was organized under the framework of the Commission for sustainable development, followed in the same year, by the Ouagadougou meeting on Integrated Water Resources Management and the one held in the same town in 2003 i.e. five (5) years known as COAGIRE + 5 years[620]. In June 2000, the European Community and Member States and Group members of African, Caribbean and Pacific States, adopted in Cotonou a partnership Agreement[621].

Lastly, in October 2001, the New Partnership for African Development (NEPAD) adopted in Abuja an objective on access and supply of drinking and adequate water. All these instruments will only have value if they are supported by sub-regional and especially internal measures.

2- <u>At the sub-regional and national level</u>

At the sub-regional level, Benin participated actively in the West-African Conference on GIRE of March 1998 which led to the Ouagadougou Declaration and drawing up a Regional Action Plan of GIRE for West Africa adopted in December 2000. One year later, Benin also attended the meeting which led to the creation of a permanent framework for coordination and monitoring of GIRE. It pertains to Unit for Coordination of Water Resources within ECOWAS adopted in December 2001.

At the internal level, standards exist for the quality of drinking water both in the urban and rural areas. Benin embarked in a participatory process with the aim of acquiring in a

[614] "Universal access to sufficient drinking water at a reasonable price for a healthy and productive life. "It therefore recognizes that access to water and sanitation are "basic human needs in the health and well-being".

[615] The General Assembly of the United Nations adopted the Millennium Declaration A/RES/55/2. At this important meeting, the Heads of State and Government decided to halve by 2015 the proportion of people without access to drinking water or do not have the means to get them. "".

[616] Article 24 of the African Charter on Human and Peoples' Rights of 1981: "All peoples have the right to a general satisfactory environment favorable to their development."".

[617] It provides for the obligation of States to take the necessary measures "to ensure provision of food and safe drinking water in sufficient quantity

[618] They wrote there: "Promoting the application of realistic water rates and sanitation services along with preferential pricing for low-income groups, such as tariff benefits, equalization, etc.." ., etc.".

[619] It was concluded at the meeting that: "If we want the water supply to be sustainable, it is necessary that all costs are covered. Grants for specific groups generally the poorest may be considered desirable as in some countries. "."

[620] See the Final Report of the study on the inventory, typology and description of various practices related to water use in Benin, initiated by the National Water Partnership of Benin, in June 2005, P. 13 and 14.

[621] Under Article 25 of the ACP-EU Agreement on social sector development: "It is necessary to pay particular attention to maintenance of sufficient level of public spending in the social sectors. In this context, cooperation shall aim to: increase the security of household water and improving access to safe drinking water and adequate sanitation ..... and improve the conditions of urban development".

consensual manner the main tools for saving but restrictive management of water resources. In this regard, Benin organized several consultation and discussion meetings at the national level between stakeholders of the water sector and of which the most important was the first National Forum of Water held in January 2001.

For effective realization and enhancement of the rule of law in Benin, the ruling class must take all the necessary measures to guarantee rights and freedoms of the citizens. It is appropriate that the Constitution stipulates that human person is sacred and inviolable[622]. In this regard, the State must guarantee a right to development and a full development of her people[623]. Water sector is a part of this process. The legislature and the holders of regulatory power have since then, taken the measures to organize this vital sector which is the provision of drinking water.

Indeed, to implement the international policy for management of water supply, a legislative and regulatory mechanism was adopted. It pertains to:

- General regulation of the public service for distribution of drinking and industrial water in urban areas of 30th October 1987, revised in 1998 and deals with the quality of water distributed.
- Act N° 2010-44 of 24th November 2010 on water management in the Republic of Benin. Its main objective is to determine the conditions of an integrated management of water resources[624]. The latter has the objective of ensuring a balanced use, equitable distribution and sustainable use of the resource available. In view of conserving water resources, the State and the decentralized authorities ensure, in time and space, a balance between the availability of water resources in quantity and in quality and the needs to be met according to various uses and functions of water[625]. To this end, and within the framework of water management, they are in charge, at all levels, of putting in place appropriate structures and participation of the stakeholders concerned[626].
- Act n° 97-029 of 15th January 1999 of organization of Communes in the Republic of Benin which confers to the Communes responsibilities concerning provision of drinking water. In the field of AEP, the Communes are in charge of the following duties[627]: Preparation and/or Participation in drawing up AEP programs and plans, in collaboration with departmental water services : Financing AEP programs ; protection of water resources and existing and future catchment areas ; Project owner, in terms of existing water facilities after their transfer by the State to the Local authorities ; Monitoring and Evaluation, in terms of use of water services provided by the State society, when the Communes shall effectively carry out the function of project owners. Indeed, « *the Commune oversees the conservation of hygiene conditions and public health mainly in matters pertaining to: prospection and distribution of drinking water; safety around water catchment areas and in drilling of wells; private treatment for sewage; […]* »[628]. In the terms of Article 93 of the same law « *The Commune has the responsibility of: providing and distributing drinking water; […]; public drainage for sewage; network for drainage of rain water; […]* ».

[622] Article 7 de la Constitution béninoise du 11 décembre 1990.
[623] Article 8 de la Constitution béninoise du 11 décembre 1990.
[624] Article 2 de la Loi N°2010-44 du 24 novembre 2010 portant gestion de l'eau en République du Bénin.
[625] Article 26 de la Loi N°2010-44 du 24 novembre 2010 portant gestion de l'eau en République du Bénin.
[626] Art 29 Al 1er de la Loi N°2010-44 du 24 novembre 2010 portant gestion de l'eau en République du Bénin.
[627] Document de la stratégie nationale d'Approvisionnement en Eau Potable en milieu urbain Période 2006 – 2015 du MMEE, janvier 2007, P, 15.
[628] Art 95 de la Loi N° 97-029 du 15 janvier 1999 portant organisation des communes en République de Bénin.

Moreover, Benin has other essential instruments namely:

- Millenium Development Goals (MDGs), defined by the United Nations, considered as fundamental for human development, so as to overcome the millenium challenges that Benin undertook since 2000 to achieve before 2015, namely « reducing by half, the proportion of the population not having access to drinking water », which is equivalent to bringing the average national rate of drinking water supply to 67.3% by the year 2015.
- National Water Partnership, of which Benin was the first country in West-Africa, to put in place, under the auspices of the Global Water Partnership[629] (« GWP ») and which has the role of defining strategic rules and directions for management of water resources of the ;
- National Water Policy which comes to confirm the government's commitment to guarantee water in quantity and in quality for all uses, while opting for rational, efficient and sustainable management of water resources. It contains big directions and guiding principles for water use in the different branches of activity, grouped together in what is called « Integrated Water Resources Management (IWRM) », adopted in 1998. From the latter, the first « Benin Water Vision 2025[630] » was developed and presented under the framework of the preparation of « World Water Vision in the 21st Century » during the Second World Water Forum which was held in The Hague in March 2000. It was developed under the form of a document entitled ''Integrated and Sustainable Water Resources Management[631] '', which presents GIRE.

To effectively implement these different legislative measures, the government must put in place regulatory texts. In this regard, the decrees and orders[632] hereinafter were taken. These texts are intended to define the institutional organization of the sector, the authorities in charge, their duties and responsibilities, (central administration, body in charge of the regulation), define the legal and administrative modalities for the exercise of the activities by the operators as well enact specific regulation applicable to operators exercising different operation functions of catchment, treatment and distribution of drinking water.

It however remains that implementation texts of the law on water management are still lacking and that among those which exist, some would deserve to more precise and complete, so as to organize in a better way the management devolved to different institutions.

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629 Voir le document de Politique Nationale de l'Eau, Direction Générale de l'Eau (DGE / MMEE), élaboré en Juillet 2009, P. 44.

630 Elle définit comment d'ici l'an 2025, les ressources en eau au Bénin seront exploitées et gérées en assurant l'équité et la paix sociales, la durabilité environnementale et l'efficience économique ; elles contribueront ainsi efficacement au renouveau économique, à la réduction de la pauvreté, et au rayonnement international du Bénin.

631 Document de Politique Nationale de l'Eau, Direction Générale de l'Eau (DGE / MMEE), Op., Cit., p. 28.

632 It pertains to Decrees No. 2003-203 and No. 2003-204 of June 12, 2003 respectively on creation and approval of the statutes of the National Water Company of Benin (SONEB) Decree 2001-094 of 20 February 2001 on setting of standards of water quality developed according to WHO guidelines; Decree No. 2007-580 of 28 December 2007 on responsibilities, organization and functioning of the Ministry of Energy and Water, Decree ° 2011-573 of 31 August 2011 concerning establishment of Master Plan of development and water management Decree No. 2011-574 of 31 August 2011, establishing responsibilities, composition, organization and functioning of the National Water Council, Decree No. 2011-621 of 29 September 2011 establishing the powers, composition, organization and operation of water basin committees; Decree No. 2011 -623 of 29 September 2011 laying down the procedure for determining the boundaries of public domain water; Decree No. 2011-671 of 5 October 2011 setting procedures for delimitation of protection areas; Decree No. 2012 - 227 of 13 August 2012 on establishment and of development of water management scheme, the Decree 2007-18 of 19 February 2007 on the responsibilities, organization and functioning of the Directorate General of Water, etc.

B- Management of public water supply

The public service for provision of drinking water throughout the national territory is a task assigned to the Minister of Energy and Water (MEW). It initiates, leads, coordinates and regulates water resources activities, as well as exercising control over all businesses and structures involved in the areas of water[633]. Thus, to perform its mission which is development and implementation of the government policy in the water sector, the MEW has under its authority, Directorate General for Water (DG-Water). The latter's mission is to manage water resources throughout the national territory, define national strategic guidelines for provision of drinking water and wastewater treatment and ensure their implementation in collaboration with the stakeholders concerned[634]. This is rightly so, that the National Water Company of Benin (SONEB), a public enterprise under the supervision of the MEE, was charged with the responsibility of providing drinking water and drainage of wastewater in urban areas[635]. Provision of drinking water in rural areas is therefore left to the responsibility of Directorate General for Water (DG-Water).

1- In Urban and peri-urban areas

Currently the sector for provision of drinking water constitutes one of the national priorities, enshrined in the basic documents of Benin[636] and gets significant technical and financial support from development partners. Since the International Decade of Drinking Water and Sanitation, tangible efforts have been made in equipping towns with modern hydraulic facilities, increasing the rate of service to the populations and management of water supply. In Urban areas, the responsibility for provision of drinking water lies with the National Water Company of Benin[637] (SONEB) created in June 2003, after the reform of electricity and water sector and which led to the separation of two activities previously managed by the former Water and Electricity Company of Benin (SBEE). SONEB is a public operator i.e. a public company with an industrial and commercial character[638], with a legal personality and financial independence. Its share capital is ten (10) Billion F CFA, fully subscribed and freed in full by the State[639]. Its direct or indirect mission is water catchment, treatment and distribution over the national territory[640], but only involved in urban and peri-urban areas.

It is also in charge of exercising the activity of treating and draining wastewater in urban areas.

In 2005, the urban population[641] of Benin was estimated at nearly 40% of the total population of Benin, while the large cities of Cotonou and Porto-Novo, Abomey and Parakou Bohicon[642] had between them 56% of the total population.

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633 Article 1er du Décret n°2007-580 du 28 décembre 2007 portant attributions, organisation et fonctionnement du Ministère de l'Energie et de l'Eau.

634 Article 1er de l'Arrêté 2007-18 du 19 février 2007 portant attributions, organisation et fonctionnement de la Direction Générale de l'Eau.

635 Article 50 du Décret n°2007-580 du 28 décembre 2007 portant attributions, organisation et fonctionnement du Ministère de l'Energie et de l'Eau.

636 Strategy for poverty reduction document, PAG2 ; Millenium Development Goals

637 Article 1er du Décret n°2003-203 portant création de la Société Nationale des Eaux du Bénin (SONEB).

638 Article 1er du Décret n°2003-203 portant approbation des statuts de la Société Nationale des Eaux du Bénin.

639 Article 6 du Décret n°2003-203 portant approbation des statuts de la Société Nationale des Eaux du Bénin.

640 Article 2 du Décret n°2003-203 portant création de la Société Nationale des Eaux du Bénin (SONEB).

641 The urban population of Benin was estimated at 2.9 million in 2005 (2.6 million according to RGPH 2002, growth rate of 3.25% per year), nearly 40% of total.

642 These towns accounted for total population of 1.62 million people in 2005, or 56 % of the total urban population.

The tariff system is administered and rigid, with only two (02) sets of payments, without distinction on the categories of consumers[643]. But from 1st July 2009, new tariffs applicable to drinking water throughout the national territory of the Republic of Benin, were adopted. They have two classes of customers: those who have a personal connection and those who have a collective access. For the first categories there three sets of payments depending per month. But concerning the second category namely standpipes, water kiosks, village water distributions and water sellers, there is only one set of payment to a preferential rate[644]. There are still no efficient mechanisms for updating the tariffs. Water production and distribution capacities are insufficient to meet the special demand in Cotonou. Water losses (technical and commercial) are increasing and estimated at 22 % in 2012 while preventive maintenance is hardly developed. The phenomenon of saline intrusion is noted on different catchment areas particularly in Godomey.

Housing in the cities is being essentially horizontal in nature, extensive and consuming a lot of space, with a low density of occupation of land, which leads to high costs of AEP investments and economic difficulties in making these facilities profitable. Rainwater is drained through open gutters along some major roads of urban cities[645].

Incomes of the populations essentially come from employment activities or trade activities[646] (including informal). Unemployment is quite high, especially among the youth, about 25% of the urban population live below the poverty line[647]. In this regard, households face a lot of difficulties in saving money to pay for connection to SONEB, due to low and unreliable incomes. Consequently, categories with low incomes resort to buying water at standpipes or from water sellers.

General regulation for distribution of water in urban areas, dated October 1987, and revised in 1998 has still not been adapted to the current reality for management of water supply on several aspects (e.g. Protection of water catchment areas, water pricing, conditions and modalities of connection to public networks for provision of drinking water).

In June 2005, SONEB only supplied 69 major towns of Communes and had about 123 000 customers. But by the end of December 2012, the situation had not changed much, since it was still 69 major towns of commune which were supplied, with about 176 603 customers, for a financial turn-over of 16.61 Billion F CFA as at 31st December 2011[648]. The demand for water is concentrated at 80 % in Cotonou, Porto-Novo, Parakou and Abomey and Bohicon. The rest comes from secondary towns and small urban centers. The rate of supply of drinking water for populations in urban and peri-urban is estimated to be about 63.4% by end of December 2012. A part of the population in urban areas also gets water through resale of water provided to connected customers.

Consequently, about 36.6% of urban population does not have access to drinking water currently. They are mainly the populations in per-urban areas who suffer more from

[643] National strategy Document for provision of Drinking water in urban areas Op., Cit P, 6.
[644] See information note of SONEB.
[645] Document of the National Strategy for provision of Drinking Water in urban areas, Op Cit., P. 8.
[646] The average annual income per UC in urban areas was 365,942 F CFA in 2002. The average size of the CPU is 3.5. Average spending per CPU urban in 2002 were 252 077 F CFA.
[647] Source: Results CWIQ, INSAE 2003, quoted in Results and Prospects in short and medium terms of the national economy, income redistribution and poverty reduction in Benin, MFE, 2003 edition.
[648] See on website of SONEB: http://www.soneb.com/soneb2/01-entreprise/fiche-signaletique.php Consulted on 21/03/2013.

problems related to supply of drinking water. This phenomenon is particularly perceptible in Cotonou with the entire estates, comprising of thousands of residents, who do not have AEP networks (it is the example of estates which densely overpopulated like Godomey, Agla and Ladji).

The demand for water is quite high, particularly in big towns, but the former is not met bearing mind, among other things, the insufficiency of financial resources to do the connections and extensions of the distribution networks. The growth of AEP sector in urban areas is nevertheless noticeable.

Moreover, the law on decentralization confers to Communes the responsibility in AEPA matters. But these prerogatives are not currently being exercised fully by the local authorities in urban areas, due to lack of texts for implementation, transfer of skills and resources[649]. Indeed, local authorities play a much reduced role in matters of urban management, due to lack of technical structures and financial and human resource means[650].

Concerning drainage of wastewater, the institutional framework and the socio-economic context of the country are not yet favorable for efficient management of this window by different stakeholders. The activity of wastewater treatment is hardly developed and the means they have are very poor. It is still at the stage of feasibility study and putting in place the funding. Public authorities and populations do not show sufficient interest in the sector of wastewater treatment. Wastewater management in urban areas is still not a priority of public authorities and the populations are not informed on issues of sanitation, mainly at the financial level. Investment programs on drainage of wastewater in urban areas do not really exist. Moreover, there is currently a pilot program for Cotonou and a part of the Commune of Abomey-Calavi.

The sector for provision of drinking water in urban areas holds real possibilities for generating more financial resources[651] if appropriate measures are taken, mainly softening the mechanisms for access to drinking water, extending distribution networks to meet the increasing demand and modernizing customer management.

Currently there are no efficient and appropriate mechanisms for funding development of the sector for provision of drinking water in urban areas. Meeting the demand is highly dependent on mobilization of financial resources indispensable for the realization of investment programs to meet the needs of the population.

2- <u>In rural and semi-rural areas</u>

The sector for provision of drinking water in rural areas in Benin also remains one of the priority sectors which is positioned at the centre of the development policy of the country. Its promotion and performing management continue to draw all the attention of the government in that increment of the rate of supply of drinking water is one of the challenges to overcome before the year 2015[652]. This also appears as prerequisite to enhancing the state

[649] National Strategy Document for provision of drinking water in urban areas, Op, Cit., p. 8.
[650] Idem., p. 6.
[651] Financial resources generated from water sales by SONEB were ten (10) billion F CFA in terms of sales and eight (08) billion F CFA in terms of receipts in 2004.
[652] See the Guidance on the process of communal programming of works for supply of drinking water in rural and semi-urban areas of the Directorate General of Water (MME), Juin 2009, p. 6.

of health and the working capacity of the people of Benin; all things which contribute in a decisive manner to the reduction of their poverty and real economic and social development of the country.

Provision of drinking water in rural areas falls under General Directorate of Water, and calls for intervention on the field, management committees of water points, and in some big villages and areas, associations of water users. General Directorate of Water comprises several directorates among them that of Supply of Drinking Water (SDW). The latter is structured in services among which there is Department for Provision of Drinking Water in Rural Areas (SAEP-MR). It is in charge of coordinating the realization and technical supervision of the AEP works in rural areas. In this regard, it has powers[653] to coordinate planning of water points in rural areas carried by decentralized departments and communes, to ensure coordination of the realization and supervision of water points in rural areas, ensure technical assistance to water services for Departmental Directorates of Mines, Energy and Water, supervise procurements for provision of drinking water in rural areas and supervise technical specifications relating to water points in rural areas..

In total, the development of the AEP sector in rural areas is very noticeable, as shown by the following table on realizations per department which high the exhaustive situation of needs of water, equipped water points, functional and broken down then National rate of water supply in rural areas in Benin as at 31st December 2011..

Department	Population	Needs at water points	Equivalent of equipped water points	Equivalent of functional water points	Rate of break downs	Rate of supply
ALIBORI	727 583	2 910	2 216	1 860	07.32%	63.90%
ATACORA	719 484	2 878	2 413	2 022	09.41%	70.30%
ATLANTIQUE	1 257 766	5 031	2 860	2 617	06.40%	52.00%
BORGOU	1 035 910	4 144	3 101	2 163	14.37%	52.20%
COLLINES	785 408	3 142	2 635	2 066	15.60%	65.80%
COUFFO	664 694	2 659	1 952	1 620	15.49%	60.90%
DONGA	460 352	1 841	1 391	1 235	01.36%	67.10%
MONO	434 728	1 739	1 669	1 404	04.88%	80.70%
OUEME	906 041	3 624	1 467	1 341	03.87%	37.00%
PLATEAU	526 062	2 104	1 662	1 428	14.08%	67.90%
ZOU	731 976	2 856	2 514	2 317	06.87%	81.10%
NATIONAL (Rural areas)	8 232 004	32 928	23 880	20 073	09.58%	61.00%

Sources of data: BDI/DG-Eau/DDMEE (Friday 11th May 2012)

[653] Article 32 de l'Arrêté 2007-18 du 19 février 2007 portant attributions, organisation et fonctionnement de la Direction Générale de l'Eau. (MMEE).

Moreover, the decentralization of the sector for provision of drinking water (AEP) shows the desire for a progressive disengagement of the Central Government from the strategic sector, for the benefit of local authorities, mainly the communes which seem from now henceforth better placed, by their proximity and their responsibilities, to ensure provision of drinking water to the local populations. Within this framework, the commune is in charge of developing and adopting its social and economic development plan that it performs in harmony with the national guidelines, with a view to ensuring better living conditions of the entire population[654]. In this sector of provision of drinking water in particular, the law provides that the commune is in charge of putting in place hydraulic infrastructures both in the supply and distribution of drinking water to the population, without forgetting the network for drainage of wastewater[655]. In this regard, it oversees the protection hydraulic resources and contributes to their better use and conservation of hygienic conditions and public health in matters pertaining to prospection and distribution of drinking water.

All these difficulties undoubtedly contribute to making it hard to realize the right of every person to drinking water without which one cannot develop.

II- A RIGHT HARDLY MET

The promotion of a true rule of law passes through various conditions among which the guarantee for human rights is in a good position. Indeed, any person has the right to a clean, satisfying and sustainable environment and has the duty to defend it. The state oversees the protection of the environment and conservation of natural resources in general, in this particular case water[656]. Act N° 2004-44 of 24th November 2004 on water management in the Republic of Benin provides exactly in the same terms in Article 27 of the Constitution of Benin of 11th December 1990 by establishing the right to water as one constitutional principle. It further provides that in Article 6: « each citizen of Benin has the right to have water for his needs and basic requirements of his life and his dignity », putting thus the responsibility of the State and local authorities, in their respective fields of jurisdiction, to oversee sustainable management of water, in view of guaranteeing to the users an equitable access.

Thus, has the right to water really been realized in Benin? By what means can we efficiently guarantee this right to every citizen? What is the state supposed to do to enable all the people of Benin to enjoy effectively the right to water? Moreover, so as to realize this constitutionally enshrined and essential right for life, there is need to think about reorganization and improvement of public water supply.

A- Realization of a constitutionally enshrined right

According to Professor AHADZI, organization of human rights in Francophone countries of West-Africa ''lies on a generous proclamation of rights accompanied by obligations and putting in place a sophisticated system of guarantees''[657]. This ''generosity''[658] which can be measured both on the statistical level and on the level of the scope of the proclaimed rights,

[654] Art. 84 de la Loi N° 97-029 du 15 janvier 1999 portant Organisation des Communes en République du Bénin.
[655] Art. 93 de la Loi N° 97-029 du 15 janvier 1999 portant Organisation des Communes en République du Bénin.
[656] Art. 1er de la Loi N° 2004-44 du 24 novembre 2004 portant gestion de l'eau en République du Bénin.
[657] K.-N. AHADZI, ''Droits de l'homme et développement : Théories et réalités'', In La Voix de l'Intégration Juridique et Judiciaire Africaine (V.I.J.J.A.), Revue semestrielle de l'Association Ouest-Africaine des Hautes Juridictions Francophones (A.O.A.-H.J.F.), N°03 et 04, Cotonou, 2003, p.49.
[658] Expression attributed to Professor Pierre MASSINA, ''Droits de l'homme, libertés publiques et le sous-développement'', N.E.A., Lomé, 1997, p. 31. Cité par Etienne S. AHOUANKA ''Réflexion sur la crise du service public en Afrique de l'ouest francophone'', In Revue Béninoise des Sciences Juridiques et Administratives (R.B.S.J.A.), N°16, Abomey-Calavi 2006, p. 72.

imposes upon States the responsibility to create conditions for realization of these economic and social rights announced. How will they be able to efficiently arrive at that without using their prerogatives of public power?

1- Public service, an indispensable condition

The legal regime of public service seems to be a means enabling Francophone countries of West Africa in general, and Benin in particular, to meet in a better way the fundamental needs established in rights by the Constitution. Indeed as stated by Babakane D. COULIBALEY[659], ''Pertaining to formulae aimed at establishing the conditions to exercise rights guaranteed by the constitution, only those which enable preservation of powers and special rights known under the name of prerogatives of public power seems to stand out in that its able to overcome obstacles which the common law would have placed against the need to defend higher public interest''.

It is therefore unquestionable that the only way for the State to realize constitutionally guaranteed rights goes through good governance in matters concerning organization of public services[660]. This organization must also be in a position to efficiently meet the needs of the entire population.

In this regard, Professor DELVOLVE wrote : ''Public service can also be a means for exercising freedoms, by enabling its users to receive in a concrete manner the means it puts at their disposal : we acknowledge here real freedoms, added to formal freedoms[661] ''. Besides credit rights can only receive satisfaction after putting in place a device meant for meeting the requirements of private individuals. As long as the State has not gotten the necessary means to perform its duty, the right of the creditor who is the citizen cannot be exercised. This explains the need to reaffirm the right to water for all.

2- Reaffirmation of a right to water for all

Access to basic services which are drinking water and sanitation is essential in the respect of human dignity. It plays a major role in all human activities. It contributes in improving living conditions of the affected populations[662].

The right to water guarantees each human being to have for his personal and domestic use affordable and clean water, in sufficient quantity, acceptable quality and accessible. A sufficient quantity of pure water is indispensable to prevent any death by dehydration, to reduce any risk of water-borne diseases and for consumption, cooking, personal and domestic hygiene[663].

Affirmation of the existence of the right to water is of no use if this right cannot effectively be implemented and in particular, if it does contribute in reducing the number of people without access to drinking water. As Mr. Federico MAYOR, Director General of UNESCO

[659] B.-D. COULIBALEY, ''Sur le service public en Afrique : déclin et utilité d'une institution'', Annales de l'Université du Bénin, Tome XVIII-1999, Les Presses de l'UB, Lomé, 1999, p.7, Cité par E.-S. AHOUANKA, op, cit. p. 72.

[660] E.-S. AHOUANKA, ''Réflexion sur la crise du service public en Afrique de l'ouest francophone'', In Revue Béninoise des Sciences Juridiques et Administratives (R.B.S.J.A.), N°16, Abomey-Calavi 2006, p. 73.

[661] P. DELVOLVE, ''Service public et libertés publiques'', in RFDA, 1985. Cité par E.-S. AHOUANKA, op, cit.

[662] See in this regard press article, SOLIDARITES INTERNATIONALES, Access to drinking water in the world, online on www.solidarites.org (Consulted on 10th January 2013).

[663] Nations Unions le 28 juillet 2010.

said: "If access to water is today considered as a basic right, it is upon us all to think about responsibilities which the exercise of this right involves."[664] And Mr. F. MAYOR added: "Water is social and heritage commodity whose use by human beings is regulated by law."[665] Modalities which facilitate access to water for all vary with institutions, tradition and cultures, level of equipments and incomes and are generally supported by information and sensitization programs[666]. Knowing that water consumed can come from several sources (bottled water, water from network, spring, river, well, swamp water, etc.), measures to be taken are diverse. Conditions of access vary a lot since water can be near or far, of good quality or not, free or at a cost.

The legal and political framework varies a lot since, in some countries, it is not possible to force people to pay for their water, nor cut the supply of water. On the other hand, there meters or not to measure the water distributed.

The implementation of the right to water requires existence of precise laws susceptible of being invoked in courts so as those who will have been deprived of water can defend themselves and demand for the respect of their right to water[667]. The right to water just like to food does not mean that water or food is free ; it only means that water be sold at an affordable price in such a way that each person can have. This means that the most underprivileged should receive water free or almost free of charge but not in the least that each person is entitled to receive water at a low cost.

3- Citizen participation and access to information

Informed and active public participation enables maintenance of a climate of trust and confidence between the water distributor and the public. To this end, information on the management of distribution networks and sanitation services and on the basis of pricing must be available, transparent and verifiable. Public participation is particularly necessary in the case of democratic societies like that of Benin and constitutes a very useful means for obtaining socio-economic information necessary for proper working of the system.

Centralism generally gives low results as compared to decentralized management with strong involvement of municipal authorities or users communities, because it tends to deprive the populations concerned of the responsibility to choose the best technical solutions and the most appropriate modalities of funding and pricing. A lot of projects concerning water failed due to lack of support from the concerned populations.

The Water Academy in France put forward in the Social Charter of water principles of participation, cooperation, consultation and negotiation with the local populations and their

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[664] Message issued on the occasion of World Water Day, 22.03.97 (Marrakech). Mr. F. Mayor calls for a new ethic of water and added: "It is clear that pricing policies consistent with the principle of social equity has a role to play in upgrading the water part." It is not enough that the poor have rights (education, culture, justice, health, water) must still they can exercise. Free education, legal aid (support for defense costs), universal health coverage as aid for water (support for basic needs) make these rights effective.

[665] F. MAYOR *:* Un monde nouveau*, Odile Jacob, Paris 1999.* Cité par SMETS Henri, Le droit à l'eau, publié par l'Académie de l'eau, CEDE – AESN, 2002, p. 82.

[666] On the concrete content of right to water, *see* H. Smets *: "De l'eau potable pour les pauvres",* Env. Pol. Law, Vol.30, n°3, pp.125-140 (2000) *; "Le droit à l'eau potable",* dans L'eau au XXIe siècle, Futuribles, Paris, 2000*,* Cité par SMETS Henri, Le droit à l'eau, publié par l'Académie de l'eau, CEDE – AESN, 2002, p. 82.

[667] According to Henri SMETS, *This approach allows to correct the imperfections of existing systems that leave aside the marginalized, too poor or too weak to enforce their rights without the support legal actions or the threat to use it. The inclusion of the poor in unequal societies involves giving them rights to counterbalance their weakness.*

representatives. On its part, CEDE[668] insists on the need to manage water "in cooperation with the users", i.e. by associating them closely with the decisions concerning water like the quality and the scope of supply, reduction of leakages from the networks, pricing modalities, billing of water to public services. The participation of users should facilitate social acceptance of water and promote equal distribution of all costs among everybody[669]. All in all, it does not pertain to only defining sufficiently precise rules so that they are operational on the legal technical level, there is need to support them with adequate reforms and improvements.

B- Pressing need to improve public water supply

Revaluation of the role of the State is imperative and seems to be the only condition of improving public water supply. This thinking which lies on the analysis of the management of public water supply, needs reform, thus requires effective participation of the local communities and intervention of the private sector.

1- Reform of water management framework

Analysis of the current state of water resources and their different modes of management show big problems of governance. The demand for water is rising and increasing competition[670]. We can observe a plurality of stakeholders asserting their legal responsibilities in management of water resources. In these conditions, it becomes necessary to institutionalize the mechanisms required to arbitrate between different types of demand and various groups of stakeholders concerned. This will call upon the Government to put in place a regulatory system to facilitate consultation between different stakeholders in such a manner that equity is guaranteed in access to water and to cover in a harmonious manner all different types of demand.

To do this, it will first be necessary to: develop a national information system on water; privilege approach by the demand; create mechanisms for prevention and resolution of conflicts; guard against risks and negative effects related to water; establish and apply water police[671], etc.

Moreover, clarification of the roles of the stakeholder involved in the water sector is essential in an institutional framework in full development[672]. These roles must be well defined and known to all. It pertains to not only those which the stakeholders have since the new mechanism was put in place. Potential stakeholders in management of water resources are many and are grouped in several categories (ministries and some ministerial departments, local authorities, the private sector, NGOs, civil society etc.). Each one of these categories of stakeholders has its own interests which can correspond with those of another group or be contradictory. The interests and importance of each category of users can also change with time. Thus, in an objective of good governance and efficiency of management of the available resources, different functions of each stakeholder must be transparent and precisely defined, and the application of clearly defined principles must govern their execution[673].

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668 European Council of Environmental Law.

669 According to Henri SMETS, *Le Droit à l'eau*, One of the challenges is to convince users to abandon subsidies to pay for water the real price of and accept the increase in the price of water to make it financially independent the water department.

670 See National Water Policy Document, Directorate General of Water (DGE / MMEE), developed in July 2009, P. 31.

671 Idem, p. 47.

672 Idem, p. 45.

673 Idem, p. 46.

Lastly, the reform of the organizational framework for management of water resources in this regard require a repositioning of government structures on their royal mandates and a better involvement of non-public stakeholders in the actions to be put in place. The success of this system of improvement of public services involves good distribution of responsibilities[674]. Decentralization and privatization shall be the relevant modes of devolution of responsibilities.

2- <u>Effective decentralization of basic public services</u>

In March 2013, Benin completed ten (10) years of experience in learning decentralization. However the transfer of powers is not yet a reality, in particular in the sector of provision of drinking water. The report made currently in this sector is that technical services[675] of the General Directorate of Water and the devolved services of water still undertake, as stakeholders the prerogatives of the before the decentralizing reform. It pertains to project owner for hydraulic and sanitation infrastructures.

By therefore seeking to capitalize on the progress accomplished by several communes in capacity to exercise project ownership and established during the assessment of village hydraulic programs, the State must ensure in a progressive manner but fast, the transfer of powers and financial resources to local authorities in the sector of provision of drinking water and sanitation. In so doing, it concerns consequently improving the level of responsibility for local stakeholders, the rhythm for execution of hydraulic infrastructures, transparency and speed in decision making, efficiency and effectiveness of activities[676].

All in all, decentralization of powers and resources to infra-municipal level, for example to estate or village level requires special efforts, but it can have significant benefits[677].

3- <u>Intervention of the private sector</u>

Making the private sector participate in the management of hydraulic works is a strategic choice which aims at improving management of hydraulic works, both in urban and in rural areas, thanks to the creation of added valued in terms of technical skill and business trends by private operators[678].

The call for private sector in the field of infrastructure in general can thus be considered relevant since it can be done as a priority for "capitalistic" projects, i.e. comprising the realization of infrastructure which it contribute in its funding, or for projects where its innovative management will be sought. The private sector also brings increase in value when the project calls for a special or developing technology and technicality[679]. Since in the first approach, the more a public commodity or a service is "priceable", the more it appears easy to introduce a private partner: this is the case in water, telecommunication, electricity,

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[674] Voir CHAPUS (R.), Droit administratif général, Tome 1, N°342, 343, p. 256-260, ou N°553 s, 15è édition, Montchrestien, Paris, 2001, Cité par E.-S. AHOUANKA, op, cit. p. 77.

[675] See National Water Policy Document, op. cit., p. 57.

[676] Idem, p. 58.

[677] World Bank Report on development in the world 2000-2001, ''*Fighting poverty*'', Editions ESKA. Cited par AHOUANKA (E. S),

[678] Document de Politique Nationale de l'Eau, op. cit., p. 58.

[679] If it does apply to telecommunications and air transport, for example, it is also the case for water and sanitation that now require special purification techniques such as pricing.

where consumption calls for fees and/or rates[680].

The national strategy for provision of drinking water in urban areas (2006-2015) provides rightly so for support-advice of SONEB in the commencement of the new experiment of delegation in urban areas. However, it is important to put in place a national mechanism for regulation of delegated management of hydraulic works by the private sector[681]. The role of the latter is to enhance through its accountability in the delegated management of hydraulic works in rural areas and small systems of AEP in semi-urban areas, in conformity respectively with the national strategy for provision of drinking water in rural areas (2005-2015) and in urban areas (2006-2015). In supporting this trend, it is indispensable to create a favorable environment to responsible and efficient participation of the private sector[682].

CONCLUSION

Access to drinking water is criterion for social justice, dignity, equity and peace. It must be guaranteed for all and be sufficient, satisfactory and non-discriminatory.

For some years, sustained efforts have been made so as to manage well water resources and ecosystems which depend on them. Improvement of performances for management of the sector for provision of drinking water indeed remains an ultimate goal. Consequently, the government must redouble efforts to realize the MDGs[683] in water which consist of bringing the average rate of water supply to populations in urban areas from 64% to 75% and in rural areas from 61% to 7% respectively, that is, a national rate of 67.5% by 2015.

In the water sector in Benin, public authorities shall in principle be on the first line to invest. Their positive obligations (providing drinking water, draining and treating wastewater, putting an obstacle to degradation of water resources, providing water in case of shortage), equality obligations (non-discriminatory treatment of different users, access for each person to the minimum quantity and sufficient quality of water) and negative obligations (not to interrupt water supply, not to distribute dirty water, not to less water resources be exhausted, not to authorize or tolerate water pollution). These obligations can be subject to contentious appeal when they are not met. The appeals concerning positive obligations are realized with difficulty when the latter involve investments from public authorities.

Thus, to arrive at guaranteeing the continuity and lasting quality of water supply, it appears often preferable that the supply of water be financed directly by the users (principle of user-payer) rather than by public grants subjected to ups and downs of budgetary policies. When the basic investments have been put in place and funded, the cost of water should be fixed to a level sufficient enough to pay at least for maintenance and renewal of the existing equipments as well as operation costs, which would enable avoiding degradation of the quality of service.

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680 C. Stéphane, op. cit., p. 38

681 Document of National Water Policy, op. cit., p. 58.

682 Idem, p. 34.

683 The strategy paper for the achievement of the target 10 of goal no. 7 entitled: "ensuring environmental sustainability" of the MDGs in Benin, December 2006. pp. 4-5.

LEGISLATION OF THE INTANGIBLE CULTURAL HERITAGE (ICH) IN BÉNIN.

By **Guy A. ONAMBELE**[*]

INTRODUCTION

Culture is models of behavior of an organized of group[684] which answers to the needs of individuals in a society. Culture is the collective living memory of a people and its conservation maintains the continuity of the society which produces it. According to UNESCO[685], culture is « *a set of distinctive, spiritual and material, intellectual and emotional features/traits which characterize a society or a social group. It encompasses in addition to arts and letters, ways of life, fundamental rights of the human person, value systems, traditions and beliefs*[686] ». It is cultural[687] that which is in relation to culture[688] and usually the term heritage is often attached to this adjective. Heritage refers all property inherited from the father and from the mother[689]. This expression also means common inheritance of a human group, of a community[690]. Cultural heritage refers to habits and customs of a given community. It is constituted of intangible and tangible property with a historic or artistic character belonging to a private or public entity, to a people or to a nation. It ensures the transmission of past knowledge to future generations and thus gives a soul to a town, to a people[691]. The so called « *tangible* » cultural heritage is formed of constructed landscapes, architecture and town planning, archeological and geological sites, some management of agricultural or forestry areas, artworks and furniture, industrial heritage (tools, instruments, machines, basting, etc). While « *intangible* » cultural heritage brings together all practices, representations, expressions, skills and knowledge[692] which communities, groups and where applicable, individuals acknowledge as part of their cultural heritage[693]. This intangible cultural heritage, transmitted from generation to generation, is continuously recreated by communities and groups in accordance with their environment, their interaction with nature and their history. It gives them a feeling of identity and continuity, thus contributing to promotion of respect of cultural diversity and human creativity. If cultural practices are transmitted from generation to generation, their

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[684] LINTON Ralph, *Le fondement culturel de la personnalité*, Paris, Dunod, 1999, p. 54.

[685] The United Nations Educational, Scientific and Cultural Organisation. There were 195 member countries of UNESCO in 2012

[686] Mexico City Declaration on Cultural Policies. World Conference on Cultural Policies, Mexico City, July 26-August 6, 1982, www.jura.ch/acju/Departements/DED/OCC/Documents/pdf/Unesco.pdf (visited 27.10.2012).

[687] «Webster's New Collegiate Dictionary » meanwhile offers three relevant definitions which of which two will be used in the context of this work because of their relevance. In the first definition, culture is seen as "the integrated set of human behavior, including thought, speech, action, and artifacts based on the ability of human beings to learn and transmit knowledge to succeeding generations. "The second definition of culture is "traditional beliefs, social conventions, the physical characteristics of a racial, religious or social group."».

[688] Le Petit Larousse illustré 2012 defines culture as a set of customs, religious festivals, artistic which characterize group or society.

[689] General meaning.

[690] Le Petit Larousse illustré 2012.

[691] SOGAN Richard and DEGBE Casimir, response in the TV show on Office Televised Radio of Benin on "Valuing and promoting the cultural heritage in Benin" October 22, 2012.

[692] As well as instruments, objects, artifacts and cultural spaces associated with them.

[693] Communities must recognize the elements that are part of the intangible cultural heritage associated with them.

content improves from one generation to another. To protect them, the State is called upon to come up with a set of legal standards in the field of cultural heritage. It is legislation or the power to make laws in a given matter[694]. Legislation is more specifically all laws of a State or a region in relation to a branch of law or relating to a particular object[695]. This legislation could be qualified as biased if the majority of its provisions enable realization of well defined objective, strive towards the conservation of the object they are called to protect.

Socio-cultural mutations which people living in Benin have undergone over the last centuries certainly promoted exchange of skills and knowledge, but especially exposed their intangible cultural heritage to disappearance due to its volatile nature. Historical stages of slavery and colonization encouraged this situation. With the advent of democratic renewal at the beginning of 1990s, no change in terms of protection is perceptible. Intangible cultural heritage remains under protégé. The Beninese legislature is hardly informed in this matter[696] in such a way that laws relating to cultural heritage enacted for the last two decades only affect the tangible aspect to the detriment of intangible heritage. The reality is that intangible cultural properties can be recorded in various forms, but they are rarely fixed on a permanent physical form. Their representation or their expression is different and has undergone major and frequent transformations. This characteristic threatens their existence and exposes them to disappearance. They can easily be subject to imitation. They can be easily trafficked. But their preservation with the help of legal mechanisms is extremely difficult[697], contrary to what is done for the benefit of heritage objects. In this context, what would be the practical scope of a legislation directed towards protection and promotion of intangible cultural heritage in Benin? What would be its basis in municipal law and in international law? What are the appropriate support mechanisms to guarantee true efficiency to such a legislative reform? How would we operationalize the legal texts in force? To what extent would the appropriation of these texts be facilitated to stakeholders in the cultural field?

The importance granted to the collective memory of humanity pushed the international community to come up in 2003 with the Convention on Intangible Heritage with a view to safeguarding and protecting it. In terms of the said Convention, intangible cultural heritage[698] is taken into consideration in all states in conformity with existing international instruments relating to human rights, as well as the requirement for mutual respect between communities, groups and individuals, and for a sustainable development[699]/[700]. The current legislation of Benin does not enable taking advantage of this Convention whose provisions can help Benin to develop her ICH. Lack of consistency and harmony of the national legislation relating to intangible cultural heritage has made it a limited asset **(I)** which urgently calls for a biased legislation for its safeguarding **(II)**

I – Limited assets of the current ICH legislation

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694 *Le petit Robert 1*, Montréal, 1992, p. 1082.

695 CORNU (Gérard), Association Henri Capitant, (Sous la direction de), *Vocabulaire juridique*, Paris, PUF, 1ère Edition, Collection Quadrige, 1987, p. 540.

696 Entretien réalisé le 10.10.2012 avec M. SOGAN Richard, Directeur du Patrimoine Culturel au Bénin.

697 DEGBEY (Coffi Casimir Apollinaire), *Bénin : Problématique de la protection juridique du patrimoine culturel. De la question de la gestion des collections muséographiques*, Berlin, Editions universitaires européennes, 2011, p. 10.

698 Intangible heritage comes in different forms: songs, costumes, dances, gastronomic traditions, games, myths, tales and legends, small trades, testimonials, uptake of techniques and know-how, written documents and archives (including audiovisual), etc..

699 Article 2 para.1 of UNESCO Convention for protection of intangible cultural heritage of 17th October 2003

700 Article 2 paragraph 2 of the Convention for protection of intangible cultural heritage of 17th October 2003: "it can be grouped in the following areas: (a) the oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) the know-how linked to traditional crafts".

Protection of cultural heritage capitalized on administrative and legislative reforms initiated in Benin since the last three decades. But, legal protection of intangible cultural heritage still suffers from inconsistence in the substance **(A)** and from disarticulation in the form **(B)**.

A – Inconsistent substance

Although Benin has a legislation which aims at protecting intangible cultural heritage, there is a clear lack of precision of this internal legal sequencing concerning protection of ICH **(1)**. It is the materialization of the limited influence of the international legal instruments in the matter **(2)**.

1. – Lack of precision in the internal legal sequencing

Internal legal sequencing for protection of ICH in Benin is characterized by perceptible lack of precision in different legal texts.

The Constitution of Benin of 11th December 1990 enshrines equality of all citizens to have access to culture[701]. If every person has a right to culture, this fundamental law gives a duty to the State « *to safeguard and promote national values of civilization both material and spiritual, as well as cultural traditions*[702] ». It is acknowledged that all communities have the freedom « *to develop their own culture*[703] » but on condition that they respect cultures of other communities. Through these provisions, the Constituent member acknowledged the importance which culture assumes for the psycho-social balance of communities. The Constitution of Benin although outstanding in the protection of cultural values, distinguishes well different forms of cultural heritage namely the tangible aspect and the intangible aspect. But, its provisions do not sufficiently integrate the cultural dimension of development recommended with the framework of the global decade of cultural development officially launched on 21st January 1981. But, cultural development is an essential dimension for the process of endogenous and integral development of a country[704].

Having the force of law, the Cultural Charter in the Republic of Benin of 1991 confirms this state of affairs. It reminds the State of its obligation of promoting national cultural development through the ministry in charge of culture[705]. The State has also the duty of safeguarding, protecting and «*development of physical and non-physical heritage*[706]» as well as the responsibility of protecting any alteration of this heritage[707]. Even if this Charter affirms the equality of cultures attached to communities, it does not distinguish tangible heritage from intangible heritage. By making the State the principal promoter of national cultural development through the ministry in charge of culture which is the central organ[708], the Charter seems to minimize individual initiatives to the extent where this central organ is convinced to be having absolute powers while in reality it is only supposed to stimulate and to coordinate the activities of all the sectors of development which contribute to cultural heritage. According to this Charter, public authorities of Benin must put in place measures

[701] Article 8 of Act No. 90-32 of 11 December 1990 on the Constitution of the Republic of Benin.
[702] Article 10 of the Act n°90-32 of 11th December 1990 on the Constitution of the Republic of Benin.
[703] Article 11 of the Act n°90-32 of 11th December 1990 on the Constitution of the Republic of Benin.
[704] ZANNOU (Timothée), « La politique culturelle de la République du Bénin », note introductive à la Politique culturelle et Charte culturelle de la République du Bénin, Cotonou, [SE], p. 7
[705] Article 1 of law 91-006 of 25 February 1991 establishing the Cultural Charter in the Republic of Benin.
[706] Article 11 of law 91-006.
[707] Article 13 of law 91-006.
[708] Article 1er of law 91-006

which prevent illegal export of cultural commodities and their marketing[709]. However, practical measures have not been put in place to implement these guidelines.

Act n°2007-20 on protection of cultural heritage which came into force in 2007 would have been a beginning of the solution to this legal vacuum. It brings precision on the process to keep for defining, making an inventory, classifying and protecting the said heritage[710]. Although it applies to intangible cultural property, movables and immovables, public or private whose protection is of public interest, it only gives a small attention to ICH. This tends to mean that tangible cultural heritage is preponderant over ICH. This is far from the truth. The implementation of this law is subordinate to the institution of other administrative measures which have not yet been taken[711]. The fact that intangible cultural property is volatile and fragile, it is very difficult to protect it, which explains the narrowness of the legal framework developed in this regard.[712]

Act n°2003-17 of 17th October 2003 on direction of the national education in the Republic of Benin makes school as a means for access to culture, science, knowledge, know-how and self-management skills[713]. According to this legal instrument, the school constitutes a carrier for transmission of cultural heritage[714]. Without naming it as such, the guidance law requires that the school transmits a big part of the ICH[715] to train intellectually and morally balanced citizens, capable of participating in economic, social and cultural development of their country[716]. Thus disciplines of cultural and artistic nature must be developed through technical education and professional training. The direction law is supposed to maintain viable some elements of ICH to the extent where it as calls upon the State to promote national languages at nursery, primary, secondary and higher learning levels. This approach is promising since ICH is transmitted orally, very few of the traditions are transcribed. But, lack of support for these measures by structural and resource materials limits the effects of this guidance law.

The texts governing academic activities in the institutions of higher learning of any level do not encourage the transmission of cultural heritage. Besides the division between different public institutions of higher learning in Benin, training modules in relation to culture and art do not arouse interest of the learners. The latter could get more interested in ICH if they were required to validate value units relating to ICH during their academic course. Maintaining the current situation enhances limited influence of the international law on the promotion of ICH at the national level.

2. – Limited influence of the international law

The International Convention of 1995 fights against illegal trafficking of cultural property. Benin is a part of this Treaty but, has not yet taken legal measures for limiting trade of

[709] Article 13 al. 2 of law 91-006. This is in accordance with the International Convention June 24, 1995 UNIDROIT.

[710] Article 1er No. 2007-20 of 23 August 2007 on the protection of the cultural heritage and natural heritage of cultural nature in the Republic of Benin,

[711] The process of producing order and circular in Benin is quite laborious in general. It requires time and patience.

[712] Interview on 09 October 2012, with Mr. SOGAN Richard, the Director of Cultural Heritage in Benin.

[713] Article 3 of Act No. 2003-17 of 17 October 2003 on Direction of Education in the Republic of Benin.

[714] « "The school must offer everyone the opportunity to understand the modern world and transform the environment starting with national cultural values, endogenous knowledge, expertise and know- and universal scientific heritage »

[715] Article 4 § 3 of Law No. 2003-17 of 17 October 2003 on Direction of Education in the Republic of Benin: "The school is open to all relevant positive innovations and must take into account in particular civic, moral teaching, education for peace and human rights, education in the field of population and family life education on the environment and development education […] ».

[716] Articles 6 and 7 of Act No. 2003-17 of 17 October 2003 on Direction of Education in the Republic of Benin.

artistic works and cultural property which carried out throughout the national territory. Sale of artistic works to tourists and to people provided by craftsmen is encouraged by the lack of a national regulation which protects them.

The African Charter for Human and Peoples' Rights (ACHPR) takes into account the traditions of the African. It affirms the need for consideration of historical traditions and values of African civilization in the understanding of human rights[717]. The promotion and protection of morals and traditional values recognized by the Community constitute an obligation to the State in the framework of safeguarding human rights[718]. But, in Benin, the promotion of cultural activities conforms to these different measures of the Charter is confronted by different constraints. One could rely on the example of Gaani to illustrate it.

In Benin *Gaani* festival[719], which takes place every year, first inn Nikki, capital of *Baatonu* Empire, then in each of big village towns of *Baru Tem*[720], is always the double sign of identity and meeting[721]. *Gaani* festival is the identity of the people Baatonu, identity seized through an emblematic cultural show. It is a commemorative day of the amnesty of Muslims with the animist people, in general, and the *Baatombu*, in particular[722]. It celebrates the death of infidels of Prophet Mohammed[723]. *Gaani* festival of Nikki is a traditional event which with time has been able to adapt with the modern times. Its major asset is that it constitutes a framework for dialogue between tradition and modernity, with a space for cultural intermingling and mixing on the substance of tolerance and reciprocal acceptance. The participation of the people of batombu in this cultural is keeping in line with the proof of their belonging to social practices which they practice. Besides administrative measures taken each year by the central government for the organization of this festival, material support for its survival still calls for efforts on its part.

African Intellectual Property Organization (AIPO) is supposed to protect all mind creations taking place in the member states of this organization. The festivities surrounding Gaani assume this nature and should receive its protection. The difficulty which AIPO would face in protecting the authenticity of an element of ICH like Gaani is due to the fact that its elements cannot acquire an individual property right not even group property like that of the Batombu. These are creations which exist since thousands of years and are transmitted from generations to generations. Granting an individual property right to an item of ICH is synonymous to its extinction to the extent where it will no longer be part of intra-community and intergenerational communication. The uniform act of the Organization for the Harmonization of Business Law in Africa (OHADA) adopted the same careful attitude as AIPO.

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[717] V. LAGELEE (Guy), MANCERON (Gilles), *La Conquête des droits de l'homme*, Paris, Le Cherche-Midi, 1998.

[718] Article 17, alinéas 2 et 3 de la CADHP.

[719] La Gaani signifie « nasara » (joie, victoire, libération) .

[720] Pays Baatonu.

[721] BIO BIGOU (Léon), « La Gaani, element of intangible cultural heritage of Benin and safeguard measures by the custodian communities, "Communication" Workshop understanding and control mechanisms of the 2003 Convention for a review of policies and legislation in Benin "held in Porto novo from 19 to 23 November 2012.

[722] Muslims and Baatombu were at war against each other. The day of the birthday of the Prophet Muhammad, the guns fell silent and the Baatombu would have gotten the opportunity to finally escape from the influence of Islam. Therefore Gaani always coincides with the Mulud or anniversary of the birth of the Prophet Muhammad. This festival takes place on the 12th day of the third month of the year among the Baatombu.

[723] The death of the prophet would have coincided with the day of his birth, while the Muslim faithful celebrate his birth, pagans, infidels threatened and attacked, celebrate, them, his death to express their joy of liberation of Islamic wars. In culture and design Baatonu, a man who is considered "lived well" is one whose date of death coincides with that of his birth. This would be the case of the Prophet Muhammad.

The Treaty of 17th October 1993 in relation to harmonization of business law in Africa enabled member states to develop and adopt simple and modern common rules adapted to their economic situations[724]. Article two (2) of this Treaty enumerates the eight (8)[725] matters which fall under the realm of business law within the scope of OHADA. This list excludes artistic objects and cultural products. This exclusion puts all art products exhibited during Gaani festival outside the control of OHADA. In other words, they are exposed to transactions which do not have legal protection.

The Beninese legislature transposed international conventions for protection of cultural heritage in its internal legal sequencing. Indeed, the Law 2007-20 integrates several aspects of international protection of cultural heritage[726] and reflects the determination of the legislature to conform to international standards in the field of cultural heritage[727]. However, the influence of international legal sequencing in the matter remains limited on the protection of ICH in Benin. Support measures for the implementation of the 2003 Convention have not yet been taken by the public authorities of Benin. It is only in 2010 that Benin ratified this convention and only recognized a part of it in 2012. But, the measures to be taken for the application of the said instrument are of great importance to clear up any confusion which the Convention came to correct. This comforts the negligence observed in the legal sequencing of Benin whose form in this matter is deeply disjointed.

B – Disjointed form

The efficiency of instruments which guarantee the legality of actions in a field lies on performing institutions in charge of applying them. However in Benin, the operationalisation of the legal protection of ICH is compromised **(1)** and its promotion is mortgaged **(2)** by ups and downs to be overcome within some key structures.

1. – Compromised operationalization

Operationalization of the ICH protection should be ensured by the Directorate of Cultural Heritage of Benin (DPC)[728]. It is a technical structure of the Ministry in charge of culture. For this reason, it cannot lead major actions on the field. This directorate suffers from shortage of human resources and a gap in necessary technical skills to efficiently implement the 2003 Convention[729]. Following the ratification by Benin of the said Convention, an implementation process is developing at the national level of which sessions for capacity building in human resources[730] are planned. Outside these sudden activities, Benin has

[724] ISSA-SAYEGH (Joseph) et al. (Sous la direction de), *Traité et Actes uniformes commentés et annotés*, Paris, Juriscope, 2008, p. 23.

[725] 1) the legal status of merchants, 2) corporate law, 3) security 4) debt collection, enforcement procedures, and 5) the system for recovery of business and legal liquidation; 6 arbitration law; 7) accounting law; 8) transportation..

[726] V. Convention concerning the Protection of Global cultural and Natural heritage of 1972 Convention on the Protection of Underwater Cultural Heritage 2001 Convention 2003 Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

[727] Association internationale des Maires francophones, Union Européenne, *Patrimoine culturel et développement local. Activité 1 : Recherche et analyse*, Cotonou, 2012, p. 18.

[728] The primary mission of the DPC is the implementation of the state policy in the field of tangible and intangible cultural heritage. V. Article 1, paragraph 1 of Decree No. 2010 037/MCAPLN/DC/SGM/CTJ/DPC/SA on allocation, organization and functioning of the Directorate of Cultural Heritage in Benin.

[729] Fiche techniques de « l'Atelier de compréhension et de maîtrise des mécanismes de la Convention 2003 pour une révision des politiques et de la législation béninoise » tenu à Porto-Novo du 19 au 23 novembre 2012.

[730] In support of this process, a training workshop was jointly organized by the Ministry of Culture, Literacy, Handicrafts and Tourism and the Ecole du Patrimoine Africain (EPA) in Porto Novo from 19 to 23 November 2012. It was attended by 23 participants including staff of CPD, representatives of local communities and associations, but also two students from the University of Abomey as observers. .. The workshop focused on basic concepts, mechanisms and

higher learning institutions where professional skills can be acquired on the management of cultural heritage. It pertains to African Heritage School (EPA)[731] and the University of Abomey-Calavi (UAC)[732]. But the graduates of these institutions do not have, upon leaving them, the necessary professional skills for the protection of ICH. They need complementary empirical knowledge to acquire such experience. Moreover, both for timely trainings and academic trainings, a deep understanding of cultural events such as Gaani must be part of the modules to be learnt. Where possible, field visits should be organized if the training period coincides with the show to witness the realities of the same. However, Gaani remains hardly known by populations whose origins are not located in Djougou or in Nikki. It consequently becomes hard to link theory and practice as pertains to knowledge and promotion of this festival at the national level or even international level.

The Decree for the creation of DPC grants it a very heavy specifications book[733]. DPC seems to be upstream and downstream of the implementation of the cultural heritage policy. Among the services which it has, there is a Department of Documentation, Research and Promotion of Intangible Heritage (SDRPPI)[734]. The powers devolved to this department lead to confusion. Indeed, SDRPPI is among others, in charge of participating in the operation of collecting tangible and intangible property, carry out an inventory of monuments and sites in liaison with the department in charge of the inventory[735]. It must also take to ethnographic, historical, esthetic, archeological and architectural researches on movable and immovable heritage counted and classified[736]. Referring to the spirit of the 2003 Convention, this provision gives a very wide specifications book[737] to SDRPPI whose activities should be limited to protection of ICH only. Operationalization of ICH is thus found compromised in respect of the shortage of human resources and technical skills of this administrative service. Benin seems to have found a solution for the approach.

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obligations of the State for the implementation of the 2003 Convention at the national level. Specific implications for the implementation of the 2003 Convention in Benin. The workshop was organized as part of the overall strategy of the UNESCO for capacity building for safeguarding intangible heritage. It is an important step in the process of long-term commitment to Benin to conduct a review of policies, inventory ICH with the participation of communities, taking into account the international mechanisms of the 2003 Convention.

731 It is a university training and research of the second (2nd) grade and specializes in the preservation and promotion of intangible cultural heritage and equipment (historical sites , monuments , archaeological sites, museums, libraries , archives) regionally oriented Its main mission is to strengthen the network of African professionals to promote the conservation and enhancement of cultural heritage. It offers, in this part of the training modules for local government officials for the best protection, conservation and management of African heritage cities. EPA has other missions of promoting projects for socio- economic development which include the safeguarding and enhancement of cultural heritage. It organizes training modules and / or workshops for capacity building of local government officials. The town hall officials who participate in training are often officials of the directorates of technical services councils, people in professional situations. Their level of education depends on the agents recruited by the local communities across the country. These courses are validated by certificates and certificates of participation. Only certificate in design and implementation of cultural projects organized in partnership with the University of Aix- en-Provence (France) is a degree program. There were local government officials trained under this program. The objective of the license is to train African professionals capable of designing and managing cultural projects V. Association internationale des Maires francophones, Union Européenne, *Patrimoine culturel et développement local. Activité 1 : Recherche et analyse*, Cotonou, 2012, p. 25. Les résultats déjà atteints : 30 cultural mediator already trained in 5 countries (Bénin, Burkina, Cameroun, Congo, Sénégal).

732 There was on the one hand the Department of History and Archaeology of the FLASH which is responsible for training learners in research and conservation of cultural heritage, on the other hand, ENAM which hosts Masters in management of cultural heritage and the first class enters the labor market in 2013.

733 It is in charge of developing and updating the national policy of cultural heritage.

734 Article 4 alinéa 5 de l'Arrêté 2010 n°037, *Op. Cit*.

735 Article 13 alinéa 1 de l'Arrêté 2010 n°037, *Op. Cit*.

736 Article 13 alinéa 2 de l'Arrêté 2010 n°037, *Op. Cit*

737 Article 13 alinéas 3 à 6 de l'Arrêté 2010 n°037, *Op. Cit*. «The Department of Documentation, Research and Promotion of Intangible Heritage is responsible for [...] * identify, preserve, popularize the Intangible Cultural Heritage of the Republic of Benin; * promote knowledge of intangible cultural heritage both inside and outside the territory through the publication of articles, seminars, broadcast in various media; * make periodic update of the central database of museum collections; * create a database on tangible and intangible cultural heritage»

Protection and promotion of ICH in Benin can only be a reality when there is a real transfer of skills from the central level to the periphery. Directives from the ministry being more technical than operational, it is by involving communities and other stakeholders that it will be possible to guarantee a better protection of ICH. On this aspect, progress although insufficient, has been made by the Beninese legislature in decentralization of cultural heritage management over the last two decades,

If in the Central Charter of Benin, communes received more responsibilities in protection of cultural heritage[738], serious changes have taken place since the promulgation of the law 2007-20 of 2007 in relation to protection of cultural heritage. Henceforth, « *management, protection and conservation of local cultural property is a responsibility of the commune and properly constituted communities*[739]». Moreover, the ministry remains principally in charge of the process of transforming property into heritage at the national level[740]. It is also in charge of giving assistance to decentralized organs through its decentralized departments[741]. The relationships between decentralized organs and the ministry of culture are not detailed in law 2007-20. Only a decree should define the modalities of their collaboration[742]. There exists within the ministry of culture various departments in charge of management of cultural heritage[743]. Although in fact communes indirectly intervene on the protection of ICH through urban planning regulations in the heritage policy, the State reserves the main prerogatives in this field. Heritage legislation does not reflect this reality and it is necessary to make this decentralization come true with more precision on the role of communes[744] particularly on conservation of ICH. To better help in the organization of Gaani festival, there should be no need to wait for the assistance of the central government. On the contrary, support from the prefecture and local authorities on the community who organize it, could guarantee real success of this event. Before promoting Gaani festival, it would also be necessary to know the content of the same thanks to the inventory.

The promotion is preceded by inventory which is continuously done[745]. Inventory is counting and description of cultural or natural property with a cultural character[746]. It is the first action to be undertaken in conservation and promotion of ICH. In Benin, public authorities have not yet undertaken a national inventory of ICH in conformity with international standards and the 2003 Convention. An institution like Gaani should not escape this inventory. The

[738] The government through the Ministry of Culture is responsible for protecting and conserving cultural heritage in all its components. Cultural Charter reminded repeatedly. However, it does not include the transfer of skills in management and development of local cultural heritage in commune. The transfer of skills in the field of culture is limited to the establishment of the necessary infrastructure in cultural life. According to Article 31 of Law 91-006 decentralization of cultural life concern '' monitoring of cultural programs of regional development associations, building infrastructure for cultural activities in the regions, towns and villages, organization of cultural events at local and national level »..

[739] Article 7 al. 2 de la loi 2007-20, *Op. Cit.*

[740] Article 7 al. 1 de la loi 2007-20, *Op. Cit.*

[741] Article 8 de la loi 2007-20, *Op. Cit.*

[742] Article 9 de la loi 2007-20, *Op. Cit.*

[743] Introductory form Benin on 27 June 2011 AIMF, p. 6. Directorate of National Archives (DAN) Directorate of the National Library (DBN), Directorate of Cultural Heritage (DPC). The latter includes: Department for Promotion of Museums and Educational Action (SPMAE) The Department of Legislation, Protection and Heritage Inventory (SLPPI) The Department of Documentation and Research (CSD) the Department of Cooperation, Communication and Training (FACT) decentralized structures: national museums: Le Musée Historique d'Abomey, Le Musée régional de Natitingou, Le Musée d'Histoire de Ouidah, Le musée Honmè de Porto-Novo, Le Musée Ethnographique Alexandre Sènou ADANDE de Porto-Novo, Le Musée Plein Air de Parakou.

[744] V. Association internationale des Maires francophones, Union Européenne, *Patrimoine culturel et développement local. Activité 1 : Recherche et analyse*, Cotonou, 2012, p. 23.

[745] Implication des communautés V. Convention 2003 articles 2, 11, 15) ; V. Directives Opérationnelles 1, 2, 7, 101b).

[746] Article 12 of Law No. 2007-20 of 23 August 2007 on the protection of cultural heritage and the natural heritage of a cultural nature in the Republic of Benin. The difficulty of ICH inventory is related to the fact that this material is volatile, not palpable. It takes time, meetings, consensus, engage communities to have reliable and updated information, adjust inventory in the middle, take inventory in the context of an overall project and not in isolation.

last national census of cultural heritage[747] present in Benin was done in 1986[748]. It did not distinguish between tangible cultural heritages from intangible heritage. Since then, attempts for inventory have taken place in a localized manner[749]. In 2012, a national NGO initiated inventory of ICH in Benin with the agreement of the Ministry of culture. Restitution of materials identified will be done in the coming days. The data base will be availed to the government to regular update. But at the current level of knowledge, an event such as Gaani cannot be included in the heritage of humanity, because proof of consent in writing given by the community[750] which practices it is not yet constituted.

Promotion of ICH by national financial resources is confronted by control on the national budget which is also decreasing each year. The priority of public funds from the ministry in charge of culture is sometimes directed towards development of public infrastructure of the district chosen to host festivities of the national holiday[751] to the detriment of the annual work of DPC[752]. The rotating nature of this celebration would sometimes be the source of reduction of the budget line allocated to the Gaani festival and other events of national scale. This gap of funding would have found a solution through funds created within the ministry of culture.

Indeed, there are two funds: Development Fund for Cultural Heritage (FDPC) and Fund for Cultural Assistance (FAC)[753]. Created by Decree 2011-806 of 29th December 2011, Development Fund for Cultural Heritage is in charge of mobilizing financial meant for development and promotion of cultural heritage and funding all actions for development of structures and international associations involved in the field of cultural heritage[754]. Among other responsibilities, this Fund is called upon to contribute in funding promotion actions for intangible property at the national and international levels[755]. It must participate in all initiatives of public and private institutions which aim at cultural heritage development at the national and international level[756]. Its resources[757] are from various origins. In its expenses there appears, besides those investments and operations, repayments for advances and loans and all other expenses connected to its duty[758]. It is theoretically a source of funding for known festivals like Gaani. But such is not the case; since its creation FDPC has not

747 Tangible and intangible

748 Interview done 10/10/2012 with M. SOGAN Richard, Director of the Cultural Heritage in Benin. This inventory was done on funding from the International Organization of the Francophone.

749 Communes of Ouidah and Abomey tried to conduct a localized inventory.

750 It is those who come together and recognize, practice and transmit elements of ICH). Communities should be involved the following steps: * Identification, definition and inventory (2 conv, 11b, 12) * Awareness (DO 101b) * Capacity building (OD 81, 82) * Backup Management (15 conv); * Applications (DO 1, 2, 7) * Request for International Assistance (DO 12) * periodic reports (OD 157, 160) the consent of the community must be free, informed, prior (with information to advance).

751 Celebration of attainment of national sovereignty for the country.

752 For this reason, in April 2011, the Ministry of Culture organized a roundtable to mobilize resources for the development of cultural heritage of Benin.

753 The first has 60 million CFA francs, while the second contains one billion CFA francs. The budget for the first year of FDPC was renewed the following year

754 Article 3, paragraph 2 of Decree No. 2011-806 of 29 December 2011 on the establishment, functions, organization and operation of the Development Fund of Cultural Heritage in the Republic of Benin.

755 Article 3, paragraph 5 of the Decree No. 2011-806 of 29 December 2011 Carrying establishment, functions, organization and operation of the Development Fund of Cultural Heritage in the Republic of Benin.

756 Article 3, para. 9 of the Decree n°2011-806, *Op. Cit*. It is administered by a Board of Directors which is the governing body. It is vested with the broadest powers to act on behalf of FDPC or authorize all acts or operations relating to its purpose and deliberate on all matters relating to the operation of the Fund.

757 Article 32, alinéas 1 à 5 du Décret n°2011-806, *Op. Cit*. They are constituted of the annual state grants for the implementation of the development program of the PC, contribution from museums and other structures of the PC, contribution from businesses and companies which have signed sponsorship agreements or patronage with the FDPC, interest on bank deposits, donations and legacies.

758 Article 33 alinéas 1 à 4 du Décret n°2011-806, *Op. Cit*.

yet supported financially an initiative of ICH[759]. It is underfunded and cannot be able to mobilize the means to achieve its ambitions.

Fund for cultural assistance of one billion CFA was put in place to support individual and joint projects in culture. It had the first duty of mobilizing local elected leaders to initiate viable cultural activities which can generate income. However, the local leaders are contented with going to draw in this fund at the central level without putting in place reliable and profitable actions of ICH in the field. For a cultural event like Gaani, this fund would have supported it for several years following the presentation of a file from committees of local elites present in the area it takes place. In the absence of a pragmatic approach, there is a risk of mortgaging the promotion of ICH.

2. – Mortgaged promotion

Cooperation and Training Department of the DPC is called to promote cultural tourism with the institutions in charge of tourism and media. This mission is not totally accomplished on the field. Tourist attraction areas are still not tapping significant crowds. By its wealth, a festival of such a scale like Gaani should mobilize as many nationals as expatriates. But it only receives media attention a few days before it takes place. Once the festival is over, it is forgotten for the next twelve months. Which explains the urgency to remove the constraints which limit proper collaboration between the Cooperation and Training Department and tourism promoters whose activities are more profitable when they receive funds through big festivals like Gaani. Failure to develop national tourism on ICH, this department would receive an added value from trade undertaken with foreign institutions by injecting enthusiasm in international and regional cooperation as provided by paragraph 6 of Order 2010 n°037 which put it in place.

The cultural environment in Benin is multiethnic due to historical ups and downs and successive neighborhood related to migration of people who live in Benin[760]. This reality constitutes to a large extent, a handicap to the implementation of single and coherent cultural policy. Moreover, manipulation of public opinion by antagonistic political leaders intensifies the fracture between different socio-cultural groups. This does not allow carrying out a relevant inventory of ICH with a view to having a standardized safeguard of the elements existing on the territory of Benin. But, this diversity should constitute a source of improvement and awareness of this very important reality[761] can only have a better guarantee for conservation of ICH present in Benin. This conservation is rather mortgaged by lack of knowledge on its mechanism, poor potential of its materials and the non-involvement of the communities in the actions relating to inventories.

In the current context, living heritage is threatened by standardization of life styles[762] and reduction of diversity[763]. There is every reason to believe that there is the culture of lack

[759] Fund for Cultural Heritage Development uses a call for proposals for projects on cultural heritage which a select committee shall analyze before allocation. Support lasts three years. Allocated funds are refundable up to sixty percent (60%) and the remainder (forty percent) is a gift for the equipment of the recipient activity.

[760] Gouvernement du Bénin, *Politique culturelle de la République du Bénin,* Preamble of the Director Generals of sports and culture held in Cotonou from 2 to 4 May 1990, point I.1.1§2.

[761] Gouvernement du Bénin, *Politique culturelle de la République du Bénin,* Preamble of the Director Generals of sports and culture held in Cotonou from 2 to 4 May 1990, point I.1.1§3.

[762] www.unesco.org. That is to say that the world has become a global village: blue jeans, cola, English, reinforced concrete building, dolls, turnips imported, …)

[763] If we take the case of music, the artists offer more modern rhythms (pop, zouglou, etc.) inspired by tradition to facilitate the sale of their products

of consciousness for some populations as pertains to the value of their heritage[764]. ICH in Benin presents some specificities. Besides endogenous multi-ethnic culture which co-exists today with an imported culture united around ways of thinking and behavior driven by schools, there is need to consider cultural practices of the immigrants which makes Benin a cultural melting point. Any initiative of conservation shall therefore ensure that there is no marginalization of any tendency since between different groups, there is a fertile interpenetration[765]. Doing the opposite mortgages any promotion of ICH to the image of disarticulation of institutional framework.

The institutional framework of Benin for promotion of ICH is supposed to integrate the law 2007, la Beninese Bureau of royalties (BUBEDRA), associations, NGOs, decentralized departments of the ministry of culture, university, schools, communes[766]. Such is not the case. These institutions do not work in synergy and have divergent objectives. Moreover, conservation and protection mechanisms of ICH are unknown to them. They cannot in any way ensure promotion of ICH.

In Benin like in several African countries, there are countless sound recordings of which some have been archived. Other musical creations going back to several centuries have not yet received such a prestige. The reasons are rooted to the lack of knowledge, lack of appropriate material, protectionist attitude of communities who hold these creations. It is important that they be studied, recorded, documented, counted and archived. Otherwise, they will be lost permanently if they are not counted[767]. During Gaani festival songs, dances, processions and canticles are secular practices which have undergone various transformations from one generation to another. In the absence of their filing, the effects induced by modernity will originate from loss of memory, therefore from loss of their authenticity. It is necessary to develop a conservation plan for Gaani. This plan must be dynamic like ICH. It needs to be updated regularly in line with the changes of the conservation situation. No stakeholder should be neglected in the development of the conservation plan in accordance with the law which protects it. Because, cultural heritage procures balance and dignity of a people; it is the reason for a legislation directed towards conservation of ICH in Benin.

II – Urgency for a legislation directed towards conservation of ICH

A cultural heritage exposed to destruction urgently calls for a legislation favorable for its conservation. The promotion for development of cultural practices is an advancement towards this direction. ICH elements are living, inclusive, representative and communal. It is for this reason that the 2003 Convention in priority aims at conservation, respect, sensitization and mutual appreciation, cooperation and international assistance[768]. To achieve these goals, it is necessary to enhance the existing legal and administrative framework. In international law, the 2003 Convention for conservation of ICH and other instruments relating to human rights, guiding principles concerning DPI (OMPI), regional agreements, international NGOs put up very well the setting for legal support deserved by ICH. But at the national level, it is urgent to activate the legal and administrative mechanism which makes the law 2007 applicable and puts Benin in conformity with the international law. Such an approach adapts the 2003 Convention at the national context in a coordinated and balanced manner.

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[764] Living material involved in the construction of history. It is both a source of creativity, identity and cultural diversity

[765] Gouvernement du Bénin, *Politique culturelle de la République du Bénin,* Preamble ,resulting the Secretary Generals of culture and sports held in Cotonou from 2 to 4 May 1990, point I.1.2 §2.

[766] Workshop for understanding and control of mechanisms of the 2003 Convention for the revision of policies and legislation in Benin.

[767] www.unesco.org. Visited on 28 November 2012.

[768] Article 1er of the Convention 2003.

It enables communities to pursue the practice and transmission of their ICH and if need be, to participate actively in its conservation[769]. This approach is justified by juridico-political **(A)** and socio-economic **(B)** arguments.

A – Juridico-political arguments

Operational guidelines have been developed by State parties to the 2003 Convention to guide its implementation. These guidelines give information on the procedures required for registrations on the lists, registers and conditions of access to the Fund for conservation of ICH. Conservation of heritage is an opportunity as capital as intangibility of the matter concerned **(1)** is a factor for consolidation of humanity **(2)**.

1. – Intangibility of the matter

Most of the ICH elements are intangible. They are viable when they are still practiced by communities which acknowledge them[770]. On the other hand, when they tend to disappear, it is necessary that they be conserved by the community. It is thanks to this conservation that inventory is possible. Moreover, without inventory, a country cannot claim a heritage element rooted out by another community or by a third party country. The conservation of ICH items must bear in mind the predominance of oral expression used as a means of communication, exhibition to the transformation of traditional art to show, ritualization of social representations and their perpetual transformation during transmission from one generation to another.

Language is targeted in Article 2 para.2 of the 2003 Convention as a means of transmission of intangible cultural heritage. Language difference moulds the transmission of stories, poems and songs and affects their content. The disappearance of a language inevitably leads to permanent loss of traditions and oral expressions to which language is attached. However, it is these oral expressions themselves and their interpretation in public which best contributes to conserve a language[771]. Languages live in songs and stories, enigmas and poems; thus, protection of languages and transmission of traditions of oral expressions are very closely related. The survival of occasions for transmission of knowledge from one generation to another such as Gaani is essential. This encourages interaction between the old and the young generation. Learning of national languages in schools enables the transmission of an important part of cultural capital. Musical art plays the same role.

« *Adjogan* » is a royal poetic traditional music of Porto-Novo where songs and dances intermingle. Women do it with « *alounloun* », stick of about one meter, made of iron covered with copper enabling chaining of rings manually shaken for the harmony of the music[772].

Oral tradition often represents an important part of festive and cultural celebrations and it can be necessary to develop legal texts to promote these shows and encourage new contexts, such as story telling festivals, so as to allow traditional creativity to find new means of expression[773]. Performing arts can also add value to these festivities.

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769 UNESCO, « Politiques et institutions du PCI », communication à l'Atelier de PN, *Op. Cit.*, novembre 2012.

770 If it is like this, there is not need to seek for its conservation. .

771 www.unesco.org. Visited on 28 November 2012.

772 It symbolized the power of the king in Allada (a southern kingdom of Benin). Te Agbanlin, founder of the kingdom of Porto-Novo, would have inherited it from his father. At his death, and succession in succession, the "alounloun" undergoes transformations considering the taste and aspirations of each king. It was truly transformed into a musical instrument by King Dč Gbegnon to honor the spirits of his ancestors.

773 www.unesco.org. Visited on 28 November 2012.

Among the intangible cultural heritage exposed to the grip of globalization, there are traditional forms of arts and crafts whose survival would be put in danger. The mass production generated by big multinational companies and small local cottage industries constitute a strong competition for craftsmen. The former can supply more commodities necessary for day to day life at a low cost than that of manual production by the craftsman[774]. Many traditional cottage industries suppose « secrets of manufacturing » that it is not allowed to divulge to people outside the cast, in such a way that, when the youngest members of the family or community do not want to learn them, these skills can disappear, since it would be violating the tradition to communicate them to strangers[775] who are not initiated.

To ensure that skills and knowledge related to traditional handicraft are transmitted to future generations, so that handicraft is still practiced within their community, both as a source of income and expression of creativity and cultural identity, some measures deserve to be taken. The first would consist of offering financial and pedagogical benefits to pupils and teachers so as to make the transfer of skills more beneficial for some and more attractive for others. The second solution would be to strengthen local traditional markets for crafts products, while creating new markets on this theme[776]. The third approach would lead to restoring forests to attempt to make up for damages inflicted to traditional handicrafts using wood as the basic material. A legal measure can be necessary to guarantee the right of communities to use these resources while ensuring protection of environment. The fourth mechanism would be protection of intellectual property and filing of patents or registration of royalties so as to help a community benefit from its proceeds and traditional artifacts. It can happen that a legal and regulatory measure[777] prohibiting marketing of products competing against art works contribute to the growth of know-how and skills of traditional handicrafts. These are the only means which can contribute to the consolidation of humanity thanks to ICH.

2. – Consolidation of Humanity

The first objective of the 2003 Convention is conservation of ICH with a view to guarantee vitality, representation and transmission of its elements while preserving their intrinsic value. To conserve universal heritage, the 2003 Convention proposed a list of urgent safeguard meant to conserve elements of ICH facing extinction[778], a representative list for viable ICH and a record of better practices for safeguarding viable elements of ICH within communities which acknowledge them[779]. This instrument advocates for two types of measures for safeguarding elements of ICH: general measures[780] and specific measures[781]. Taking these measures for the benefit of ICH strives after perpetuating collective memory, enhance international cooperation, develop esthetic of works of art and guarantee universal recognition to the communities. Development of legislative mechanisms going in this direction will develop in a better way the ICH existing in Benin.

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[774] www.unesco.org.Visited on 28 November 2012.
[775] www.unesco.org. visited 28 November 2012.
[776] Many people enjoy the best handmade products as a result of the technology "high tech". www.unesco.org. Accessed November 28, 2012.
[777] At the local level the ban on disposable plastic bags can boost the market for paper bags and handmade baskets in woven fibers.
[778] Article 17 of the Convention on the Protection of the Intangible Cultural Heritage of 17 October 2003.
[779] Article 18 of the Convention on the Protection of the Intangible Cultural Heritage of 17 October 2003.
[780] Article 11b, 15 of the Convention on the Protection of the Intangible Cultural Heritage of 17 October 2003.
[781] Article 23, 13 of the Convention on the Protection of the Intangible Cultural Heritage of 17 October 2003.

Through its Article 19, the 2003 Convention promotes international cooperation within the framework of safeguarding ICH which is a carrier for exchange of information and skills. Multinational candidatures to the UNESCO lists contributes to safeguarding elements of common cultural heritage of the communities concerned. These actions encourage cooperation between States in the field of culture and heritage[782]. Diplomatic and political channels are open in Benin to arrive at this goal.

The field of « *traditions and oral expressions* » encompasses extremely varied spoken forms, like proverbs, enigma, fairy tales, rhymes, legends, myths, songs and epic poems, incantations, prayers, psalmodies, songs or theatrical performances[783]. Traditions and oral expressions are used to transmit skills, cultural and social skills and collective memory. They play an essential role to keep the culture lively. All contribute to mutual recognition by communities and exchanges between them and therefore their humanity. Traditional theatrical performances are shown in form of shows, life style, social classes and social roles in a community. We could cite in this particular case, encouragement songs which accompany agricultural works, music which announces a ritual, lullabies sung to make babies sleep[784], etc. If dance is a means of interpreting music and harmonious and esthetic coordination of body movements, its steps often express a state of mind or illustrate a special event or a daily action in this case hunting, war or sexual act. Taking legal and financial measures which maintain the hosting of traditional arts festivals during which performing arts are presented is the ideal means for their viability. On the basis of Article 16 of the 2003 Convention, the biased legislation will enable improvement of their visibility by making them to be well known. Socio-economic arguments also fight for the implementation of this provision.

B – Socio-economic arguments

Conservation of ICH for its continued use by communities[785]. Adhering to it encourages a positive social dynamics **(1)** and a sustainable economic growth **(2)**.

1. – Positive social dynamics

Culture does not exist in a vacuum. It brings together all the mechanisms implemented by Man to know his environment, to transform it so as to live in harmony with himself[786]. Cultural heritage therefore finds its source and its end result in Man. Being linked to the Man's life, cultural heritage is as fluid as the latter. Its transformations are consubstantial to the development of each human society. Use of intangible cultural heritage for purposes of social calm-down was done in the past by former kingdoms which used to live in the current territory of the Republic of Benin.

Indeed, after the conquest of new territories, feudal overlords would bring in their royal yard the best creators of mind works or at least, would ensure their services so as to control

[782] UNESCO, « International cooperation and assistance, "Communication in the PN Workshop on the PCI PN. Documentation, conservation applications, requests for international assistance. V. Articles 20 and 21 of the 2003 Convention: ICH Fund supports other activities: the safeguarding elements registered on the list of urgent conservation, the preparation of inventories, programs and projects for the safeguarding of ICH, any other activity deemed necessary by Committee (e.g. preparatory assistance and capacity building).

[783] V. article 2 paragraph 2 of the 2003 Convention

[784] www.unesco.org. Visited on 28 November 2012.

[785] UNESCO, « Introduction to the Convention of Intangible Cultural Heritage, "communication" Workshop for understanding and mastering the mechanisms for the 2003 Convention for a review of policies and legislation in Benin "held in Porto-Novo from 19 to 23 November 2012.

[786] Government of Benin, Cultural policy of the Republic of Benin, Preamble.

in better way different tendencies which were developing among the people[787]. Africans, better still, the people of Benin, must have a high esteem of shared skills of their country, because they enhance intra-community communication, are in a position to participate well in the society, tone down rural-urban migration, promote traditional medical knowledge and in particular promote economic growth.

2. - Economic growth

A special attention deserves to be put on the promotion of cultural heritage through significant investments by public authorities and economic operators[788]. Promotion of cultural heritage can help increase value addition of tourism to national economy, monetarization of works of art, promotion of sustainable employment and protection of employment.

Tourists are sensitive and attracted by music, dance, theatre, art and craft; which makes the promotion of the cultural heritage of the country concerned. Tour operators often build their itineraries on these cultural elements existing in the country. By attracting more tourists and visitors in the country, ICH elements offer a window of its mental structure by bringing value addition to Gross Domestic Product (GDP). ICH is an income generating source, it contributes to increase of economic activities through drawn transport services[789], postal services such as sale of stamps and stamp-collection, hotel services, catering services and culinary art, immigration levies[790], telecommunication services[791], etc. Promotion of tourism has a direct effect on that of ICH whose value it increases. It is true sometimes that, due to increase in tourism demand, social representations are deprived of the cultural aspect and are reduced to their strictly spectacular aspect. Cultural stakeholders thus find themselves presenting only art excerpts which have been watered down to adapt to the demand of tourists. Transforming traditional artistic forms into mercantile products in the name of entertainment evades them from their social function and from their communal expression. The biased legislation meant for the promotion of ICH elements must bear in mind this limit which is sometimes passed very quickly by cultural stakeholders in the search for livelihood. Beacons must be fixed in this regard through decrees and orders.

Social practices, rituals and festivals are customary activities which structure the life of communities and groups[792], and to which a big number of members of the communities are attached and participate in them[793]. They constitute an opportunity offered to communities to earn income through sale of their works of art during festivals, competitions and stakes.

It is necessary to keep in mind that it is in and through culture that creativity develops, the leading factor of any economic development[794]. Enhanced value, management and protection of cultural heritage represent a cultural, social and economic stake for development of

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787 Government of Benin, *Cultural policy of the Republic of Benin,* Preamble, , Resulting from the Secretary generals of culture and sports held in Cotonou from 2 to 4 May 1990..

788 Article 50 of the law n°91-006 of 25 February1991 on the Cultural Charter of the Republic of Benin, article 50.

789 Land, air, water, railway, etc.

790 Visa, residence card, laisser-passer, etc.

791 Telephone, fax, internet, etc.

792 V. Article 2, paragraph 2 of the 2003 Convention. www.unesco.org. For example, the festival of the residents of Savalon (central Benin) which takes place on 15 August each year. It often coincides with the celebration of the first harvest of yams (staple food of the central region).

793 For example Novintcha from the residents Grand Popo in South-West Bénin.

794 ZANNOU (Timothée), « La politique culturelle de la République du Bénin », note introductive à la *Politique culturelle et Charte culturelle de la République du Bénin*, Cotonou, [SE], p. 8.

territories and contribute to fight against poverty[795]. Although local elected leaders rarely think about integrating cultural heritage in their development plan, the involvement of local communities is preponderant for development and promotion of ICH. They must be sensitized in this direction and be equipped to fully play their role. Several sources of motivation contribute to this objective. First, cultural heritage in Africa is a potential reservoir for development which is still largely unexploited, particularly in urban areas. Then, within the framework of consolidation of decentralization and transfer of current skills, municipal authorities have an essential role to play in putting in place strategies meant for protecting intangible heritage. Lastly, recognition of intangible cultural heritage must be integrated in all tools and projects of territorial planning and improvement of living conditions of the population[796]. It is true that local authorities are faced with lack of specific skills which explains poor initiation and/or poor management of heritage components for community projects. To a larger scale a weak link is noted between national stakeholders and local authorities on heritage policy and particularly in ICH. They would win by working together to inject enthusiasm into the local economy or even the national one.

Development of traditional forms of performing arts can be ensured by the media, cultural and industrial institutions. The latter have appropriate means for mobilizing and sensitizing the larger public. They can inform the public on various aspects of a form of cultural expression thus ensuring wide popularity within the public by arousing interest for its local variations. Such an approach could encourage an active participation in the execution of this practice and arouse new professional vocations in favor of ICH promotion. Conservation of ICH also passes through education. Not only can we introduce traditional arts in teaching programs, but it is also possible to improve training infrastructures with a view to appropriately prepare the personnel and institutions for the preservation of the entire range of performing arts[797]. Efforts for safeguarding traditional handicraft[798] should rather be attached to encouraging craftsmen to pursue its production and to transmit to others their skills and know-how, particularly within the community. Sponsoring private or public companies could contribute to this end and stimulate self-employment.

Among the solutions identified by the communities for ensuring safeguard of ICH, there is putting in place cultural banks or village museums. It pertains to an approach which consists of seeking from the owners of ICH elements and put them in a precise area in the community against guarantee for micro-credit. Once the credit has been repaid in full, the deposited ICH element is returned to the owner. But reality has shown that beneficiaries of micro-credit always want to contract credits by leaving their cultural property in a safe place. This approach could encourage safeguard of ICH items, develop self-funding while ensuring environmental protection.

So as to enable ICH to stimulate economic growth of which it is a real potential, several approaches of solutions are conceivable. It is possible to mobilize resources in foundations

[795] Strengthening the sense of belonging and pride of local populations, job creation, income generation for local communities through tourism. etc.

[796] International Association of Francophone Mayors, European Union, cultural heritage and local development. Activity *1 : Recherche et analyse*, Cotonou, 2012, p. 5.

[797] www.unesco.org. Visited on 28 November 2012.

[798] Expressions of traditional crafts: tools, clothing and jewelry, customs and accessories for festivals and performing arts, containers, objects used for storage, transportation and protection, decorative arts and ritual objects, musical instruments and household utensils and toys for entertainment as well as for education. Some are used a few times or are created for festive rites, while others can become an heirloom passed down from generation to generation. V. www.unesco.org. Accessed November 28, 2012.

which exist at national and international level[799] through the cultural heritage development fund by appointing experts who can help it to write relevant requests. We can call upon private entities who can recruit external collaborators for DPC. It is permissible to organize meetings between Federations of Artists Associations and technical directorates of heritage to harmonize opinions with a view of tying agreements/partnerships between technical directorates of the ministry of culture, University of Abomey-Calavi and professionals of culture. In the same perspective, we can increase lobbying in the direction of policy makers and private partnerships to improve support received for the promotion of ICH. It is necessary, in order to achieve these goals, to make the best of the communication window of the ministry of culture to convince the population and partners on all the achievements in ICH.

CONCLUSION

In Benin, efficient application of the 2003 Convention is limited by shortage of qualified human resources and lack of the necessary technical know-how. The national legislation in force in the field of conservation of cultural heritage does not always include safeguarding mechanisms. This Convention defends the union of communities, promotion of cultural diversity, human creativity, mutual understanding to promote the culture of peace, international cooperation. To achieve these goals, the Convention would like to uphold the role of communities who are trustees of traditions in definition, practice, transmission and safeguarding their ICH. It calls upon state parties to identify, define, carry out inventories with a view to safeguarding ICH existing on their territory with an effective participation of the communities. If Benin, a State party accomplishes her obligations in respect to the Convention, she will reap several benefits. Benefits expected are safeguard of ICH, international financial assistance to this end, preparatory mechanisms for registration of ICH items in the lists, strengthening international cooperation, sharing skills and participation in the organs of the Convention[800]. While Egypt, Kenya, Morocco use intelligently their CH and inject into their GDP the financial resources thus mobilized, the State of Benin has not taken all the legislative and regulatory measures required to take advantage of the 2003 Convention. The directed reform of the legislation of Benin in relation to ICH is a necessity for its vitality. It shall in priority oversee the development of inventories with the participation of communities, groups and individuals as well as preparation of candidatures for the lists and register of ICH. An institutional arrangement reform in the field of culture to guarantee safeguarding of intangible cultural heritage is capital[801].

[799] Fondations Zinsou, Adjavon, MTN, MOOV, BOA, etc

[800] V. UNESCO, Communication introductive à « l'Atelier de compréhension et de maîtrise des mécanismes de la Convention 2003 pour une révision des politiques et de la législation béninoise » tenu à Porto-Novo du 19 au 23 novembre 2012.

[801] An inventory that includes all stakeholders: State, communities, groups, individuals and among others

ILLEGAL DISTRIBUTION OF PETROLEUM PRODUCTS –LEGAL FRAMEWORK, CURRENT ASPECTS

By **Baï Irène Aimée KOOVI**[*]

GENERAL INTRODUCTION

Distribution law is placed at the confluence of economic analysis and contractual practice in marketing of products and services. It governs the organization and realization of trade through contracts bearing in mind legal and regulatory constraints, particularly those concerning economic public policy for direction and protection[802].

But, we have to say that distribution law was born with the regulation which in the 1950s supported the development of "hypermarkets" by banning the refusal of sale by producers to new distributors. It pertained to the fight against inflation and to develop the purchasing power. Distribution law was thereafter completed by rules which had the objective of preserving the existence of traditional forms of trade[803].

We have to say that between 1950s and 1980s, Africa experienced a demographic boom inversely proportional to economic growth. With a per capita income below 1000 dollars, these countries easily passed the mark of 24% of population growth of 24% per year. According to the famous formula of Jean Baptiste SAY, « it is where the table is empty that the bed is fertile ». Thus, during the same period, urban population was growing at a rate of 6% per year and that of the peri-urban areas was at 10% while increase of jobs offered by the formal or modern sector represented only 2%. Very fast, demand for employment appeared higher than the supply. To the classical determinant triad, should we add a fourth sector which would be the informal sector entitled to cite for the same reasons as its three rivals? Illegal distribution of petroleum products was not only going to see the light of the day , but also experience a growth to lure away welders, mechanics, pupils, etc.

Distribution covers all the operations of transporting the products from the producer to the consumer[804]. It is an intermediary activity. *The right of distribution has the objective of studying all these relationships, which are often contractual, which are tied between these intermediaries to this occasion*[805]*. In a wider meaning, the distribution corresponds to the distribution to the consumer*[806]. It is a special right, mainly contractual, which is a branch of business law. *It is a right of professionals, essentially, not codified, in constant and rapid development*[807]. These legislative or regulatory sources are not many. To begin with, there is the common law for obligations

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[802] **FERRIER (Didier)**, Droit de la distribution, 9e Litec, Paris, 2012, 432 pages. BLAISE (Jean-Bernard), Droit de la distribution, Litec, Paris, 2007. **ARHEL (Pierre),** *La pratique des accords de distribution,* EFE, 2000.

[803] http://lexinter.net/JF/dtdistribution.htm

[804] **MOUSSERON (Jean-Marc)**, BURST (J.-J.), CHOLLET (N.), LAVACHE (Ch.), LELOUP (J.-M.) et SEUBE (A.), Droit de la distribution, Lib. Tech., 1975, n° 2.

[805] **BEAUCHARD (Jean),** Droit de la distribution et de la consommation, PUF, Paris, 1996, p. 21.

[806] Ibid., p. 22.

[807] Ibid., p. 28.

and contractual freedom on which new contracts are hardly regulated. Since Benin did not legislate on the matter, *finally, it is the law of internal and communal competition which, as a counterpoint, constitutes the essential part of the legislation applicable to the sector of distribution by the many limits it has over contractual practices*[808] such as prohibition of agreements, refusal of sale, sale at a loss, etc. But, in France, the order of 1st December 1986 is the main source. Moreover, communal sources, which were limited for long, acquired a significance importance by putting in rules which in attempting to respect free competition have a direct impact on distribution. Thus, the jurisprudence of the Court of Justice of the European Communities decide that *distribution networks could see themselves applying Article 85 of the treaty, community instances were led to take several regulations, guidelines and decisions directly affecting distribution networks, mainly franchise, selective distribution and concession*[809]. Inexistence of a serious legal arsenal is the reason for lack of jurisprudence on the case of Benin. However, on this law, which is mainly contractual, the contribution of the jurisprudence and the doctrine is fundamental. Thus, there is practically no month which passes without an important decision touching on the matter is issued by the Court of Appeal[810]. Lastly, the practice here is essential. *It has particularly been innovative to adapt its conventions to the market in constant development, the law only intervening a posteriori to limit or to invalidate which appears very audacious or contrary to the higher principles like that of free competition*[811].

The contracts for distribution law, except for sale, are almost all innominate. Most of these contracts were unknown thirty years ago and are true creations of the practice just as inside these contracts there are clauses. *It is a field of reflection and study which is constantly renewed*[812]. Distribution grows and this is how illicit distribution is born, settles and remains the biggest market in almost all countries. It invades all fields. Thus, within the same country, we have a part which is informal, which is the biggest and escapes the law while the formal part, the smallest is governed by the law.

Development of informal practices in African economies has reached a level which could not leave any person indifferent. It must be considered as a necessary stage of the development. This is why, in attempting to define the notion, we noticed that there are several definitions of the concept of informal sector but two of them appear relevant.

Informal sector means all the economic activities which are realized outside criminal, social and fiscal legislation or which escape the National Accounting system on the one hand. On the other hand it means all activities which escape the social and economic policy, and therefore escaping any state regulation. In both cases, the two definitions underline the idea of fraud. Paradoxically, this sector, supposed to escape the control of the State functions light-heartedly for all to see. Complacency or ambiguity of the state? *Indeed it follows from a survey carried by the Directorate of Social Welfare and Statistics in the City of Dakar between 2002 and 2003 that the informal sector is not only the leading supplier of jobs but the one which meets the needs of the populations*[813]*. The informal notion is therefore a social-economic phenomenon which*

[808] **DREIFFUS-NETTER (Frédérique)**, Droit de la concurrence et droit commun des obligations, RTD Civ., 1990, p. 369.

[809] SHAPIRA (J.), LETALLEC (G.) et BLAISE (J.-M.), Droit européen des affaires, PUF, Thémis, 3e édition, Paris, 1994.

[810] It focuses on the determination of prices in distribution agreements, the franchise selective distribution or termination of concession contract, in addition to the Competition Council and the opinions of the Committee on unfair terms, which also affect directly the distribution law they contribute to form.

[811] LELOUP (Jean-Marie), Les contrats commerciaux, in l'évolution contemporaine du droit des contrats, Journées René SAVATIER, 1985, PUF, Paris, 1986, p. 16. PALLUSSEAU (Jean), Les contrats d'affaires, in Le droit contemporains des contrats, Economica, 1987, p. 169.

[812] **BEAUCHARD (Jean),** Droit de la distribution et de la consommation, PUF, Paris, 1996, p. 29.

[813] Direction de la Prévoyance et des Statistiques. « Phase 1 - L'emploi, le chômage et les conditions d'activité dans l'agglomération de Dakar : Phase 2 – Secteur informel dans la région de Dakar : performances, insertions, perspectives :

shows the current changes in developping societies. The informal sector occupies a central place in the economy of the country[814].

There is need to acknowledge despite the attempts of governmental authorities to make the said stakeholders of the said business activities to formalize themselves, these business activities have taken the extent to a point where they have become an essential element in the operation and social regulation. *Thus, in Benin, 98% of business activities are individual and develop in the informal sector*[815]*. Furthermore within OHADA, the entrepreneur is taken into consideration and a uniform act has been dedicated to him.*

Known by most African countries, the legal system of Benin is pluralist. This pluralism, born from simultaneous application of a law of western origin known as modern law and African laws known as traditional or customary laws[816] is both invasive[817] and embarrassing[818].

Benin like most countries, is characterized by a dual economy: formal and informal. It is hard or even impossible to say with certainty where the activities of one or the other end and where those of the other start. They complete one another and this complementarity is the reason for the various definitions.

We can retain that formal activities are those which obey established, normal, and common rules which are based on a division of work and where wage system dominates. As for informal activities, they are those which *do not use the wage system*[819]. Employment can be defined any human occupation with a view to a remuneration.

Informal economy is defined, as compared to the official and modern economy which is found today in economically developed countries, the production of goods and services. The expression « informal sector » (or « non-structured sector ») comes from International Labour Office and enables many people to get employment. We would also like that government authorities change option by considering the stakeholders of this business sector as potential contributors to socio-economic development in Benin. There isn't from majority of the people working in this sector, a deliberate will to avoid subjecting themselves to legal obligations and payment of taxes.

It rather pertains to some inability or lack of will from the state, to apply its own regulations, may be because, in most cases, these appear unsuitable and inapplicable.

Phase 3 – La consommation à Dakar : le rôle du secteur informel dans la demande des mécanismes.

814 Ibid.

815 **Dans le journal « Le Matinal » n° 3387 du 02/07/2010 et au 2ème General census of business entities initiated in October 2008.**

816 **GBAGUIDI (Ahonagnon Noel),** Pluralisme juridique et conflits internes de lois en Afrique noire, thèse pour le doctorat en droit, 1998, p. 1.

817 According to Professor **GBAGUIDI (Ahonagnon Noel),** Pluralisme juridique et conflits internes de lois en Afrique noire, thèse pour le doctorat en droit, 1998, p. 1. « *It is invasive because it is everywhere present in African societies where it is essential. Its manifestations, its rationale and conflicts it engenders, affecting the very foundations of these societies. It is an expression of the diversity of cultures and interests. Neither the pre-colonial conquerors nor the colonial and even boldness of unifying reforms by postcolonial legislators some African countries could eradicate legal pluralism. "*

818 *It is embarrassing because the law is designed nowadays as a unitary system that governs the behavior of all members of a given society, so we do not want to concede any legal autonomy to social subgroups. Therefore, any society with pluralistic legal practice is considered weak and archaic. Thus, in the myth of unity and by decency of modern western societies they do not want to admit the reality of the existence of other legal orders, in the shadow of state law. But in recent years, the reality is becoming more and more accepted*

819 **ARELLANO (Rolando), GASSE (Yvon), et VERNA (Gérard),** *Le monde de l'entreprise informelle : économie souterraine ou parallèle*, **Université Laval, Québec, Canada, 1993.**

To understand therefore the contribution of the informal sector, its influence on the economy and help people working in it to capitalize on their situation, we have limited our study to illegal distribution of petroleum products. «which promotes the realization of economies of scale, essentially realized in the informal part of this solidarity falling under survival economy ...». Our interest will be the legal framework without forgetting the effectiveness of this activity on the economy of Benin and the legal environment. This is why, the objective of our research is therefore on the theme:**« *Illegal Distribution of Petroleum Products: Legal Framework and Current Aspects* »**.

To enable stakeholders of this activity to determine its different contours and to draw lessons from them, we wished in our study, to do a proposal for putting in place an institutional framework for integrating the informal sector into the national economy. Because it is a failure on the part of the State not to have found until today an adequate solution to this illegal trade of fuel.

We are in the « ordo-liberalism » stage. *It is a doctrine developed in the 1930s in Germany and which gave birth to social market economy, in which the State has the responsibility of putting in place an institutional framework to promote healthy competition*[820]. And through this institutional framework, we are going to make proposals on a social cover, a special tax system while not diverting much from the reality so as not to discourage economic activities of some stakeholders.

For this study, documentary researches supported by surveys and field interviews were conducted. Different results of our investigations are presented in this work which is articulated around theories and concepts which explain the phenomenon studied, through the existing legal framework and effectiveness of the application of the legal arsenal showing the difference between what is envisaged and the reality.

Accredited operators in the sector of marketing of petroleum products do not cease to complain, in view of the extent taken by illegal sale of fuel in Benin. For these operators, the informal sector openly presents an unfair competition, thus making them to sell at a loss, closure of some of their selling points (petrol stations).

We estimate that this sector makes the state lose 24 billion FCFA per year in terms turn-over, taxes and various levies[821]. But, the State should in principle, organize itself so as to sanitize the sector for marketing of petroleum products.

Seizing the products from the traffickers, arresting the players, such are the measures used by public authorities to eliminate this informal sector. Better still, the State went to the extent of proposing to the informal stakeholders their reconversion in other activities. Public authorities have still not been able to reassure accredited operators because practically no measure has been able to counter the illegal sale which is practiced on the pavements and on the roadsides.

Moreover, *close to 75% of the petroleum products consumed in Benin come from the informal sector while it is a dangerous trade both for the people and their goods, according to the Directorate of*

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[820] **AUTISSIER (David), BENSEBAA (Faouzi) et BOUDIER (Fabienne),** L'Encyclopédie du Management en 100 dossiers-clés, édition Eyrolles, Paris, 2010, 530 pages.

[821] **KOUTON (Apollinaire),** Journal « L'Autre Quotidien » à Cotonou du 1er septembre 2009, disponible **sur www.allAfrica.com**

Promotion of Internal Trade in the Ministry of Trade[822].

A special framework for stakeholders of the illegal trade of petroleum products could be put in place on condition that economic policy options, objectives, criteria and limits of this activity in Benin are established clearly. In any event, there will be need to reconcile the interests of public authorities, accredited operators and the constraints faced by informal stakeholders, because it pertains to safeguarding social and economic progress of the country. This is why, we shall study on the one hand, the legal framework for the sale of petroleum products in Benin (I) before tackling the effectiveness of implementation of the terms by recounting the state of the sale of petroleum products of the informal sector (II) on the other hand.

I- Legal framework for the sale of petroleum products in Benin

Trade is an important branch of economic activity which represented 17% of GDP in Benin[823]. The exercise of this commercial activity requires certain conditions. However, there are those which only reserved to the State which holds the monopoly on them. Such is the case for distribution of petroleum products everywhere in the world. But it has to be said that sale of petroleum products in some African countries escape the legislation due to the availability of the product with the giant on the East of Benin : Nigeria a petroleum country par excellence. We shall tackle the regulation for distribution of petroleum products in Benin (A) followed by the effectiveness of the implementation of the regulation in the matter (B).

A- Regulation of commercial activity of Benin

The sales contract was for long the most important contract even if historically it was preceded by trade. Its position remains the first quantitatively, thanks to countless contracts of everyday life, and because it is the major instrument of creation for transfer wealth[824].

Trade in Benin is governed by the provisions of the law n° 90-005 of 15th May 1990. In this study we will only be interested in distribution of petroleum products.

1. GENERAL REGULATION FOR DISTRIBUTION OF PETROLEUM PRODUCTS

It is governed by the law n° 90-32 of 11th December 1990 of the constitution of the Republic of Benin. The law n° 90-005 of 15th May 1990 fixing the conditions for exercise of trade activities in the Republic of Benin, the law n° 92-023 of 6th August 1992 on determination of fundamental principles of denationalization and transfer of company property from the public sector to the private sector. The Decree n° 2000-43 of 7th February 2000 on institution of the new mechanism for fixing the prices of petroleum products.

The sector for distribution of petroleum products is governed by the Decree n° 62-1297 of 7th November 1962 on public administration regulation concerning technical rules for use and characteristics of petroleum products amended by Decree n° 66-394 of 13-06-1966 in the official gazette of 17-06-1966, Decree n° 95-139 of 3rd May 1995, on modalities of importing and distribution of refined petroleum products and their by-products in the Republic of Benin.

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[822] **FANOU (Ignace), 2009 :** Energie Bénin du 16 février 2009 sur www.ipsinternational.org.

[823] INSAE, 2e General census for business entities in the Republic of Benin, in mois of statistics 2010.

[824] **LETOURNEAU (Philippe)**, Le contrat de vente, édition Connaissance du droit, Dalloz, Paris, 2005, p. 1.

It is also governed by the provisions of the Decree n° 95/135/PM of 3rd December 1977, on the regulation for storage and distribution of petroleum products.

It is the same for the inter-ministerial order n°104/MCAT/MFE/SGM/DCP, on the determination of a percentage for review of price ceiling for petroleum products, without forgetting the Decree of n° 63-295 of 19th March 1963, in relation to characteristics of bottles which can serve as measured containers for some products. it is also in the sphere of the Order n° 74-70 of 4th December 1974 instituting for the State, the monopoly of supplying, storing , transporting and sale of petroleum products and their by-products, Decree n° 89-64 of 17th February 1989 on approvals of the articles of associations for the national company for marketing of petroleum products (SONACOP). But what are the conditions for the distribution petroleum products?

2. CONDITIONS FOR THE DISTRIBUTION OF PETROLEUM PRODUCTS

Inter-ministerial order n° 25/MCT/MEMH/CAB fixes the conditions for accessing storage facilities at the disposal of the National Company for marketing of petroleum products (SONACOP) and on other modalities for the implementation of the opening of the sector for petroleum products in Benin. We also have the inter-ministerial order n° 24/MCT/MEMH/MTPT/CAB of 3rd May 1995 fixing the conditions for implementation of the Decree n° 95-139 of 3rd May1995 on modalities of importation and distribution of petroleum products and their by-products in the Republic of Benin.

Opening of service stations is governed by the Order n° 033/MMEH/DC/SG/CTJ/DEN/SA of 19th November 1998 on general conditions for opening of hydrocarbon depots or service stations in the Republic of Benin.

To this texts, is added inter-ministerial order n° 93 MMEH/MEHU/DC/SGM/CTRNE/DGE/SA of 2nd November 2004, on administrative procedure for issuance of licenses for opening, rehabilitation, operating service stations and hydrocarbon depots in Benin, Order n° 2001-235 of 12th February 2001, on the organization of the procedure for environmental impact study in the Republic of Benin. There is nevertheless the need to know the characteristics of these products so as to measure the security requirements related to their distribution.

B- From characteristics to requirements related to the distribution of petroleum products

1. CHARACTERISTICS OF PETROLEUM PRODUCTS

The characteristics of petroleum products at all levels of the marketing after their delivery to internal consumption.

Products containing natural mixture of hydrocarbons or derived from physical or chemical treatment of natural hydrocarbons as well as products of similar composition obtained through synthesis or by other processes are considered as petroleum products provided that the levels of their boiling temperature exceeds -50° C under an absolute pressure of 1 bar. These products can contain other substances in the proportion of above 30 p. 100[825].

[825] Article 1er of Decree n° 62-1297 du 17 November1962, in the Official Gazette of 8 novembre 1962, portant règlement

Usage petroleum products must comply with the technical and security rules. These rules must be on manufacturing for domestic market, holding for use or for sale, as well as conditions for installation and use of materials and devices using petroleum products. This is why a technical committee for usage of petroleum products was created responsible for giving its opinion on technical issues of general character which are submitted to it by the ministry of industry and mainly concerning the use of petroleum products[826].

Petroleum products enumerated hereinafter, should when they are detained for sale, put on sale or sold after their delivery for domestic consumption, be in conformity with the characteristics corresponding to their denomination. The following are considered as fuels, high octane petrol, jet fuel, special fuels A, B, C, D, E, F, G, H, alkylenes, light fractions ; kerosene, pouturbomachine fuels ; gas-oils, domestic fuel-oils, light means, heavy duty ° 1 or heavy duty n° 2 ; commercial butane, commercial propane, other liquefied hydrocarbons ; Vaseline oils or paraffin;

Vaselines, petroleum-based waxes, paraffins, slack wax; bitumen, fluxed bitumen and petroleum coke[827].

High octane petrol can only be put for sale or sold under guarantee of a registered trade mark.

2. conditions for the exercise and security requirments for petroleum products

Besides the provisions of Uniform Act relating to the general commercial law, there is need to underline the survival of the measures taken by the law n° 90-005 of 15th May 1990 (amended by the law 93-007 of 29th March 1993) which fixes the conditions for exercise of commercial activities in Benin and the Decree n° 93-313 of 29th December 1993 defining the profession of importer in the Republic in Benin.

These texts enshrine the principle of freedom of trade, streamline the procedure for establishment of foreign companies in Benin and mainly give the conditions for exercise of commercial activities.

2.1. Conditions to fulfill for distribution of petroleum products

Since 1804, Articles 1641 to 1648 of the Civil Code on guarantees against hidden defects, security obligations, or obligations to give information, and unfair terms[828] have a special importance and protect buyers

Besides the jurisprudence applying common law liability already used to take into consideration lack of information and warning to render professional sellers liable. Thus, orders were expressly based on breach of the obligation to give information and on the dangers contained in using the product to render the manufacturer liable[829].

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d'administration publique en ce qui concerne les règles techniques d'utilisation et les caractéristiques des produits pétroliers.

[826] Article 2 du Décret n° 62-1297 du 17 novembre 1962, in Journal officiel du 8 novembre 1962, portant règlement d'administration publique en ce qui concerne les règles techniques d'utilisation et les caractéristiques des produits pétroliers.

[827] Article 7 du Décret n° 62-1297 du 17 novembre 1962, in Journal officiel du 8 novembre 1962, portant règlement d'administration publique en ce qui concerne les règles techniques d'utilisation et les caractéristiques des produits pétroliers.

[828] They are part of the provisions of consumption law in article L. 211-1 but attachable to civil law.

[829] Civ., 1re, 7 juin 1989, Bull. Civ., I, n° 232; 11 décembre 1990, Bulletin civil, I, n° 289; 17 février 1998, Bulletin civil, I, n° 61; 1er mars 2005, CCC 2005, comm., p. 142, obs. G.R.

The most significant economic readjustment is without doubt giving professionals the obligation to give information whose objective is to enlighten the consent of the weak party[830].

The capacity of the debtor for an obligation to give information must be classically reserved for the person who has knowledge of information which the other does not have and the importance of the information held for the latter[831].

2.2. Requirement of safety obligation against petroleum products professional

Trade confers to its stakeholders rights and imposes upon them specific obligations. The law imposes upon its agents a special status with own obligations to their corporation. Sale of petroleum products arising from State's monopoly, weigh more on the obligation of the professional. As far as within the WAMU region, community authorities in competition see to it that companies enjoying monopoly do not abuse their market power *to obstruct fair competition*[832].

Public buyers of the Union can only invoke exclusivity drawn from a monopoly in support of a direct market negotiation « *when the needs can only be met by a service requiring use of exclusive rights held a single entrepreneur, a single supplier or a single service provider* »[833].

The seller has the safety obligation , « *that indicating on the product, its nature, production and consumption dates, its composition or contents of necessary ingredients any products, risks inherent to the use of the product, the tests carried out, directions for use or the precautions to be taken*[834] *; to put on the market falsified products*[835]. Packaging of any product sold must indicate, in clear words, its composition and mainly content of necessary ingredients and if need be its expiry date. Thus, any distributor of petroleum products must be a license holder.

It would the same to the extent where the exercise of this trade is of a field exclusively reserved for the State. The State can exercise it or entrust it to serious players. This is why, these players enjoy a monopoly. It can be direct or indirect. This is exclusive privilege of a citizen over any other to sell and to buy»[836]. But companies holding the license must abide as much as possible by the rules governing the matter and those of trade mainly the principle of competition which is closely related to freedom of trade and industry. According to Professor Yves SERRA, « *freedom of competition is a variation of freedom of trade and industry »*[837].

It means that each company must be able to enter freely on the market and also come out freely. It involves condemnation of any practice constituting an obstacle to free exercise of activities on a market. Thus anti-competitive practices such as agreements, abuse of dominant position or economic dependence are prohibited. Economic concentrations same as state's assistance to private companies are also prohibited.

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830 **PIEDELIEVRE (Stéphane)**, Droit de la consommation, édition Economica, Paris, 2008, p. 20.
831 **FABRE-MAGNAN (Muriel),** De l'obligation d'information dans les contrats, LGDJ, Paris, 1992, n° 358 et s.
832 Article 88 du Traité de l'UEMOA.
833 Article 38 de la Directive n°04/2005/CM/UEMOA portant procédures de passation, d'exécution et de règlement des marchés publics et des délégations de service public dans l'UEMOA.
834 Article 31 de la loi 2007-21.
835 Article 32 de la loi 2007-21.
836 **RAYNAL (Guillaume Thomas),** Histoire philosophique et politiques des établissements et du commerce des Européens dans les deux Indes 1770.
837 SERRA (Yves), Le droit français de la concurrence, Dalloz, coll. « Connaissance du droit », 1993, p.12.

Thus, supply, storage, transport and sale of refined petroleum products and their by-products fall under state monopoly[838]. State monopoly in supply, storage, transport and sale of refined petroleum products and their by-products can be exercised *directly or indirectly*[839]. *By virtue of Article 6 of the Decree n° 2000-43 of 7th February in relation to new mechanism for fixing prices for petroleum products, a system has been put in place for periodic review of price ceiling for high octane petrol, ordinary fuel, lamp fuel and gasoil*[840].

Exercise of direct or indirect monopoly must be carried not only in conformity with the legal and regulatory provisions in relation to the exercise of commercial activities in the Republic of Benin but also with the provisions of the texts on regulation of institutions classified as dangerous, unhealthy or uncomfortable.

National or foreign companies interested in importing and marketing of refined petroleum products must obtain a special license issued by a decree of council of ministers on joint proposal with the Minister in charge of commerce and minister in charge of hydrocarbons[841].

The special license is given after an opinion of a technical committee of licensing presided over a representative of the minister in charge of trade[842]. *It is issued for a term of 10 years and can be renewed or extended in the same manner six months before the expiry of the license in force. Any company having a license in the matter can use storage facilities for depots situated in Cotonou, Parakou and Natitingou which continue to be the property of the state*[843].

Licensed companies are free to import petroleum products they can transport by their own means or have them transported by third parties for their marketing[844]. *Transport of petroleum products must be done by tankers with the wordings «dangerous products, inflammable ».* Service stations are designed in such a way that the products do not expose the seller or the buyer to any danger.

Modalities of management of service stations are carried within the framework of a free management contract signed between the companies working in the sector and private economic operators[845].
It should be noted that *'no company of the industrial sector, energy production, motor vehicle garages and road construction can get the special license for importation and consumption , even for*

[838] Article 1er du Décret n° 95-139 du 03 Mai 1995, portant modalités d'importation et de distribution des produits pétroliers raffinés et de leurs dérives en République du Bénin.

[839] Direct monopoly "is the exercise of state monopoly for procurement, storage, transportation and sale of refined petroleum products and their by-products by a state company or mixed economy" as Article 3 of Decree No. 95-139 of 3 May 1995 laying down rules for the importation and distribution of refined petroleum products and their derivatives in the Republic of Benin. As for indirect monopoly, "is the exercise of state monopoly in procurement, storage, transportation and sale of refined petroleum products and their by-products by national or foreign private companies." ».

[840] Article 1er de l'arrêté interministériel n° 104/MCAT/MFE/SGM/DCP du 26 juin 2000, portant détermination d'un pourcentage de révision du prix plafond des produits pétroliers.

[841] Article 4 du Décret n° 95-139 du 03 Mai 1995, portant modalités d'importation et de distribution des produits pétroliers raffinés et de leurs dérivés en République du Bénin.

[842] Article 5 du Décret n° 95-139 du 03 Mai 1995, portant modalités d'importation et de distribution des produits pétroliers raffinés et de leurs dérivés en République du Bénin.

[843] Article 1er de l'arrêté interministériel n° 25/MCT/MEMH/CAB fixant les conditions d'accès aux installations de stockage à la disposition de la Société Nationale de Commercialisation des Produits Pétroliers (SONACOP) et portant autres modalités de mise en œuvre de l'ouverture du secteur des produits pétroliers au Bénin.

[844] Article 6 de l'arrêté interministériel n° 25/MCT/MEMH/CAB fixant les conditions d'accès aux installations de stockage à la disposition de la Société Nationale de Commercialisation des Produits Pétroliers (SONACOP) et portant autres modalités de mise en œuvre de l'ouverture du secteur des produits pétroliers au Bénin.

[845] Article 7 de l'arrêté interministériel n° 25/MCT/MEMH/CAB fixant les conditions d'accès aux installations de stockage à la disposition de la Société Nationale de Commercialisation des Produits Pétroliers (SONACOP) et portant autres modalités de mise en œuvre de l'ouverture du secteur des produits pétroliers au Bénin.

its own exclusive, of refined petroleum products and their by-products[846].

It is the obligation of every importer or distributor of refined petroleum products to constitute and preserve at any time a reserve stock representing at least per category of imported products equivalent to sales of one month[847].

Withdrawal of the special license is subject to the breach of Articles 8 and 10 of the Decree[848]. Although it is a legal arsenal weakened by the open sale of adulterated fuel, gasoil, motor oil or even petrol at the road sides, the authorities remain powerless despite numerous public health problems they cause.

But, we need to ask the question to know if the main features which characterize it enable it to be competitive? What is the position of illegal distribution of petroleum products?

II- State of sale of petroleum products in the informal sector

A- Illegal distribution of petroleum products free from conflicts

Illegal trafficking of petroleum products in Benin is a thorny issue which different successive governments have been unable to control due to its complexity.

It is puzzling for governments which have led the country for over thirty years. There is need to acknowledge that illegal trafficking of adulterated fuel known as «kpayo» expanded with the poverty which is rampant within the society. This was made worse by structural adjustment programs proposed by the IMF and the World Bank.

Majority of the sellers of «kpayo» fuel interviewed are mechanics, welders, drivers, house workers, school drop-outs and farmers in the rural areas. Majority of the fuel sellers do it in places which do not belong to them and the owners of these places are in reality players of the big mafia.

1. Reasons for progressive ban of illegal distribution of petroleum products in Cotonou

Fifty years after independence, Benin is the theatre of conflicts from various origins which contribute in giving a black mark on her poor record in political, economic and social development. Social peace has been over the last few years seriously troubled by tensions between government and different stakeholders in distribution of petroleum products. How do we stop all these people from selling «kpayo» fuel which has been in place for over thirty years and make them return to their former occupations?

The population of Benin is estimated at 8.2 million people. According to the last population study carried by the World Bank in 2004, active population is about 301 million people. From the same study, assessment of the active population working in the modern sector is 3%[849].

[846] Article 9 du Décret n° 95-139 du 03 Mai 1995, portant modalités d'importation et de distribution des produits pétroliers raffinés et de leurs dérivés en République du Bénin.

[847] Article 10 du Décret n° 95-139 du 03 Mai 1995, portant modalités d'importation et de distribution des produits pétroliers raffinés et de leurs dérivés en République du Bénin.

[848] Article 11 du Décret n° 95-139 du 03 Mai 1995, portant modalités d'importation et de distribution des produits pétroliers raffinés et de leurs dérivés en République du Bénin.

[849] **Séminaire national sur «** *Les PME/PMI et l'emploi* **», INFOSEC Janvier 1988 cité par MONGBO (Mauricette), 1994,** *Le*

The recruitment method for those working in this modern sector sometimes poses problems which make people believe that they can arrogate themselves the rights by claiming every time that they have a family to feed. Democracy fundamentally lies on acknowledgement of the sacred value of human person. Democracy must as a result, promote development of the individual within the society, it must especially protect the individual against all forms of pressure particularly pressure from political power. We can therefore measure the importance of acknowledgement of the right and freedom of the citizen.

It would be naive to believe that only acknowledgement of rights and freedoms is enough to build a democracy, because beyond this formal acknowledgement, there is need to provide mechanisms for protecting the citizens against all adverse effects to their rights and freedoms.

From these data, we notice the importance of the active population not employed in the formal sector. This population is either working in the informal sector or looking for jobs. But, there is no policy for reducing unemployment by insurances. Thus only the informal sector is the savior regardless of the activity. But it should however be acknowledged that a look into the economy of Benin shows that the informal sector existed well before the problem of unemployment arose.

If during the first thirteen years of Lenin Marxist Revolution in 1972, economic results of Benin were rather positive, from 1985, the first signs of weaknesses were perceptible: delays in paying civil servants, closure of state-owned companies, beginning of unemployment for new graduates, etc. The country was extremely indebted and seriously lacked financial resources so much that in 1988 the economic crisis was bad. The banking system was insolvent, budgetary deficits exploded while arrears for internal and external payments were accumulating. This situation worsened with the slowdown in economic activities mainly trade towards Nigeria and Niger. At this time, the State would have reformed the programs and think about the appropriateness of training with new job offers. The State lacked vision, prospective to continue by training unemployed people some of whom are very bright and who today supply the network for sale of petroleum products. « *What a waste if agricultural engineers are forced to become teachers, illegal sellers of medicines, sellers in the informal sector, zémidjan, Tontinier, etc.* »[850].

Indeed, in 1986, the State of Benin suspended automatic hiring in the Public Service for graduates from universities, Institutes and Professional Schools. During the same year, redudancy of 1134 employees occurred in several companies[851]. At the same time, the modern private sector was only occupied 8% of employment of the modern sector. This private sector created 1000 jobs per year hardly being able to maintain its pre-existing level of employment.

Employment crisis reached its top in 1989 when the Government of Benin signed the International Monetary Fund (IMF) and the World Bank (WB) an agreement of a first Structural Adjustment Program (SAP) which emphasized on reduction of state employees,

dynamisme des diplômés face au gel du recrutement dans la Fonction Publique : cas des diplômés universitaires évoluant dans le secteur informel à Cotonou, **FASJEP/UNB, p. 5.**

[850] We hold this information from field surveys where a couple seller of adulterated drugs from Nigeria asked the respondent not to give us information as it came to stop eating while he, Abdou, he studied with full of dreams agricultural sciences while today is a poor drug wholesaler from Nigeria while Tramol a antidopant is brought from Mecca and his daughter was sentenced to death..

[851] **Séminaire national sur «** *Les PME/PMI et l'emploi* **», INFOSEC Janvier 1988, op.cit, p. 6.**

winding up or restructuring of some companies. All the first programs implemented within the framework for reduction of the number of staff working in public administration, showed that there were from September 1989 to 31st December 1992, about 4139 voluntary departures. This number was added to 9571 officers who had discharged from companies which had been wound up or restructured from 1982 to 1992[852]. These programs had among others the objective of transferring labour force towards the modern private sector. But we unfortunately note that these voluntary departures found themselves on the job market either looking for jobs just like those unemployed or working in the informal sector.

We can conclude that in the face of employment precariousness, it should be understood that informal sector for sale of petroleum products offering a consistent revenue of about 70 000 to 170 000 even if intelligentsia does not realize it, it uses those who are close to it.

Lastly, beyond economic considerations, the informal sector finds a social justification insofar as it ensures the maintenance of traditional business activities, confers to some individuals a duty within the company by giving access to information and satisfies the needs of the minority which has remained ignored in the group in which they evolve.

Distribution law is creative, since it aims not only at application but also, where appropriate, refine contractual documents adapted to changing requirements of the economy and law. **Didier FERRIER** studies the contractual documents used to realize or promote economic operations through which transfer of goods or services is done: sales or service provision contract, commercial agency, selective and exclusive distribution, concession, franchise..., and the legal constraints to which they are subjected[853]. It must however be realized today, that the informal sector for distribution of petroleum products does not have much future in the face of the fight started by the State in Cotonou. Thus, the cost of fuel in the informal sector today oscillates between 390 and 500 F CFA while the pump price is 600 F CFA. Only in Cotonou, where we are witnessing a relentless fight against this product which creates an injustice of allowing access to the same product much more easily to some while to others, it is difficult to have access or even a real crime within the same state.

In a state governed by the rule of law like Benin, any illegal activity must, under normal circumstances, be punished but the report is that illegal trade of fuel is done in peace and open to all and sundry. What are the reasons which explain this kind of activity?

1.1. Essential reasons for sale of illegal fuels

The cost for oil is influenced by three types of factors which evade any forecast: climatic factors, political factors and economic factors. On a very tense oil market as the one in place since two years, any « event» likely to reduce the capacity of supply tends to push the cost upwards[854]. But, since 2004, negative signs have multiplied[855].

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[852] **DPE/MTEAS,** *Observatoire de l'emploi***, cité par MONGBO (Mauricette) in mémoire, 1994, p. 7.**

[853] FERRIER (Didier), Droit de la distribution, édition Lexis Nexis, Paris, 2012, 480 pages.

[854] At the political level, include the upsurge of attacks in Iraq fourth biggest oil producer), the takeover of Russian oil interests by president Puttin that dramatically reduced the chances of investment by international companies in the second world producing country), the very anti-American position of president Chavez in the eighth world producer (Venezuela), or, more recently (, the election of Mahmoud Ahmadinejad as president of the third world producer of the Republic Iran world) in June 2005 and the exacerbation of the conflict between that country and the Western countries on the nuclear issue.

[855] The amount of overcapacity of production only makes the object of estimation to the extent that Saudi Arabia, the largest producer , publishes no controllable statistics by independent experts

Illegal sale of fuels which has been in existence in Benin for the last thirty (30) years has grown with the economic crisis in Nigeria in the 1980s[856].

Since the military regime of Olusegun Obasanjo (1976-1979), Nigeria has been subsidizing fuels to a tune of (1) two (2) billion dollars per year. For this reason, the cost of fuel became very affordable in this country, very affordable than the price charged in Benin especially after the depreciation of their currency Naïra. This led to the rush of the people of Benin towards Nigeria to buy the commodity for purposes of reselling it.

Unemployment, freeze of recruitment in the public service and especially the 1989 crisis seriously contributed to the rooting of this illegal trade which feeds thousands of households in Benin.

Indeed, unemployment and precariousness has led to many people getting into this activity although conscious of the unfortunate consequences it might have on their health and their lives.

Our enquiries among some illegal fuel sellers has led us to understand that many people only went into this trade by necessity.

For purposes of enquiry, it is regrettable that upto now the ruling classes which have succeeded one another have not yet understood that governing or ruling is providing. It should be noted that in the private sector, the State could come up with a reliable integration policy instead of leaving the private sector to exploit, overexploit intelligentsia. A young person who is aged 35 years in Benin today is still unemployed. If he is an entrepreneur, the formal sector rejects him because to create a partnership, he must have the capacity of a trader which prevents him from applying later for entry examinations in the public service due to incompatibility between these two functions. If he decides to create a limited liability company or a business corporation, he needs a capital of 1 000 000 and 10 000 000 respectively. Curiously, if he decides to go for the chalk, he will have to suffer the injustice of the state. *If he has the chance to intervene in public, he has more than 9 hours of classes per week. And the same state prohibits part-time teachers to be in more than two institutions. The hourly rate is 1500 FCFA. For the less lucky who intervene in the private sector, he can have between two (02), to eight (08) hours of classes per week, meaning he has to be in 1 to 6 institutions at the same time with the requirement to prepare the lessons, correct several questions to which he is obliged. During this time, the family in its African understanding expects him to help in educating his brothers, family expenses are weighing on him while in reality he cannot meet the expenses of his nuclear family. He must also honor class advises which overlap, teacher advices which are endless because he is everywhere at the same time. To this, you add the distance which separates different colleges which he has to criss-cross before receiving payment for the fruits of his services. Another phenomenon obliges the young man to go towards the informal sector, he is working but the « salary » is not paid in time and he is compelled to give an account number for the payment which never done at the right time. Consequently intelligentsia is uselessly expended if it is not in public service. Curious thing, officers deflated from the State have today become permanent state employees with a retirement benefit while the poor man is constrained to play with his life but he is doing it while counting on the Supreme Being to take care of him[857]. The survey* noted that with a Bill which extends the retirement age

[856] Aboubacar CONDE, « Secteur informel et les recettes fiscales au Bénin : Cas du commerce illicite des produits pétroliers. » Rapport du stage de Magistère II année académique 2006-2007

[857] It must be said that a program which appeared on Canal 3 of Benin Television enables us to confirm these statements in the extent where trade union members declared that volunteer parties and some deflated workers were still in public service or receive pension after having failed in illegal trade.

to 60 years, while it maintaining minimum entry age within 18 to 40 years, the phenomenon has strong chances of surviving. The teachers' course described is the one which keeps the status of service provider compelled to deduct 5% of his salary with several deductions of 1000 to FCFA per month to for the solidarity fund. This is why some intellectuals stand as surety by asking the semi-wholesaler to sell 20 to 100 litres of fuel to the retailer who will sell them to the consumer by returning the proceeds from the sale either at the end of day or every three days at the renewal of stock. This activity, we can say constitutes their livelihood since the state is not in a position to provide employment immediately. Is this not one of the reasons for which the punishment is still not severe at State's level?

In 2006, the Government of President Boni YAYI decided to fight against illegal sale of fuel originating from Nigeria. Economic operators were therefore invited to invest in hydrocarbons with exemptions on equipments. This is why we can count 87 mini stations besides service which already existed in Cotonou[858].

However, some consumers choose to buy fuel from the roadsides, not because of the quality of fuel but also due to more affordable price and quantity. They deplore theft taking place in the service stations through tampered measuring since the central government which is supposed to test fuel dispensing machines in the service stations is not doing enough.

To all this we can add the porous nature of our borders and lack of firmness in supervision and control by our accomplice officers. Then how does this phenomenon manifest itself?

1.2. Manifestations of illegal distribution of petroleum products

Nigeria is the only source of fuel supply for the informal sector in Benin.

The traffickers transport this liquid on the national territory through several means of transport namely motor boats, cars, three-wheel and two-wheel engines.

Wholesalers indeed use motor boats to transport several hundreds of jerry cans and barrels which they convey through water or maritime route within the country.

The semi-wholesalers in turn get their supplies with the assistance of several land means from wholesalers who are often located along the lagoon banks.

These semi-wholesalers store the products in makeshift shops or in their dwellings, this with the possible risks.

As for retailers, they get their supplies from semi-wholesalers for purposes of reselling the said products to final consumers.

These retailers indeed use as selling techniques, jerry cans, bottles and connectors which they display on a table on roadsides and corners of Cotonou without any safety measure. They also expose their life and that of other citizen to dangers of this practice which is open to the Central government.

Do these citizens deserve from the State protection and guarantee for their safety?

[858] Source Town Hall of Cotonou.

2. Protection of citizens and limitations of freedoms

Every individual has a right to life, to freedom and security of his person.[859] For ordinary people, this freedom means total absence of constraints. Being free is to be able to do what one wants, do whatever one wants without being prevented under any measure. But do we often say that the freedom of one person stops where the freedom of others start? If such is the case can we put barriers i.e. limits to some freedoms?

Who has the responsibility of protecting citizens against some abusive freedoms of some among them?

2.1. The duty of protection of citizens by the State

The growth of distribution of petroleum products does not at all guarantee security to the population while the law[860] guarantees respect of the freedom of the individual and even his security. But, only the State legally has the power and the responsibility to provide this security and thus protect the citizens. This why, for almost two months, President Boni YAYI will no longer pile for political reasons and by respect for the constitution, without fearing to lose his electorate, the Head of State preferred to keep a low profile or throw some sparks which quickly put off.

Finally, the burns, fire with the key of unbearable shows, just as endless ultimatums by the Minister of Interior and Security, Armand ZINZINDOHOUE flourished. It is war started against illegal distribution of petroleum products in Cotonou. The State has the duty of maintaining law and order, by punishing illegal distribution of petroleum products harmful to the society.

Besides, when the citizens have the tendency of abusing some freedoms, the State must impose maintenance of law and order to guarantee security for all.

According to Professor Ganshof Van der Meersch, « *The State has the responsibility of overseeing its own security and that of the citizens……. »*[861]. Today due to the rush for sale of illegal distribution of petroleum products, the citizen is at a higher risk than in the past. We are doing because of the quality, mentality and the casual nature of the people who exercise public power continue facilitating supply of petroleum products in Nigeria. We have to say that security forces instead of overseeing security of the peaceful populations, majority of them learn to fleece in crossroads, on road sections they are supposed to secure. How to understand that with so much row in the current fight, fuel continue to litter pavements from 18h30 till dawn with just a few liters the rest being hidden in the dwellings sometimes very near incandescent sources. If all of us aware that petroleum products sold in such deplorable conditions only come from Nigeria, it is therefore necessary to enhance security checks at the border and on detour roads. The current mode of operation of the State is not efficient as between 18h30 and dawn, the product is being sold and the artificial scarcity noticed enable them to raise the price to between 550 and 625. The cost for fuel is between 450 and 500 PK to PK 10 while it costs only 400 FCFA in Porto-Novo. In Ouinhi, it costs between 325 and 375. In the northern part of our country, the prices vary between 400 and 500 with the products displayed in the same start-up conditions without being worried. In

[859] Article 3 of the Universal Declaration of Human Rights of 10 December 1948
[860] Article 3 of the Universal Declaration of Human Rights aforementioned
[861] GANSHOF Van der Meersch W.J., « La sécurité de l'Etat et les libertés individuelles en droit belge », RDIDC, 1958, p. 336.

Tchaourou in the region of the President of Republic for instance, fuel is sold at less than 500 M from the police station of the village to a point where we wonder whether there is really political will to eradicate illegal distribution of petroleum products. the scarcity of petroleum products in Cotonou and in the environs due to the fight lead some drivers to get spare jerry cans for themselves to reduce the costs and face the competition which is presented Benafrique company to drivers.

The state has therefore the responsibility to provide security to citizens. As the repository of public power, it must also impose respect of the freedoms of others and guarantee their security in the actions by the citizens. Citizens are free to exercise this activity but they have to respect the provisions imposed by regulatory laws of this trade. When they flout these provisions and settle as it is done now, the State must punish the offenders while maintaining law and order.

2.2. Limitations of freedoms

Freedom is one of the indefeasible rights of man. It is a right which is recognized for every individual but its exercise should adversely affect that of the others, their dignity, their health. «It consists of being able to do what is not harmful to others…… »[862], but we know that every man who has the power, the freedom to do what he wants, always has the tendency abusing it. So for the respect of the freedom of other citizens, the state must put barriers, so as to guarantee law and order in the society. And this is why, although painful for the people of Cotonou, we think that the decision of banning the distribution of petroleum products is salutary. But it is when in other towns and country sides, the other stakeholders are not worried. As it was well said by an author: « the even existence of a social link indeed involves that there are hardly any freedoms, i.e. placed outside any breach of power, regardless of the circumstances»[863]

In this particular case, the citizens are free to exercise the kind of business they want i.e. sale of fuels. But if we know that this manner of expose fuel to open air, its evaporation into the atmosphere does not guarantee a safe environment which is so dear to our constitution[864], we would understand the risk which the citizens take. Studies done by other researchers on consumption of foods show that they contain lead that is largely above the cadmium values. The lowest concentration of lead is 0.51mg/kg against 0.09 mg/kg for cadmium; for the highest value, it is 0.95 mg/kg for lead and 0.25 mg/kg for cadmium.

The average values of lead and cadmium are 0.69 mg/kg and 0.15 mg/kg respectively obtained in this market are clearly above the recommended acceptability standards both at the national and international level which is 0.02 mg/kg for lead. These values limits are presented in the tables A and B in the schedule. This shows that the average content of lead in cheese from this market is about 34.5 times of the content accepted by the European Union or Codex Alimentarius and **Order N°0362/MAEP/D-CAB/SGM/DRH/DP/SA of 30th October 2007**. This means that these cheeses are highly contaminated by lead. Suspensions values (Table 13) obtained in this same market which are 3 mg/kg et and 0.56 mg/kg respectively for lead and cadmium have just confirmed that these cheeses are so contaminated with heavy metals in this market. This value of 3 mg/kg of plomb originating from this market therefore explains anthropogenic activities in particular those of sale of adulterated fuel on

[862] HEYMANN-DOAT (Arlette), « Libertés publiques et droits de l'homme », Paris, 2000, LGDJ, p.36.
[863] WACHSMANN (Patrick), Libertés publiques, Paris, 2000, DALLOZ, p. 51.
[864] Article 27 of the Constitution of 11 December 1990

food exhibition in our markets. Indeed, some reports by experts in the sub-region mainly in **Burkina Faso in 2005** indicates that the lead content in gasoline is used as an octane enhancer and is discharged into the exhaust gases. These would be one of the sources of lead contamination found in these samples of cheese. This result is confirmed by the work of Mr. ADJAKIDJE in 2009 the city of Cotonou.

Other citizens are no longer free to enjoy their freedom to them, while freedoms should mingle should coexist within the mission of the State.

Life in society requires respect for the freedoms therefore does not exclude the possibility of restriction when it harms others. It has to punish these behaviors (storage, transport, sale of fuel) of Fuel dealers since it is the regulator of public power, but also of the monopoly on sale of fuel and its by -products[865].

The State has the obligation to "determine the status of this freedom, to mark the boundaries ..... [866]„to ensure peace in the society. What are the impacts of such a trade?

B- Impacts of illegal distribution of petroleum products

Illegal distribution of petroleum products has contributed in one way or another to the partial resolution of some of the problems the state is facing.

Moreover, the lack of effectiveness of regulation or restraint in this activity has serious consequences for both citizens and the state.

It is therefore a question of the consequences of the exercise of unlawful distribution of petroleum products without forgetting the need to provide solutions to regulate this sector.

1. Consequences related to illegal distribution of petroleum products

Consequences can be construed as advantages on the one hand and disadvantages on the other hand. We endeavor to list some advantages and disadvantages of the distribution of petroleum products in urban and rural areas.

1.1. Advantages related to illegal distribution of petroleum products

While the illegal distribution of petroleum products is incidentally "deconstructing" to the economy, this illegal activity has certain advantages for both citizens and the state.

Indeed, the informal distribution of petroleum products has allowed citizens to solve various problems brought about by the issue of unemployment. Thus, citizens can now meet the needs of their respective families. The decline in oil prices has an impact on the cost of transport as well as the cost of living in Benin.

In addition, people who were struggling to source petroleum products, either due to acute shortage of service stations, either because of high fuel prices at the pump and due to perpetual fuel disruptions in service stations are now relieved of their pain. It must be said that shortly before the suspension of this sector, the informal sector compensated for

[865] Article 2 of Decree No. 95 -139 May 03, 1995 concerning the importation and distribution of refined petroleum products and their by-products in the Republic of the Benin.

[866] RIVERO (Jean), « Les libertés publiques, Tome 1, les droits de l'homme, Paris, PUF, 1997, p. 165.

shortage of fuel at the pump for more than a week throughout the territory but especially in Cotonou because of the low percentage of the existence of the service stations in other communes of Benin.

In terms of the benefits of the State in relation to this activity prohibited the hiring freeze in the public service and the dismissal of a large number of workers often due to the jobs crisis and the implementation of Structural Adjustment Programs were all unmanageable situation by the state had this activity being described as a "necessary evil" which now employs many youth. According to a survey by the LAREST it employs hundreds of Beninese.

Thus in 2004, for example, the illegal distribution of petroleum products mobilized about 17 000-42 000 direct stakeholders and provided an average monthly gross profit of between 70,000 and 170,000 FCFA that is 34 billion FCFA per year[867]. Which constitutes an illegal factor for fight against poverty and an asset for social peace, very necessary for sustainable development.

1.2. Disadvantages of illegal distribution of petroleum products.

Notwithstanding the benefits it provides to citizens and the state, illegal distribution of petroleum products is in no doubt a constant threat to both people's lives, the environment and the economy of Benin.

It should first be noted that huge losses of life, property damage, are frequently recorded as a result of traffic accidents, the most macabre was the one which killed a nurse who was in the service but died because a fuel driver had to overtake.

Then the poor conditions of storage and distribution of products added to the poor quality of these products create health problems related to environmental pollution. But the constitution advocates for the right of every citizen to a healthy environment.

We are also witnessing the decline in sales i.e. sale at a loss in official oil companies because of the low prices offered by illegal vendors not to mention its proximity to final consumers. As long as the product continues to exist in some parts of Benin, Seme, Porto- Novo, Ouinhi, Bohicon and throughout the north, the fight could not really eradicate the illicit distribution of petroleum products on the contrary, people will run more risk due to exposure to petroleum products in their dwellings.

Finally, the state is the loser in the proliferation of this activity. Indeed, in a first place, the policy of the State was to appeal to traders while reassuring them to invest in this sector is failing gradually because many mini gas stations running at a loss.

Secondly, the most crucial problem the state faces is that the activity being fraudulent, it does not contribute to the tax revenue of the state. No compulsory levy is done and suddenly the public treasury does not receive any proceeds from this activity.

Because of their slump with corollary huge losses due to unfair competition from the informal market, official oil companies fail to pay as is needed taxes and levies to bail out the state. It is indisputable that the revenue of the state suffers from the expansion experienced by the phenomenon of illegal trade.

[867] CONDE (Aboubacar), « Secteur informel et les recettes fiscales au Bénin : Cas du commerce illicite des produits pétroliers. » Rapport du stage de Magistère II année académique 2006-2007, P 35

Thus from 1998 to 2001, the state has increased from 1,189,885,278 FCFA 24,174,175,643 FCFA loss of tax revenue[868] and since then the state loses an average of 20 billion FCFA per year[869]. This activity, rooted in the daily lives of the people of Benin involves stakeholders who make incomes more important, but cause huge loss of tax revenue to the state without forgetting social losses. From the foregoing the need to explore solutions appears indispensable.

2. Enhancement of attempts for solutions

Given the many problems posed today by the illegal distribution of petroleum products, the State must take the necessary measures to resolve them as soon as possible otherwise there is the risk of their spread.

Among the steps to be taken by the State, we recommend actual application of the laws in place and effective satisfaction of the basic needs of citizens.

2.1. Enhancement of attempts for solutions initiated by the State

The actual application of the law can only be done in stages and especially with moderation. It is imperative for the state with regard to the disturbing development in the informal sector for sale of petroleum products, to put in place an effective policy and efficient supply storage, transport and increment of distribution networks petroleum product in the formal sector.

Besides, the state must issue decrees to subsidize fuel prices in a collegial manner with the effective and rapid development of the mechanism for setting prices on the international market. Thus for several months now, the price of petrol at the pump is 600 FCFA instead of the Pharaonic rates that were place. Moreover, the state has involved the police with a view to effectively fight against the product but only in the city of Cotonou.

Furthermore, awareness sessions are essential to prevent people from the dangers they face in practicing this activity and the losses it causes to the state.

Solving the problem of porosity of our borders with Nigeria by enhancing the number of security checkpoints of our borders would help in eradicating this illegal trade.

The State must meet the basic needs of citizens by creating a framework for the conversion of informal sector stakeholders and by fighting generally against poverty as suggested by the article L-115-2 of the Law No. 2008 -1249 of 1 December 2008 on the fight against poverty and exclusion[870] which provides that "the social and professional integration of people with difficulties contributes to the realization of the national duty of fight against poverty and exclusion ...."

The state must "ensure across the territory effective access to all fundamental rights in the areas of employment, housing, protection of health, justice, education, education and culture, the protection of family and children ».

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[868] Data from the Department of commerce.

[869] MORILLON (Virginie) et AFOUDA (Servais), Le trafic illicite des produits pétroliers, vice ou vertu pour l'économie béninoise. Ed. LARES, Cotonou, 2005 in Aboubacar CONDE, « Secteur informel et les recettes fiscales au Bénin : Cas du commerce illicite des produits pétroliers. » Rapport du stage de Magistère II année académique 2006-2007, p. 35.

[870] OBERDORFF (Henri) et ROBERT (Jacques) « Libertés fondamentales et droit de l'homme », 8 éd., p. 579.

2.2. Enhancement of attempts for solutions initiated by distributors

Two categories of vendors are observed in this case mainly sellers of the formal sector and those in the informal sector.

Regarding vendors in the formal sector, they must be courageous to resist unfair competition. The installation of mini gas stations so as to bring consumers closer to their needs must be an effective weapon for them. These stakeholders must challenge the state regularly in accordance with the commitments it makes to them.

They must improve their service gauging to persuade end users to the actual measuring size. Faced with this situation, the Honourable Fikara Sacca, former director of SONACOP disapproves hunting " at gunpoint " against sellers of " kpayo " fuel at the time when the former Minister Soumanou Moudjahidou was heading the Committee fight against smuggling of petroleum products. Former Director SONACOP said there is need to adjust the price of fuel at the pump by putting lower than the price charged by the sellers of " kpayo " fuel in the streets . If this difference is observed every time, then "kpayo "fuel will be in trouble. Admittedly, the author is right because since the price of fuel at the pump drop from nearly 700 to 600 FCFA per liter, some consumers now prefer to get fuel from the pump instead of the informal sector.

This adjustment in the price of fuel at the pump will not stop SONACOP making profits, he added. This assumes that the prices charged are too high and the profits very consistent. How to understand that the Director General of SONACOP can divert many millions if the institution does not make consistent profits? I must say that the price of fuel at the pump is 600 francs, but now it is a real difference to people. It is therefore necessary to review the cost of fuel as well as gasoline purchased at the pump without forgetting that fuel is bought by the roadsides, because of inadequate or non-existent service stations in some areas of Cotonou, Calavi and its environs. Reducing the prices of petroleum products at the pump could be a beneficial solution but especially brought closer to the sociological realities of Benin can have the desired results. Similarly, why not refuel in Nigeria, if it is enough to simply to add a substance to still sell to the people of Benin?

Regarding illegal vendors, a real awareness is needed them to be aware of the dangers that people face in this activity. Why the informal sector does not constitute themselves into an association feed people by initiating mini service stations capable of competing formal sector to force him to sell petroleum products at reasonable cost. Our investigations have led us to understand that even in service stations products sold are not free from lead just like n pharmacies where one can buy fake medicines. Also, what is the state doing with adulterated products seized, once seized they are sold to service stations which resell them to the same people. Once seized, do adulterated products become of good quality? The state should stop distracting people by doing things as it is required. Either the distribution of petroleum products is an offense and the process will be initiated, or the state carry out a seizure for the public interest but before this it will have to comply with the necessary requirements.

They must also take into account the recommendations of the State's policy for regulating the sector.

GENERAL CONCLUSION

In the foregoing, it is clear that illegal distribution of petroleum products in Benin could not be regulated by legislations texts as it is indeed an illegal which is more or less become official. The formal sector meanwhile is governed by regulatory texts, decrees, orders, ministerial orders, but not by a law in good and due form which shows that do members of parliament have not been able to regulate this thorny problem in so far as it partly solves many of the problems facing the poor thereby becoming a necessary evil. *Since 1999, Benin has been engaged in the implementation of a national strategy document for poverty reduction (PRSP) for sustainable human development. But the evaluation of the strategy for poverty 2003-2005 as well as 2007-2009 showed that the results did not reach the goals in terms of growth and poverty reduction*[871]. It must be said that at the time the poorest populations were engaged in the sale of petroleum products at roadsides, but today, with the prohibition of reducing extreme poverty and hunger by 2015 will not be attained. It should be noted that if this activity has some advantages, it is not without adverse consequences both for the state and citizens. But the hungry belly has no ear to hear and that is why the consistency to sustain permanent state employees in their positions by extending their terms of office could be detrimental to the youth and cause banditry, theft and gay.

Therefore, the state must assume its responsibilities vis-à-vis these stakeholders by limiting certain freedoms harmful to society, in order to protect its citizens against these illegal acts such as illegal distribution of petroleum products. Moreover, the seizures are not destroyed and the players are not criminally prosecuted which poses a problem of the strongest over the weakest Can we stop the drug without destroying or prosecute the counterfeiters?

To achieve its mission, the state must make first make awareness its workhorse, then ensure real satisfaction of the basic needs of the population, guarantee disappearance of this illicit trade. Finally ensure the strict enforcement of existing laws in this area by punishing all offenders with fines and jail time if possible.

Consumer safety, in an environment of widespread poverty and increasing informal trade, also implicitly tolerated by the government, no longer depends on the quality of legal provisions. The consumer would be satisfied in the context of a guarantee of safety of products, especially when it is established that the supply of products is not possible to make other choices in an environment not conducive to the emergence of a liberal consumer culture[872].

One might ask whether organized crime found in the commune of Calavi in this case to wedo, AKASSATO, ZOUNDJA, ADJAGBO and Zangnanado, Kpedekpo[873] where offenders sow more terror by firing at close range into peaceful population is not the result of the ban on petroleum products still occupied a big part of the constraints to crime for their survival? Aussi, avons-nous voulu regarder ce secteur sous un autre angle en souhaitant développer un cadre institutionnel en vue de l'intégrer dans le développement économique Béninois. Loin de disparaître, ce secteur essaie de s'organiser pour durer pendant longtemps encore.

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[871] HOUNKPODOTE (Hilaire), Multidimensional Analysis of Poverty in Benin: A fuzzy Subset Approach, ENSEA Abidjan, ensea@ensea.ed.ci; hilarguo@yahoo.fr, p. 1. Enquête Modulaire Intégrée sur les conditions de vie des ménages.

[872] **NJEUFACK TEMGWA (Réne)**, Regards sur la protection juridique du consommateur africain : lecture comparée, in Penant 868, pp : 293-311 : p. 293.

[873] Au lieu que les forces de l'ordre tirent parfois à bout portant sur les vendeur de produits pétroliers, est-ce qu'il ne fera pas mieux leur travail en défiant les délinquants qui ont défié la police en braquant les autorités policières au point où le colonel HOUSSOU Isidore est passé de vie à trépas et son compagnon de fortune grièvement atteint.

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