

THE EVERYDAY FUNCTIONING OF AN AFRICAN PUBLIC SERVICE: INFORMALIZATION, PRIVATIZATION AND CORRUPTION IN BENIN'S LEGAL SYSTEM

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While there is an abundant literature on African states, the actual functioning of African public bureaucracies has provoked little empirical research interest. Africanist political science has been more interested in politics than in policy (Young 2003), and has spent much energy in typologizing, trying to grasp the essence of the State in Africa in one all-encompassing adjective (Olivier de Sardan 2004). This literature is often “over-heated by metaphor” (Richard Fardon on the blurb of Blundo and Olivier de Sardan 2006). Anthropology, for a long time, has shied away from the state (and all things modern). Recently, a self-conscious anthropology of the state has been emerging (Sharma and Gupta 2006). However, this anthropology of the state seems more interested in establishing its credibility by referencing to established, highly abstract philosophical positions than by theoretical innovation on the basis of solid empirical research. In particular, it tends to reduce the notion of the state to its political, regulatory and disciplinary practices (as opposed to other functions like service delivery) and to equate the state with the political regime and/or political elites. In both political science and anthropological perspectives, African states curiously seem to be states without civil servants (Copans 2001). And the lack of empirical studies on the actual functioning of public administrations and services in Africa (more generally in the Global South) contrasts conspicuously with the significance which development policy increasingly assigns to the effectively functioning state.

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The present essay addresses, on the basis of ethnographic research, the everyday functioning of a particular public bureaucracy – the judiciary and, in a more general sense, the legal system – and the common practices of its actors in the Republic of Benin. African judiciaries have, if at all, mainly been studied by legal scholars, “under the reductive prism of classical legal exegis or normative analysis” (Tidjani Alou 2006: 141). These studies have highlighted the problem of the formal independence of the judiciary and of formal access to law, but have limited themselves to purely legal aspects, without adopting a sociological perspective.¹ This contrasts strangely with the highly developed research tradition in countries of the Global North, where the sociology of law has for a long time been interested in actor strategies to mobilize the law, mechanisms of organisational selectivity and the professional culture and social backgrounds of the legal professions, to name only a few topics.²

Originally, my research on the legal system in Benin was exclusively focused on the topic of corruption. In fact, it was part of a major collaborative and comparative research programme on corruption in West African public services (Blundo et al. 2006). However, fieldwork – as it often does – had its own dynamics, and slowly changed our problematic, for corruption turned out to be only an entry passage into a much wider, and completely understudied, field: the professional practices of African public servants and the culture of public bureaucracies.³ This is not to deny the role of money in the Beninese legal system

¹ The few available publications written from a more sociological perspective include Albrecht (1985/86); Dubois de Gaudusson and Conac (1990); Ndiaye (1990); Pie (1990); Le Roy (1997); Tidjani Alou (2001); Jones-Pauly and Elbern (2002); Le Roy (2004).

² For an excellent introduction, see Rehbinder (2000); for a suggestive comparative perspective, see Blankenburg (1995).

³ My field research was carried out in Cotonou, Benin in spring 2000 with Nassirou Bako-Arifari. Our informants were judges and public prosecutors, lawyers, solicitors and bailiffs (*huissiers*). My analysis also incorporates the findings of other members of the project, in particular Nassirou Bako-Arifari’s findings on corruption in Benin (Bako-Arifari 2006) and Mahaman Tidjani Alou’s on the legal systems in the three countries studied (Tidjani Alou 2006). This explains the occasional use of the pronoun ‘we’ in this text. I also examined the Beninese legal system some years ago through the supervision of a student research project (Ribouis 1998/99) and, currently, of a PhD dissertation by Sai

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or, in other words, the venality of Beninese judges, public prosecutors, police officers and gendarmes. Although publications on corruption are now legion, texts on this topic which are based on empirical research are something of a rarity.⁴ Venality and corruption are not, however, the focus of my text. Instead, I attempt to present – drawing on notions of organizational sociology – the corruption in the Beninese legal system as one of several informalization and privatization strategies, which simultaneously resolve and reinforce the functional problems of the Beninese legal system in a kind of negative feedback loop. This is not to say that the functional problems of the Beninese legal system – its personnel, technical, organizational and ‘regulative’ under-resourcing or ‘misresourcing’ to which I will turn presently – are the cause of corruption (which, based on the reverse conclusion, would lead to the entirely erroneous view that corruption could be eliminated through mere organizational reforms).⁵ One finding of our joint project was that everyday corruption in Benin (and other West African states) is systemic in nature and over-determined: it is the outcome of historical, economic, political, organizational and cultural factors which support and reinforce each other mutually and are, in turn, reinforced by corruption.

Indeed, enlarging the perspective from corruption to the organizational problems of the Beninese legal system has four advantages: firstly, it ‘puts corruption in its place’ as one of many informal practices carried out within an African public

Sotima Tchantipo. Shorter versions of this essay were presented between 2001 and 2004 at the Ecole des Hautes Etudes en Sciences Sociales (EHESS) in Marseille, at the Institute for Social Anthropology, Free University Berlin, the Faculty of Sociology, University of Bielefeld, the Africa Colloquium of the University of Bayreuth and at various seminars at the Johannes Gutenberg University Mainz. A preliminary version was published in German as a contribution to the anthology for the late Georg Elwert (Eckert 2004). I would like to thank participants in the discussion at these lectures for their suggestions, as well as Erdmute Alber, Julia Eckert, Aboubakary Imorou and Sai Sotima Tchantipo for their productive comments on earlier versions of this text.

⁴ See the bibliographical references in Blundo (2000) and Blundo and Olivier de Sardan (2001, 2006)

⁵ The expression ‘procedural misresourcing’ is used to express the way that archaic and confusing laws constitute an inadequate basis for the implementation of sufficiently predictable procedures and decision-making. See below, pp. 114ff.

bureaucracy where, like in all formal organisations, these informal practices are in turn embedded in formal ones; secondly, it does not suppress the fact that, while corruption is indeed endemic, it does not affect the legal system homogeneously and with the same intensity, nor does it simply replace ‘normal’ forms of functioning; in fact, sections of the legal system (as well as public services in general) actually manage to function (as Tidjani Alou 2006: 14 puts it, there are “oases of integrity”); thirdly, such a perspective avoids the tendency for culturalization and normative valuation which characterizes a good part of the literature on corruption; and lastly, but maybe most importantly, it puts the functioning of the Beninese legal system in a squarely comparative perspective, thus hopefully avoiding the exoticising effect of many contemporary discussion on African states which present them as the ‘entirely other’. As we will see, many differences are only of a degree, even if the accumulated result of many relative differences may make for a quite particular overall situation.

The West African country of Benin, whose territory is about the size of England and whose population is currently around eight million, is, according to official statistics, one of the poorest countries in the world. Its political economy is characterized by an extremely high dependence on transnational rent flows, i.e. development aid, on the one hand (Bierschenk 1993), and position rents, based on its geographical situation as an ‘entrepot state’ for Nigeria and the Sahel states, on the other (Igué and Soulé 1992). This means that Benin’s economy and politics are ‘extroverted’⁶ to a significant extent, a fact that is expressed in the extensive influence that aid donors exert on the formulation of official national policy. After a long decade, in which the majority of these donors basically harboured distrust for the state of Benin (as they did for all states in the Third World and beyond), they changed their mind and are now generally hold the view, expressed in buzzwords like good governance, accountability and ownership, that not ‘less state’, but states that function well (as opposed to badly) constitute a central precondition for economic and societal development. Together with the democratization processes which started in many parts of Africa around 1990 in parallel to the fall of the Berlin Wall and the disappearance of the Iron Curtain, and in which Benin adopted a pioneering position, this led to the revalorization of the constitutional state and a functioning independent legal system. In 1989/90 Benin underwent an exemplarily peaceful regime change from a local variant of Marxist-Leninism to a multi-party system. Today, it is viewed as one of Africa’s most democratic countries, with its free elections, an extensive respect of human

⁶ in the sense used by Bayart (1989).

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rights and an avowed policy in support of the development of a strong legal system. This essay concerns the reality of this Beninese legal system.

When I refer to the Beninese legal system in the following, in addition to the courts (which, from a formal legal point of view, should have the monopoly on the administration of justice), I am also referring to the investigating agencies, e.g. police and gendarmerie, the liberal legal professions, to which bailiffs (*huissiers*) belong in the French legal tradition along with barristers and solicitors,⁷ and the prison authorities and their custodial and administrative personnel. In fact, one characteristic aspect of Benin's legal system is the degree to which justice is administered outside the courts. However, the main focus of my attention will be on the courts.

I will start by demonstrating what I see as the fundamental functional problems of the Beninese legal system, i.e. the extreme overloading of the system, which is the outcome of severe personnel, material, organizational and regulatory under-resourcing or misresourcing as compared with Western European standards. In the face of this overloading, the professional legal actors and their clients develop collusive relief strategies – a core topic of this essay. The strategies are collusive because they are based on an (often unspoken) agreement between these actors and can be roughly divided into informalization and privatization strategies.

This is not surprising in itself as, firstly, all administrative apparatuses develop informalization strategies as a means of relief, and, secondly, the privatization of state functions is currently being propagated throughout the world. In other words, it is not the existence of informalization and privatization practices as such which indicates the difference between a Western European legal system, for example the German or French one, and an African one, but rather the higher prevalence of spontaneous informalization and privatization (as specified in areas A2 and B2 of the matrix, Figure 1, next page), practices which are not supported by formal organisational rules.

On the one hand, these practices of spontaneous informalization and privatization are necessary as a source of relief for the system. Without these practices, the legal system would function even less effectively than it already does; they actually prevent its complete collapse. On the other hand, however, they deprive the

⁷ Whereas in Germany the bailiffs are independent officials (*Beamte*) with a basic salary and income from fees.

system of (economic and legitimacy) resources and may annul basic legal principles, in particular the principle of the legality of decisions. As a result, they reinforce the functional problems – of which they are the result – in a negative feedback loop.

Figure 1: Relief strategies adopted in Benin's legal system

	A. Informalization	B. Privatization
1	A1. Informalization supported by regulation	B1. Privatization supported by regulation
2	A2. Spontaneous informalization	B2. Spontaneous privatization a. Externalization b. Internal privatization (corruption)

Thus, the collusive practices of spontaneous informalization and privatization simultaneously explain the survival of the legal system (neither the legal professionals nor the subjects of the law see the complete disappearance of the modern legal system as being in their interest) and its malfunction (in terms of its own organizational norms): the system stabilizes itself at a low level of performance.

The Functional Problems of the Modern Legal System in Benin

The functional problems of the modern legal system in Benin are due, firstly, to its under-resourcing in terms of both personnel and material. They are due, secondly, to the low motivation of the state personnel, resulting from low pay, poor working conditions and the lack of a career policy linked to professional achievement. Thirdly, they are due to organizational and regulative deficits which arise from the widespread lack of legal reform and failure to update the legislation since the country gained its independence in 1960.

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Under-resourcing in terms of personnel

Based on the standards that apply to Western legal systems, the Beninese legal system is hopelessly under-resourced. As Table 1 shows, in the year 2000 approximately 60 judges and 20 state prosecutors (referred to collectively as *magistrats de siège*) were working in the Beninese courts. This represents a ratio of one judge/prosecutor to 75,000 inhabitants. As compared with this, in France there is one judge or public prosecutor per 15,000 inhabitants, in other words seven and a half times more per capita. With one judge or public prosecutor per 3,800 inhabitants, the ratio of judges to the population in Germany is almost 20 times higher than in Benin.⁸

Table 1. Population and the Legal Profession in Benin, France and Germany: Some Comparative Data (2004)

	Population (rounded up)	Number of judges and public prosecutors	Ratio of judges and prosecutors to population	Number of lawyers	Ratio of lawyers to population
Benin	6,000,000	80	1 : 75,000	60	1 : 100,000
France	60,000,000	6,100	ca. 1 : 10,000	no data available	---
Germany	80,000,000	20,000	1 : 4,000	50,000	1 : 1,600

⁸ The comparison with Germany and France was chosen because France provided the model for the modern law and organization of the legal system in Benin and because the text was originally written with a German readership in mind. The comparison shows en passant how different the organisational culture of legal systems is even within continental western Europe (on this point, see the numerous publications by Gerhard Blankenburg, e.g. Blankenburg 1994). Figures were calculated on the basis of author's own survey data (for Benin where no data is available on the legal system) and on Perrot (1995: 56) and Rehbinder (2000: 109). In Niger, there is one judge to 70,000 inhabitants and over one lawyer to over 300,000 inhabitants (Blundo and Olivier de Sardan 2001). In Benin in 1995 there were 71 lawyers admitted to the bar. In addition, there were five bailiffs (*hussiers*), i.e. four in Cotonou and one in Porto Novo, and eight *notaires*, six in Cotonou, one in Porto Novo and one in Parakou (where he is only temporarily present). Cf. République du Bénin 1996.

In addition to these academically trained jurists in the public sector, in Germany there are approximately 50,000 lawyers and a further 50,000 trained jurists in other professions, i.e. a ratio of one lawyer to 1,600 inhabitants. Benin has a total of around 60 lawyers, i.e. one to 100,000 inhabitants. Based on the French standard, Benin lacks over 520 judges and public prosecutors, i.e. almost seven times more than the existing number, and based on the German standard it lacks 1,420, almost seven times the existing number. Furthermore, based on the German standard, Benin lacks 3,700 lawyers, i.e. 60 times the number currently available.

To make things worse, in terms of the number of judges and public prosecutors employed, the situation in Benin has rather been deteriorating for the last twenty years. In response to pressure from the IMF and the World Bank, the automatic recruitment of graduates in the civil service was abolished in 1986 and a general recruitment ban imposed. Since then, the number of judges and legal officials employed has decreased by approximately 20 percent.⁹ The so-called ‘democratic renewal’ of 1989/1990 resulted in the upvaluation of the constitutional state, a development welcomed by foreign observers and experts. This has translated into a growing demand for conflict resolution by the courts which has resulted in a year on year increase in the number of cases to be dealt with, a judicialisation of conflict resolution welcomed by international donor discourse but which donor policy renders difficult to execute.¹⁰

⁹ In 1995, 70 judges and 27 public prosecutors were still employed by the nine courts (République du Bénin 1996).

¹⁰ This disparity between the neo-liberal-based demands of the donor world for the ‘cutting back’ and ‘dismantling’ of the state, on the one hand, and the upgrading of democracy and constitutional state on the other, between the cutback in state resources and the simultaneous increase in the demand for state provision of public goods, is a good example of the paradoxes and contradictions which are so abundant in the context of international development aid, but which only become apparent when the effects of macro processes are examined at micro level. The educational system with its increasing number of pupils and decreasing number of teachers would be another example of this contradiction (Bierschenk 2007).

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An examining magistrate at the court of appeal (*cour d'appel*) in Cotonou (up to the most recent reform of the legal system, the only such court in the country¹¹) has 600 cases on his desk. The norm for his French colleagues is 50; they would be regarded as considerably overburdened if their caseload reached 80. The Beninese examining magistrate also fulfils the role of custodial judge and in this function is responsible for 140 prisoners who have the right to write to him once a month, something the majority of them apparently do as the risk of otherwise languishing forgotten in prison is considerable. In 1995, with the exception of the local district court (*tribunal de 1ère instance*), the number of new cases in all Beninese courts exceeded that of the cases completed (République du Bénin 1996). However, the number of completed cases per judge varies significantly from one region to the next, i.e. it is significantly higher in the south of the country than it is in the north.¹²

Other vast regional imbalances exist in addition to this: while Benin's (economic) capital of Cotonou lacks judges and public prosecutors, not a single lawyer has set up a practice outside of Cotonou. Up to the most recent reform, there was only one court of appeal in Benin (*cour d'appel*, in Cotonou) of which the *chambre administrative* also functioned as the only administrative court in the country.¹³ Even more crass regional imbalances can be found in relation to solicitors and bailiffs who are virtually non-existent outside of Cotonou and Porto-Novo.¹⁴ The

¹¹ Two more appeal courts, one in Abomey and one in Parakou, become functional in 2006.

¹² In 1995, a judge in Abomey dealt with an average of 268 cases while his colleague in Kandi, the local district court furthest north in the country, only dealt with 63; one judge is even reputed not to have dealt with a single case in 1992 (République du Bénin 1996).

¹³ Legal conflicts between citizens and the public administration in Benin are very rare. This may be due to the fact that, as is the case in France, the tradition of administrative jurisdiction is relatively weak and that during the Beninese Marxist-Leninist era, the executive was further reinforced vis-à-vis the judiciary (which was defined at the time as a simple authority [*autorité* or *service publique*] and not as an independent power [*pouvoir*]) (République du Bénin 1996: 2). In any case, it is clear that in conflicts with the state, the vast majority of Beninese citizens adopt strategies other than recourse to the courts, e.g. clientelist strategies as described, for example, by Gerd Spittler (1977).

¹⁴ Above n. 8.

overloading of the single local district court in Cotonou, a city with one million inhabitants – an overloading which is considerable even in the context of Benin – is the outcome of a legal system which has not been reformed since 1963.¹⁵

Similarly under-resourced are the court offices, in particular in Cotonou, and this is immediately apparent even during short visits here: the court of appeal in Cotonou is one of the few Beninese authorities in which I have not seen any secretaries asleep at their typewriters. All of the court clerks (*greffiers*, the majority of whom are women) and, moreover, examining magistrates, interviewed stated that they regularly had to work at the weekend, for which they were not paid overtime, and having seen the mountains of files on their desks, we had no reason to doubt this. In 1995, there were 132 court clerks (*fonctionnaires des greffes*) in the country, i.e. around 1.4 per judge or public prosecutor; the corresponding ratio in France is three to one, and French magistrates also have far superior material resources, e.g. computers, at their disposal. The offices of the Beninese courts can only function at all because in addition to the permanent staff they also employ a large number of (usually untrained) office personnel who are temporarily employed and are paid using income from court fees. Criminal court sessions in which, as we were able to observe, over 50 cases are dealt with in less than three hours, are a direct consequence of this overloading of the service.¹⁶

In anticipation of the line of argument I will later pursue, it should, however, be noted that these organizational deficits are sometimes the result of the corruption

¹⁵ In Benin, there are eight courts of first recourse (*tribunaux de 1ère instance*) and a single court of appeal (*cour d'appel*, in Cotonou) for six million inhabitants. In a survey carried out in 1995, travel costs represented the most significant expense incurred in the course of court proceedings, ahead of the cost of lawyers and cost of 'gifts' (i.e. bribes), see République du Bénin (1996, Annexe: 'Réponses enregistrées aux questionnaires'). The ongoing reform of the organization of the courts includes planning for an additional two courts (one in Parakou, which has already been established, and one in Abomey), and additional courts of first recourse.

¹⁶ Sometimes sessions are halted shortly after they start and adjourned to a date several months later because the presiding judge is required to deal with another urgent matter (FIDH 2004). It is also worth noting that no court in Benin has more than two chambers (République du Bénin 1996).

to which they give rise to in a feedback loop. I will return to this point in the third part of this paper.¹⁷

Low (but increasing) salaries for officials

At the time of our fieldwork in 2000, a young judge – who can be responsible for cases involving hundreds of millions of CFA francs – earned a basic salary of approximately CFA Fr 80,000 including his basic salary and different supplementary benefits, i.e. around € 122 per month. It was obvious that on no account did his income enable him to even come close to maintaining an adequate lifestyle. Due to the introduction of structural adaptation measures, these salaries were lower in 2001 in real terms than they were in 1985.¹⁸

Material and technical under-resourcing

The relative under-resourcing of the Beninese legal system in terms of personnel is aggravated by its material and technical under-resourcing. Thus, Benin almost entirely lacks the tools of modern criminal technology and, as a result, the police

¹⁷ To illustrate this point about the feedback between organisational shortcomings and corruption, cf. the following example from the Benin police force: of the nine police officers employed at the commissariat of the town of Ouidah, eight are regularly occupied with checking the traffic on the Lagos-Cotonou-Ouidah-Lome-Accra-Abidjan through road – an activity which is far more lucrative for the police officers than the prevention and detection of crime. Thus, corruption withdraws resources for a system which is already badly resourced and thus intensifies its functional problems.

¹⁸ After 2004, the judicial service profited from considerable salary increases and judges must today be considered to be among the best paid of Benin's public servants. Today a new entrant judge earns a basic salary of about CFA Fr 135,000 (€ 206) per month (which will rise to CFA Fr 378,000 /€ 576 after five years of service), to which have to be added considerable supplementary benefits. It is surprisingly difficult to find reliable figures for these benefits which are decided in the Council of Ministers and which are not in the public domain, but it is probably not unrealistic to expect that these benefits would at least double the basic salary (personal information Sai Sotima Tchantipo, June 2007).

force has no department for criminal technology. This means, for example, that it is not possible to take and analyse finger prints and this is a source of additional work for the already understaffed legal personnel. For example, the collection of evidence in advance of legal judgments is almost exclusively reliant on witness statements which are usually far more time-consuming for the judge and his office than circumstantial evidence. On the other hand, it also provides a justification for the sometimes very harsh interrogation practices, for which the Beninese investigating agencies are known, for the widespread abuse of imprisonment on remand and for the abuse of the principle of *flagrante delicto* by public prosecutors (Tidjani Alou 2006: 153).¹⁹

Furthermore, the legal system shares the general problems of the Beninese administration, which everywhere lacks funding for office material. Office material is centrally distributed in completely insufficient quantities and at erratic and unpredictable intervals.²⁰ Like many other authorities, the court of appeal in Cotonou purchases its own stationary from the legal fees it collects. In addition to this, it is not rare for authorities to charge fees for administrative acts in order to remain operational, although there is no legal basis for such fees.²¹ A client of such an authority would not usually understand the difference between a fee regulated by law and an *ad hoc* fee requested by a certain authority. To anticipate my argument regarding corruption, it is not difficult to see that this practice can easily be extended to individual officials requesting fees for administrative acts which they then pocket for themselves.²²

¹⁹ FIDH (2004: *passim*). The International League of Human Rights estimates that approximately 90 percent of prison inmates in Benin are remand prisoners. During a prison visit in 2004, they met a prisoner who had been on remand since 5 June 1996 (FIDH: 17).

²⁰ Which, to anticipate my line of argument of the feedback loop, may itself be a consequence of corruption within the state material distribution administration.

²¹ For examples from the legal system, see République du Bénin (1996), Annex: 'Letter of the Chambre des Notaires du Bénin' of 4 October 1995.

²² Most station commanders of the gendarmerie, for example, would ask for a down-payment of CFA Fr 10,000 from each party to an accident before proceeding to the acquisition of accident data, the justification being that their stations have no operations budget (personal information Sai Sotima Tchantipo, May 2007).

Organizational deficits

These resourcing problems are accompanied by considerable organizational deficits which will only be listed briefly here. The most obvious example of conflicts of competence are the conflicts between the police and the gendarmerie, which constantly attempt to recover procedures from each other, or between the *huissiers* and *gendarmerie* or the police in relation to the enforcement of court decisions. While being alternative forums for the resolution of conflict for which litigants may opt, these public instances and corps themselves shop for clients (K. von Benda-Beckmann 1981). Also worthy of mention in this context is the lack of performance monitoring. The officials of Benin's legal system have no career plan and there is no formal system in place for the evaluation of their performance. As examples of the varying productivity of judges with respect to the handling of cases show,²³ no systematic routines exist for the sanctioning of non-conforming behaviour; and it is probably fair to say that Benin's judges, like their colleagues in Niger and other public servants throughout the region, are more likely to be sanctioned for political reasons than for more strictly professional or deontological ones (Tidjani Alou 2006: 144). The fact that Benin has no legal statistics is an expression of this lack of control of the activity of judges. Moreover, the legal system is considered highly politicized: at the time of our field work (spring 2000), decisions concerning personnel in the legal system were still the prerogative of the Minister of Justice and not of a *Conseil supérieur de la magistrature* elected from within the legal system, whose establishment had been demanded by the states general of the legal system since 1996 to guarantee the independence of the judiciary. As is the case throughout Benin's public service, attempts to introduce modern, performance-based human resources management have failed. The corresponding reform legislation has been on ice in parliament for over ten years and attempts to introduce reform in individual authorities meet with extensive resistance on the part of those affected by the proposed measures.²⁴

²³ Above note 12.

²⁴ Consider the following example from the Beninese customs service. The Benin government published a *code de la bonne conduite de la douane* to great fanfare, directed in particular at the development aid donors, around the year 2000. The purpose of this code was to stem the extensive corruption within the service, in particular in the harbour of Cotonou (Bako-Arifari 2001). The customs service went on strike when the proposed measures were due to be implemented.

The biggest problem facing the Beninese legal system is, perhaps, its archaic and impenetrable laws which are increasingly less suited to local situations and conditions. The Benin Parliament barely keeps up with its legislative functions, and consequently the body of existing law codes is not systematically modernized. Between 1960, the year of independence and 1998, only three statute books were passed in Benin: the codes of criminal procedure and of labour legislation in 1967 and the code of maritime commerce in 1974. In other words, apart from a few exceptions, the criminal and civil law currently valid in Benin originates from the colonial era. The penal code, which takes the form of the so-called Code Bouvenet (Bouvenet and Hutin 1955), has been in force in the French colonies of Africa since 1877 and large parts of it originate from the 1930s; the mid-1950s version is still valid in Benin. The situation regarding the code of criminal and civil procedure is similar; the latter originates from 1939. Draft legislation for the amendment of the code of procedure has been before the Benin National Assembly for years as has a draft for the modification of the code of criminal procedure. A preliminary draft for the modification of the penal code has also been in the process of 'being drafted' for years now.

Commercial law was reformed in recent years, when Benin adopted the terms of reference of the treaty of the Organization for the Harmonization of Commercial Law in Africa (OHADA). Also, after nine years of debate at the National Assembly, a new family law was adopted in June 2004. Both reforms were carried out in (partly very reluctant) response to considerable pressure from the development aid agencies which support Benin. Outside commercial law, the French civil law of 1958 is still applicable in Benin.

To make matters worse, the information basis available to professional jurists is so bad that, as was explained to us, not only are they sometimes unaware of the texts which should be applied, there is no straightforward way for them to resolve this problem, for example by referring to a clearly regulated legal or adjudication status in an accessible database. The code of criminal procedure was reprinted for the last time in 1982 and is not available today in the book shops, neither is the French Civil Code of 1958. Indeed, the President of the Court of Appeal claimed in 1995 that some Beninese judges are completely unfamiliar with the latter (République du Bénin 1996).²⁵ The other statute books are similarly inaccessible to

²⁵ This may have something to do with the fact that Beninese judges study for four years at the national university (and graduate with a *maîtrise en droit*) and then

the public. Beninese jurists manage at best with copies which are passed around for years – if not decades – or often work simply on the basis of lecture scripts which they had drawn up as students lecturers in the course of their training as judges and judicial officials.²⁶ With the exception of the Court of Appeal in Cotonou, none of the courts has a functioning library. For some years, the President of the Court of Appeal has been publishing a collection of the court's resolutions on his own initiative with the aim of contributing to the standardization of case law in the courts of primary instance. Based on its cost alone (one copy costs CFA Fr 4,000) this collection is not very widely disseminated among the jurists in the interior of the country. In other words, like in neighbouring countries, there is no 'judicial public arena' (Tidjani Alou 2006: 144) in Benin: judges have to deal with cases on the basis of what they learned during their initial training, which often took place many years ago, and their individual common sense, and have no professional back-up system, and this in face of an increasing quantity and complexity of cases they have to deal with. The fact that Beninese judges are basically generalists and are not specialized in specific areas of the law makes things even more difficult. The result is an 'everyone-for-himself' attitude which seems to be characteristic of African public services in general (Blundo et al. 2006: 94f.), and only weakly stabilized professional identities.

This situation which we describe as 'regulative under-resourcing or misresourcing' has three consequences which are relevant to the line of argument adopted here.

Consequence 1: significant areas of societal life are legally under-regulated

The most striking example of under-regulation is property law or land law. The Code Foncier, which is theoretically applicable in Benin, originates from 19th century France and is impossible to apply in Benin, at least in rural areas where

spend two years training at the *Ecole de la Magistrature Française* in Bordeaux where, of course, they receive instruction in the currently valid version of the French civil code, and not the version of 1958.

²⁶ For example, scripts like 'Toumatou, M. Justin. o.J. Le procès civile au Bénin' (lecture script of the *greffier-en-chef* of the Benin *Cour Suprême*, Cotonou), s.l, and 'Ganmavo, Placide. o.J. Le procès pénal au Bénin' (lecture script of the *greffier-en-chef* of the *Tribunal de 1ère instance* of Cotonou), s.l, copies of which circulate.

there is no private ownership of land. The corresponding customary law regulations (Code coutumier du Dahomey) have not been modified since their establishment in 1931. This is the background to a situation whereby the majority of legal proceedings in the south of the country involve conflicts of land ownership. The relevant cases have thus to be resolved on a completely inadequate regulatory basis.

Consequence 2: the legal texts are often inapplicable

The legal handling of adultery in flagranti is an example of a completely obsolete legal situation. Based on an archaic piece of French legislation, this is a criminal offence in Benin which carries a minimum mandatory prison sentence of six months. This regulation is simply unenforceable. So are many others, for example the rule whereby an offence involving a sum of CFA Fr 500,000, i.e. approximately € 760, is automatically punishable with a custodial sentence.

This clashes not only with the facts of social life but also with the massive overcrowding in the prisons. For example, the prison in Cotonou, which was built in 1952 to house 400 inmates, in 2004 held 1,686 (FIDH, 2004).²⁷ For this reason, the judges are under both moral and official pressure from their minister to exercise restraint in the handing down of prison sentences, although according to the law they are actually obliged to do this when faced with certain offences. Another example of an ‘unrealistic’ legal situation concerns the prescribed deadlines for the recording of court resolutions, which are practically impossible to observe given the lack of human resources, and which, as we shall see below, represent one of the gateways to corruption.

²⁷ Of whom, 1408, i.e. 83 percent, are on remand! The prison in Porto Novo was constructed to house 250 inmates in 1893; it currently houses 932 prisoners, of whom only 275 (30 percent) have are serving legally valid sentences. In 1996, the country’s eight prisons which can accommodate a total of 1,500 prisoners had over 4,000 inmates (République du Bénin 1996). The prisons are manned by gendarmes who do not have any special training for this task.

Consequence 3: delegitimization of the modern legal system

The consequence of this is a profound ambiguity in the self-image of Benin's jurists who, on the one hand, are trained to see themselves as "slaves of the law" (in the words of the president of the *Cour suprême*; République du Bénin 1996: 7) but who, on the other hand, are forced to ignore constantly the legal texts and procedural regulations. On a practical level, this ambiguity is solved by informalization and privatization practices, but the result certainly is a weakening of the moral authority of the law.

Consequence 4: the protracted nature of proceedings

The legal system is notoriously slow everywhere. It is slow of necessity because it must produce valid judgments based on complex regulations. In fact, time autonomy generally is a constitutive feature of functioning procedures (Luhmann 1983). The legal system in Benin, however, can be extremely slow: the superior courts are currently still processing civil proceedings from the mid-1980s.

The reasons for the slowness lie, firstly, in the above-described overloading of the system. It is entirely normal for six, nine, twelve or even 18 months to lapse between one trial date and the next.

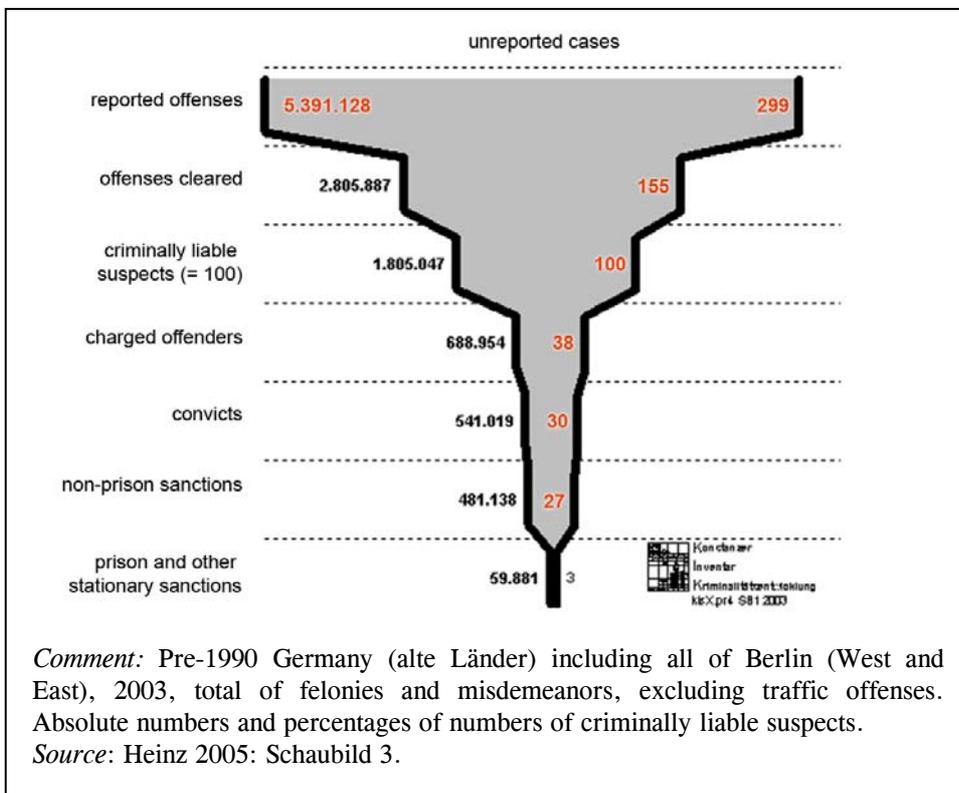
Secondly, they are also due to the delaying strategies familiar from other bureaucratic locations which are aggravated in Benin by the lack of any real options on the part of the legal system for the imposition of sanctions. For example, a frequent occurrence in civil proceedings is that the parties which fear an unfavourable outcome simply fail to appear in court or do not present the necessary documents in the expectation that the case will be adjourned to a date twelve months or later. The courts clearly lack any real way of dealing with such strategies.²⁸

²⁸ According to République du Bénin (1996: different annexes), the practice of adjourning hearings, which was perceived as excessive, was one of the most common points of complaint which was made in particular by the banks. The creation of queues is one of the most fertile contexts for corruption, cf. Blundo and Olivier de Sardan 2006: 87ff.

Informalization and Spontaneous Privatization: Collusive Alleviation Strategies Adopted by Legal Professionals and Their Clients

It is well known that organizations need to develop selection mechanisms to stabilize their boundary with external environments in order to survive. To grasp this fact in relation to the penal system, legal sociology has developed the so-called ‘funnel model’ (Figure 2, next page) which is present here in the version as given by Heinz (Heinz 2005: figure 3) for Germany.

Figure 2. Reported Criminal Offenses and Identified Suspects in Germany (2003)



This model allows us simultaneously to clarify the similarities and some important differences between European legal systems and an African system. For example, the Beninese funnel is considerably narrower than the German or French one while the mechanisms, on the basis of which people fall into and possibly emerge from it again before hitting the ground, are partly similar, and partly different, and altogether much more complex. Certainly the shape of the funnel (its incline at various spots) would also be different. This higher complexity of the African legal system arises because of the stronger influence of informal practices, and translates, for legal professionals and their clients alike, into a much higher degree of unpredictability. One obvious factor influencing these attraction and repulsion mechanisms, which represent the working of the funnel and give it its particular size and shape, are the above-described material, organizational and regulatory deficits of the Beninese legal system.

It is intuitively comprehensible that the 'target groups' of the law try to avoid falling into the funnel. In the eyes of these target groups, the system seems like a vacuum cleaner which functions on the basis of obscure mechanisms and which, once it aims its hose at the target group of a legal norm, threatens to suck it up in a vortex leading to the unknown. But surprisingly, at least at first sight, this feeling of unpredictability with regard to the possible course and outcome of legal procedures is shared by the legal professionals. As a Beninese lawyer explained to us: "Every case ... is like a jump into the unknown. You know where it begins but you do not know when and where you will end up."²⁹

The fear of the funnel on the part of the 'target groups' is based on a widespread lack of understanding of the extreme technical complexity which characterizes

²⁹ This insider view of the basic unpredictability of the outcome of legal proceedings is not limited to Benin or Africa. As my own father, who was a district court judge in the Mosel region, would say when I asked him about the probable outcome of a case: 'everything depends on the judge'. However, in Germany, the alternative possible procedural trajectories, the time horizon linked to them, and the extent to which the professionals will adhere to their prescribed roles are far more predictable.

modern law and the functioning of the legal system.³⁰ Our interview partners from the legal professions attributed this to the ‘legal illiteracy’ of the general Beninese population. However, this is another phenomenon which is not particularly African as such. Modern law is based on fundamental distinctions, for example between form and content or private law and criminal law, and on a rationality of decision-making which is simply not accessible from the perspective of everyday understanding and often does not correspond to natural perceptions of justice, whether in Africa or in Germany.

Thus, to quote from our field research notes, the Beninese layperson will not necessarily understand that an appeal against a decision of a court of first instance has been rejected only because it was received three days after the submission deadline or was submitted in an incorrect form (e.g. sent by registered mail instead of being submitted for recording by the clerk of the court) if, at the same time, the judge had privately expressed the view that in terms of substance the appeal would have a good chance of succeeding. Or how should a justice seeker understand that he will have to wait seven years to be divorced from his Chadian wife who left him three years ago without specifying her new address and from whom he has not heard anything since – because it is mandatory under the law that the divorce petition be sent by post to the wife?

To this is added the complex distribution of roles between the individual actors which is often equally incomprehensible to the outsider. These complex differences and their symbolic reflection serve to create a distance from the social everyday world and hence are a basic condition of the successful functioning of the system.

For example, during court cases in Benin black robes are worn not only by the judge, but also the public prosecutor, the defending lawyer, the clerk of court and any translator who may also be present. The differences between the different robes take the form of subtle variations in the stitching which, to be noticed at all, must be first explained to outsiders – including anthropologists, be they foreign or local. If no one points these differences out to a plaintiff who does not speak

³⁰ In a survey carried out in Benin in 1995, 78 percent of respondents specified that they did not know what a judge’s work consisted of. The corresponding figure for the greffier and solicitor was 85 percent and for the profession of lawyer 55 percent. In general, men emerged as better informed than women (République du Bénin 1996 Annexe: ‘Réponses enregistrées aux questionnaires’).

French, it is entirely possible that he will mistake the public prosecutor who speaks with a loud voice for the judge, the tall translator who repeatedly approaches him with a threatening voice for a kind of assistant, and the female judge who says little and constantly makes notes for the judge's secretary, and that the role of the lawyer assigned to him (admittedly an unlikely event in Benin³¹), whose clothing would indicate that he clearly belongs to the same group, will remain entirely unclear.

Thus, the fact that the target groups of legal norms often prefer to avoid contact with the legal system is intuitively understandable. More surprising is the fact that, in this respect, they collude with the 'implementers of the law' in whose interest it is, in turn, to ensure that the funnel does not become blocked with too many cases. In other words, the legal professions develop strategies to alleviate their burden, which are a prerequisite for the functioning of the legal system. Without these strategies, the boundary that separates it from its environment would collapse.

As already suggested, it is possible to identify two different types of collusive alleviation strategies: informalization and privatization. As we shall see, the boundary between them cannot always be drawn clearly. Theoretically, a third option for alleviating the legal system exists, i.e. the regular calibration of the system through occasional normative decriminalization and legal reform, but we have already pointed out that this is rarely implemented in Benin.

Informalization

A distinction should be made between centrally controlled administrative informalization and pragmatic informalization, which develops spontaneously (see figure 1, above p. 107). While both forms are found in Europe and Benin, administrative informalization is far more prevalent in Europe while pragmatic informalization predominates in Benin.

For example, in Germany, an attempt is made to keep the courts free of cases involving petty criminality such as shoplifting and driving without a licence through official instructions to the public prosecution services and the police, e.g.

³¹ Even in Cotonou where virtually all of Benin's lawyers have their chambers, no more than 5 percent of defendants in criminal cases are represented by lawyers: see FIDH (2004: 7).

by executory law (cf. Albrecht 1999). The administrative requirement that the French gendarmerie request a doctor's certificate in advance of the filing of complaints of assault can be seen as an equivalent strategy of informal administrative alleviation (avoidance of the filing of complaints). In the Beninese context, an example of administrative informalization would be the widespread, and administratively tolerated, practice by prospective home owners of limiting themselves to holding dwelling authorizations (*permis d'habiter*) without going into the costly and time-consuming process of legal acquisition of their building lot (Spellenberg 1999).³²

More typical for Benin, however, are the many examples of pragmatic informalization (*usages judiciaires*) which have emerged spontaneously. The numerous simplifications of the formal requirements for obtaining official documents or certificates, which are often in direct contravention of the law and never written down, but appear to have become widely established in administrative practice, represent a typical example of this.

For example, under Beninese civil law, gifts between relatives require notarized certification. This provision seems to be almost completely ignored in practice in a country where no notary exists outside the capital area. Another example is the interpretation of the authorized number of passenger seats in vehicle registration documents in which the driver is never included, even by the police and gendarmerie who are otherwise extremely creative when it comes to finding highly obscure breaches of the rules in their regular road checks of long-distance taxis so as to be 'paid off'.

Due to the already discussed anachronism of the laws, the poor information base, and the lack of continuous professional training, judge-made law (case law or *Richterrecht*) – another informalization strategy – is probably considerably more significant in Benin than in continental European legal systems where case law basically disturbs the system-forming idea of the division of powers (but nonetheless in practice also regularly occurs).

³² However, according to the law the state can grant this right only to its *domaine privé*. In practice, private owners very often receive a *permis d'habiter* to land which belongs to them by traditional law, thus not to the state; this would then constitute a case not of administrative but pragmatic informalization (Spellenberg 1999: 206). However, the example also demonstrates that the boundary between both forms of informalization is fluid.

An example of this is the standard practice of Beninese courts whereby the custody of children and right of determination of the domicile of children up to six years of age is routinely granted to the mother and thereafter to the father, a practice which is not covered by any legislative text.³³

Both pragmatic informalization and law-making by judges reduce the predictability of legal procedure. In the Beninese context, moreover, they constitute the gateway to corruption. We shall return to this point later.

Privatization

The privatization of conflict resolution occurs in two forms, i.e. the keeping of conflict resolution outside the legal system (what we might call avoidance strategies), and spontaneous internal privatization which is generally referred to as corruption.

*Avoidance strategies (private forms of conflict resolution)*³⁴

As is the case elsewhere, in Benin there are many basically justiciable conflicts which never reach the legal system because the parties to the conflict avoid the

³³ Although many Beninese jurists claim that this merely involves the implementation of a civil law regulation. My attention was drawn to this example by Erdmute Alber.

³⁴ In this text which focuses on the legal system, I use the concept of 'avoidance' in a different way from Elwert (2004) and Alber (1995), both of whom, following James Scott (1976, 1985, 1990) and Spittler (1977, 1981), understand avoidance as an actor strategy of steering clear of the open staging of conflicts. Jean-Pierre Olivier de Sardan and I referred to the phenomenon of 'sweeping under the carpet' in a similar sense in relation to rural Central African Republic (Bierschenk and Olivier de Sardan 1997). This form of avoidance is referred to in this text as the renunciation of regulation (see below) while the term avoidance refers to behaviour which involves not becoming involved in a specific mode of conflict resolution, i.e. that which takes place in a court of law, or trying not to get involved with an institution as such.

legal system. In other words, they avoid the funnel per se. In Germany, it is estimated, for example, that two-thirds of all criminal offences remain unrecorded and that 75 percent of all civil disputes are resolved by means of out-of-court settlements, very often as a result of informal pressure exerted by the courts (see also figure 2).

Extra-legal conflict resolution is an established topic of the anthropology of law which, moreover, has shown that this strategy is in no way restricted to so-called traditional or transitional societies. The resolution of conflict through non-state instances is very common in Benin, in particular in the area of familial and land use conflict (which are quite often related): it is far more common for them to be regulated by the local chiefs (*chefs de village*), mayors, agricultural extension officers or gendarmes than by the courts.³⁵ This phenomenon has been widely discussed in the anthropology of law under the heading of 'legal pluralism' (F. von Benda-Beckmann 1994; Griffiths 1986).

In a survey carried out during the preparation of the *États généraux de la justice* in 1995, land was listed as by far the most frequent object of conflict for the resolution of which the respondents turned to third parties or instances. However, the respondents only turned to the courts in approximately one quarter of all cases of conflict; the majority of the conflicts were resolved by the gendarmerie, the head of the family, the village or neighbourhood chief, the mayor, the police or a traditional chief (in this order). In the case of out-of-court conflict resolutions, a conclusive resolution was achieved in a greater number of cases (73 percent as opposed to 61 percent) and more rapidly (i.e. in a matter of days rather than years) and the solutions were viewed as significantly more satisfactory (67 percent as opposed to 36 percent in the case of court resolutions). In general, the gendarmerie enjoy a better reputation than the police in this regard (34 percent of respondents had a very good or good opinion of the former as opposed to 27 percent in the case of the latter) and a significantly better one than the judges (15 percent) (République du Bénin 1996, Annexe: 'Réponses enregistrées aux questionnaires').

³⁵ As is demonstrated in detail for Niger by Lund (1998), even the representatives of political parties may be called on to act as referees. Spittler (1980) observed however that even non-state conflict resolution takes place 'in the shadow of the state', i.e. with the awareness of the participants that if a resolution emerges which is perceived as unsatisfactory, state instances may be called on to intervene at any time.

However, again in principle not unlike in Germany, the renunciation of regulation ('conflict avoidance' in the sense used by Elwert 2004 and Alber 2005) is probably commoner. The 'taking of the law into one's own hands' is also universal, and is frequently accompanied by the use of physical violence in Benin (Alber 2001; Bierschenk 2000). In its extreme form as 'mob law', it is commoner in urban areas and occurs mainly in the context of petty property-related offences (Paulenz 1999). It is the expression of the low level of trust in the legal system to reach a comprehensible judgment within an acceptable period of time. In the area of commercial law, in particular, the negotiation of agreements by lawyers – a form of regulation probably preferred by lawyers throughout the world – occurs, although probably far less frequently than in Europe or in the USA. I have no data on the frequency of settlements; however all of the lawyers questioned by us supported this form of conflict resolution. Their main argument here was the excessive duration of court proceedings and the difficulty in predicting the course they would take and their outcome: according to a frequently cited observation, 'a bad settlement today is better than a good court case the day after tomorrow.'

Spontaneous internal privatization (corruption)

All these practices could be termed 'outsourcing' of conflict resolution to extra-legal instances or 'external privatization'. In addition, we observe an internal privatization of the legal system when conflicts are dealt with by the official legal professionals but outside the correct legal procedure. When someone in Benin talks about going to court, he/she usually says (in French): '*je vais au parquet*' ('I am going to the *parquet*'). This initially surprising equation (at least from the standpoint of the German legal tradition) of the court with the public prosecution service (*parquet*) even when the matter involved is not a criminal case, which has also been adopted in all of the local languages used in Benin, may be seen firstly as the expression of the aforementioned 'legal illiteracy' of the Beninese population. In the popular conception, the public prosecutor is endowed with an unfathomable abundance of powers that seems extend far beyond the boundaries of the role as defined in the law.

However, this popular conception is not simply one of the myths generated by the high degree of complexity of the legal system; it does in fact correspond to legal dogma and widespread informal practices. Under French law the prerogatives of the public prosecutor are fairly extensive (and more extensive than in Germany):

he can terminate proceedings at his discretion, while in the case of flagrante delicto he has the power to have people imprisoned through a committal order (which otherwise is the prerogative of the examining judge). He can also initiate civil proceedings and can basically become involved in all cases as matters of 'public interest' (Sonnenberger and Autexier 2000: 236; Tidjani Alou 2006: 153). This legal role of the prosecutor is further enhanced by widespread informal practices, for example the frequent abuse of flagrante delicto that has been observed (Tidjani Alou 2006). Thus, for the people of Benin it is in fact quite realistic to assume that public prosecutors regulate – like indeed gendarmes and police officers – conflicts for which they may or may not be responsible according to the law, and that they benefit from the possibility of mobilizing the potential threat which is associated with their official function in criminal proceedings. Even in civil cases, they represent the threat of the funnel of criminal proceedings.³⁶

Thus, it frequently arises that a creditor succeeds in motivating a police superintendent or even a public prosecutor to send for the debtor. If the latter actually appears (based on purely legal requirements, he/she would have no reason whatsoever to do so but then, as we have seen, one never knows...), an agreement may be reached between the creditor and debtor regarding the payment of the debt or, at least, a written acknowledgement of the debt obtained from the debtor. This *règlement à l'amiable*, as it is euphemistically called (euphemistically as it is backed up by potential, if illegal, force), always takes place in the presence of the public prosecutor, or of a policeman or gendarme, who may work in a small reference to the criminal law fact of 'breach of trust' (*abus de confiance*) and its consequences, as though its relevance to the case in question were indisputable. In fact, Benin's citizens know very well that imprisonment on remand in order to recuperate unpaid debts is frequently practised on all levels of the legal system. If the debt is settled – and from the point of view of the creditor and public prosecutor a cash settlement is the optimum outcome – good manners decree that a part of the sum involved (usually 10 percent) be given to the police superintendent or public prosecutor present (for which the expression of *dessous de table* is used).

³⁶ For a historical parallel on popular conceptions of the role of the public prosecutor from the French jurisdiction, see Alexandre Dumas's novel *The Count of Monte Cristo* where the public prosecutor is responsible for the hero's years of imprisonment in the dungeon. In the descriptions of the courts by Beninese citizens, the public prosecutor often features as a kind of superior judge, without whom no case is opened and no judgment spoken (oral information from Erdmute Alber, 31.8.2004).

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The model on which this practice is based is that of conflict resolution by the village chief which also involves the payment of a small sum of money (so-called *droits de table*) by both parties prior to the commencement of the negotiations. Likewise, in the case of the sale of a house negotiated by an agent whereby the purchase price is generally also handed over in cash in the presence of the agent, the latter would also receive ten percent of the purchase price. Another less culturally-rooted comparison can also be made, with that of the hospital doctor who looks after patients on the side and charges privately for the service – an informal practice which is also widespread in Benin and the rest of French-speaking West Africa (Jaffré and Olivier de Sardan 2003).

In other words, police superintendents and public prosecutors operate informal conflict resolution practices on the side (sometimes during work hours, sometimes after work), for which, like the Beninese hospital doctors in their private clinics, they avail themselves of resources from their official positions.³⁷ They charge a kind of privatized court fee for an extra-legal form of conflict resolution.

This procedure is profitable for the officials engaged in it but it has certain advantages for the creditor as well. In fact, in view of the protracted nature of civil processes and their unpredictability, it is probably the most advantageous way for the creditor to pursue his interests, particularly when the uncertainty of the future is taken into account. From the perspective of the legal system, it alleviates the workload of the overburdened courts – at least at first glance, although this practice has concealed costs which we will return to later – and helps the public prosecutor to survive the consequences of the salary freeze imposed by the government under pressure from the IMF and World Bank.

³⁷ Historically, these practices are reminiscent of the licences which were typical of the relationship between the colonial state and the private sector, for example for the exclusive import of certain products. That is to say, the state grants exclusive private rights of appropriation to private individuals. In a survey carried out in 1995, the respondents admitted to having spent around the same proportion of the total sum paid for '*cadeaux*' in both court proceedings and out-of-court conflicts. The total sum paid may have differed considerably – a point left open in the report. It may be assumed, however that it was generally higher in the case of court proceedings (République du Bénin 1996, Annexe: 'Réponses enregistrées aux questionnaires').

From a systemic point of view, this procedure for reducing the duration of conflict resolution constitutes a mechanism for the reduction of organizational complexity. Different areas of the legal system which are related to each other through complex official procedures are short-circuited through informal practices. The creditor could also have instigated civil proceedings. Assuming he wins and the debtor refuses to pay up, the creditor would then have had to apply for an enforcement order in court which would have had to be executed by a bailiff (*huissier*). Assuming further that all of the participants involved in the case up to now have acted correctly, and assuming that the debtor continues to reject the enforcement order – these two assumptions are neither very probable nor completely implausible in the case of Benin – only then would the time have come to activate criminal law and the law enforcement agencies.

In a circular order of 8 September 1993, the Prefect of the Atlantic Province forbade all police officers and gendarmes in his region to support bailiffs in the exercise of their function without his prior express authorization. The Chamber of Bailiffs suspects that the reason behind this flagrantly illegal but apparently unsanctioned measure was to prevent the implementation of a resolution of the Beninese Court of Appeal in a conflict concerning a piece of land. The public prosecutor's office had also informally acquired the basic right (like the Prefect without leaving any documentary traces) to make the execution of court resolutions in civil cases dependent on its agreement. This is confirmed by the Fédération internationale des Ligues des Droits de l'Homme which criticizes the fact that the *procureur général* at the Court of Appeal had appropriated the right contrary to law to make any eviction dependent on his prior authorization (FIDH 2004: 7). In general, the Chamber of Bailiffs is critical of the constant interference of the public prosecutor's offices in civil proceedings (République du Bénin (1996), Annex, 'Letter of Chambre Nationale des Huissiers de Justice', 21.10.1995).

Thus, it is possible to gain a significant amount of time by short-circuiting and privatizing such proceedings.

The regulation of conflicts by the officials of the legal system on a private basis but using resources of public office is one of the main forms of corruption found in the Beninese legal system.³⁸ As in other areas of the Beninese public service, many

³⁸ On corruption in other parts of the public sector in Benin, see Wong (1982), and, more recently, Bako-Arifari (2001; 2006). However, corruption in Benin is not limited to the public service and is widespread in the private sector as well.

corrupt practices revolve around the acceleration and deceleration of procedures. Key actors in this regard are the court clerks (*personnel du greffe*), who are overextended to a similar extent to the judges and public prosecutors and whose desks are covered with piles of files. All of those familiar with the system whom we interviewed referred to the fact that, if a lawyer does not want his files to disappear in these piles for an unforeseeable period, or if he wants to accelerate the processing of his file, he must regularly pay homage to the officials of the clerk of court's office and pay a 'dowry' (*dot*, one of the many expressions used in this context). This is particularly applicable when, following a favourable judgment, it is important to obtain quickly an enforceable copy of the judgment (*grosse*) from the clerk of court's office.³⁹ Conversely, it suits the opponent in a case if there is a delay in the production of the documents. For both sides, regular gifts, e.g. on public holidays, create and maintain '*la bonne ambiance*' necessary for the cooperation of the officials of the clerk of court's office. '*C'est l'affinité qui joue*' is how lawyers describe the conditions necessary for the successful processing of court matters.⁴⁰

However, money is not the only means of short-circuiting or blocking, of accelerating or decelerating strategies. It can be replaced by other means or, even more commonly, combined with them. Social status is an alternative medium in this context: a few of the 'big' lawyers who have been active for several decades are not subject to the informal obligation to donate regular monetary gifts to the

See: Sommer (2000) for agricultural associations; Nansounon (2000, 2000/01) for the truck drivers' associations; and Adjovi (2003) for the private press. For a very graphic report on corruption in the Beninese cotton sector, see Scheen (2004).

³⁹ In a letter of 23 August 1996 to the Preparatory Committee of the *États Généraux de la Justice Béninoise*, the Financial Bank of Cotonou complained that enforceable copies of court judgments passed three years earlier were still not available, see République du Bénin (1996), Annex.

⁴⁰ It is a widespread view in Benin that a procedure will only progress through the necessary stations in an authority if the citizen involved personally follows its progress through the stations. This is referred to as '*suivre le dossier*' from the perspective of the citizen, whereas the officials would perhaps speak of the need to 'put a stone [on the file] to stop it from flying away'. For an analysis of the popular language of corruption in West Africa, see Blundo and Olivier de Sardan 2006, ch. 4.

officials of the legal system. Familial or friendship-based relations to the judge's environment or a director of a court chambers (*greffier-en-chef*) can be used to reinforce the effect of monetary gifts or to reduce the 'price' of services. It is also possible to seek the services of a specialist in supernatural powers to enhance one's chances of success in court. In the case of conflicts involving land law, in particular, the air in the court room is full of smoke and dust generated by the mysterious substances burned by numerous old men in the courtroom or in front of it before the beginning of the sitting. Finally, violence or the threat of violence is another medium used not only in the out-of-court settlement of conflicts, but also as a strategy used in parallel to court proceedings. Opponents are not the only targets of this measure. Judges and public prosecutors explained to us that they also receive constant anonymous and open threats in connection with cases. Money, social capital, supernatural powers and violence can be viewed as 'currencies' with which legal procedures can be influenced and which are both used in combination and convertible into each other, at least in part.⁴¹

The corrupt practices found in the Beninese legal system discussed here are not the only ones that exist.⁴² However, they clarify the issue which I am primarily concerned with here: that of the embedding of corruption in the 'normal' functioning of a bureaucratic apparatus. It seems that once such practices reach a certain level of frequency, feedback loops emerge within the organization, through

⁴¹ In reference to the terms 'healer shopping' used in the ethnology of medicine or 'forum shopping' used in the ethnology of law (K. von Benda-Beckmann 1981), it would be possible to refer here to the term 'currency shopping'.

⁴² Since spring 2004, almost 100 judges, public prosecutors, legal officials and officials from the tax administration have been forced to take responsibility in court for fraud in the calculation of expenses for business trips which has apparently been practised for years. This is supposed to have given rise to losses of over € 12 million between 1996 and 2000. Another example of corruption is the numerous private individuals who have assumed the function of informal 'porters' at the courts over the years, sometimes with the complicity of the official personnel, and who force themselves on justice seekers as intermediaries (Tidjani Alou 2006) This phenomenon of a grey area of semi-private figures on the interface between the public service and citizens exists in all areas of the public administration in West Africa. (Blundo and Olivier de Sardan 2001; Blundo et al. 2006: 87f.) For the work of those brokers, see the very suggestive ethnographic description with which Tidjani Alou (2006) opens his chapter.

which corruption creates the conditions of its own necessity. Corruption systemically stabilizes itself. The private payment to the public prosecutor helps him to resolve the pressing problem of increasing his salary. However, it deprives the Beninese treasury of resources that could be used to increase the salaries of the officials. The triangular relation of citizen–official–state (the latter in its multiple role as regulator, service provider, tax collector and employer) is short-circuited to a dyadic one, in which the citizen directly remunerates the official for a service. This direct remuneration, be it *ex ante* or *ex post*, then gradually becomes a precondition for the fulfilment of (at least some of) his official duties by the official. This delegitimizes the collection of taxes, ultimately reduces tax revenue and cuts salary increases. The circle closes. The Beninese political economy is characterized by a rate of internal resource mobilization for public purposes which is extremely low, even for Africa (Joekes, Houedete and Serra 2000). Furthermore, corruption withdraws not only economic resources from the public service, but also legitimating ones. In the eyes of officials and those of citizens, the state has broken a moral agreement because it neither pays its officials decently nor is it in a position to create law. Thus the citizen is not only obliged to pay officials directly but also feels morally justified in doing so.

As all or at least a sufficient number of Beninese citizens work on the assumption that decisions, in this case by the legal system, are not produced by means of correct procedures, but by payment in other ‘currencies’, it is not possible for sufficient trust in the system to emerge to justify sole dependence on the legal process. This, in turn, reinforces in a feedback loop the incentive for the use of alternative or additional ‘currencies’. Corruption feeds itself, so to speak, through itself, and thus perpetuates itself.

Conclusions

Sociologists and anthropologists of conflict have argued that if societal anomie is to be avoided, conflicts must be regulated: they must be ‘embedded’ in transparent institutions and predictable procedures. Georg Elwert (2004) formulated a model of three great alternative modes of conflict resolution: procedure, avoidance (or in my terminology, renunciation), and violence (with destruction having a special status, it being the non-resolution of conflicts *per se*). Following Luhmann (1983: 55-136), he sees the ideal of procedure as derived in its purest form from the working of the legal system, even though he mentions other regulated forms of conflict resolution like oracles and forms of non-violent competition.

The Benin data presented here make it clear that in the everyday workings of legal systems, the claims on this ideal type of conflict resolution are often not or only incompletely fulfilled. In Benin's reality, individual procedural steps and processes cannot be predicted in a sufficiently reliable way, even by professionals. The time autonomy of the system is severely hampered by the successful deceleration and acceleration strategies of individual actors. Court judgments have binding effect only to a limited degree, and often have no consequences for the conflicting parties who ignore them or turn to alternative conflict arbitrators.

In particular, the power differentials between conflicting parties are inadequately suspended. These power differentials are based on the resources which the actors involved can mobilize to influence procedures. Such resources can be very different in nature. Elwert (2006) refers to money, time and social status in this context. We can perceive these resources as 'currencies' (or 'capitals' in the sense of Bourdieu 1979), a metaphor which relates to the fact that they 'buy' outputs, and that they can be converted into each other to a certain extent. Thus elevated social status (e.g. the seniority of a lawyer) can reduce the financial costs involved in the informal accompaniment of a procedure. The superior financial power of one's opponent in a conflict who is not permanently present on-site can be compensated for, at least in part, by an elevated temporal cost based on on-site presence. The absent litigant can, in turn, attempt to compensate for this strategic disadvantage through the mobilization of social relations, for example in the environment of the judge. Violent solutions can be applied to conflicts concerning property or land rights, whereby, for example, non-local tenants who have occupied a plot of land for decades are driven from their houses overnight by an ad hoc troop of young men (for examples, see Le Meur, Bierschenk and Floquet 1999). Or attempts may be made to rid oneself of an opponent through harmful magic.⁴³

This would suggest that avoidance and violence should not be viewed as the only alternatives to legal procedure in the resolution of conflicts. There are further alternatives like 'time', 'money', 'social status', 'social relations' and 'supernatural powers' (which in the Elwertian model are dealt with only as negative interferences in procedure). Moreover, the resources identified as featuring in the

⁴³ By way of example, see the local interpretation of the sudden death of the Director of the Parakou market company who was involved in a court case with the mayor of Parakou (Bierschenk 2006).

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reality of conflict regulation strategies in Benin are not usually mutually exclusive alternatives. Instead, they are combinable and are typically used on a complementary basis. In principle, social actors always have several options for action in the context of conflict. The fact that a woman initiates maintenance proceedings against her husband with the help of a lawyer in the course of a divorce does not exclude the possibility that she will simultaneously attempt to bribe the judge, send harmful magic to her husband, and threaten to have him beaten up by her relatives on the street at night.

However, the scope of these actions is always limited by the structure of society, the social attributes of the actors, and the nature of the conflicts. The sociology of law has demonstrated that this also applies to Western European society, which a normative view would see as dominated by the procedural mode: in fact, self-regulation in its various forms, not regulation by the legal system and its procedures, is the statistically normal process in all basically justifiable conflicts (Albrecht 1999: 126f.). In an African society like that of Benin, however, the scope and combinability of the action options, the possibility of 'optation' in the sense used by Gluckman (1961), would appear to be larger than in European society. Not only is a larger number of procedures available in Benin (even within the legal system where court proceedings are only one possible procedure), and applicable to a wider range of conflicts and by a wider range of actors. Also, alternative to and combined with this, is a larger number of options beyond procedure, including violence and avoidance (Alber 2005). Thus, it would be difficult to characterize the situation in Benin by the dominance of a particular conflict resolution mode. It is not that people in any case try to avoid the state – it all depends. If there is anything specific to conflict resolution in Benin, or more generally Africa, it might well be not a particular mode but the preference for a combination of strategies.

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