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Rule of Law? Plea for a revaluation of the function of Judge in the Democratic Republic of Congo.

N'semy Aubin Mabanza

Abstract

*In the early 1990s, the National Conference called "sovereign" was held in the Democratic Republic of Congo, which also made multipartyism possible. Among the recommendations made there was the creation of a rule of law. Since that date, everyone has been talking about the rule of law without asking themselves what the criteria are for its creation and effectiveness, to the point of making it a "republican" slogan. If this study analyzes what the rule of law is, it looks in depth at the judge. The latter is the main actor whose function not only allows the creation of a rule of law *stricto sensu* but also contributes to its maintenance. In times of major crisis that leads to a loss of trust between Judge, hierarchy and litigants, we believe that only a revaluation of the function of judge can revive a new climate.*

Keywords: rule of law, judge, revaluation, recruitment, training, French-speaking countries, independence.

Résumé

Au début des années 1990 s'est tenue en République Démocratique du Congo la fameuse Conférence nationale dite « *souveraine* » laquelle avait également rendu possible le multipartisme. Au nombre des recommandations y formulées figurait la création d'un État de droit. Depuis cette date, tout le monde parle de l'État de droit sans se poser la question de savoir quels sont les critères de sa création et de son effectivité au point d'en faire un slogan « *républicain* ». Si la présente étude analyse ce qu'est l'État de droit, elle se penche en profondeur sur le juge. Ce dernier est le principal acteur dont la fonction non seulement permet la création d'un État de droit *stricto sensu* mais aussi contribue à son maintien. En période de crise de grande importance qui conduit à la perte de confiance entre le juge, sa hiérarchie et les justiciables, nous pensons que seule une revalorisation de la fonction du juge peut faire renaître un climat nouveau.

Mots clés : État de droit, juge, revalorisation, recrutement, formation, pays francophones, indépendance.

For three decades, the function of judge in French-speaking Africa, particularly in the Democratic Republic of Congo, the country concerned by our study, has been experiencing a major crisis. Thus, we believe that this function needs to be revalued. Throughout the territory of the Democratic Republic of Congo, judges of the Courts of Appeal and Tribunals have the feeling of being "*left behind*" by the judicial Institution, in particular by the failure to take into account their professional demands. Thus, unlike the Democratic Republic of Congo, Cameroon for example, where magistrates do not have the right to strike, in the Democratic Republic of Congo, judges, when they decide, do not hesitate to observe the effective strike.

We believe that this revaluation of the function of judge must be done both in terms of improving the salary scale and the working conditions of the judge. This can be achieved by strengthening the resources that the judge needs to fulfill his missions. To the extent that the harm suffered by citizens and litigants is considerable, it is necessary to revalue the function of judge in order to achieve quality justice. The original meaning of the function of judge is the accomplishment of his jurisdictional power, that is to say, to settle the dispute with impartiality. The function of judge also presupposes the possibility of creating the standard "*as a last resort*", in the face of a vacuum. In fact, the judge must apply the law, including by interpreting it, that is to say by adapting it to the specific dispute, the context or the time before rendering his decision. This is, in reality, a function that involves enormous constraints with regard to the judge himself and with regard to litigants. The judge can only exercise his jurisdictional power if he enjoys real independence (I). The latter must be accompanied by recognition of acceptable indicative salaries (II).

I. The thorny issue of the independence of judge.

The independence of judge does not constitute a privilege in itself, it is a condition without which one cannot speak of real justice. It is rather a duty of the judge in the exercise of his mission. As a result, independence is one of the conditions by which the judge renders justice in accordance with the claims of the parties who ask him to decide between them. This requires above all that the judge is not corrupt, nor subservient to political power. To do this, he must render his decision with complete impartiality in order to guarantee the independence of his function. However, compliance with the rules of independence is only effective, on the one hand, if the judge bases himself on the law and the evidence presented to him by the parties, and on the other hand, if he shows that he acts without external influence, regardless of the party, even if it is a third party to the dispute he is hearing.

Generally speaking, the judge benefits first from the trust of his hierarchy, then from that of his colleagues, and finally from that of the litigants. It follows that the loss of trust by one of the stakeholders can inevitably affect the office of the judge. This is the situation currently experienced by the Congolese judge. Similarly, we know that the revaluation must concern the status enjoyed by the judge, as well as the ethics and deontology of the judiciary.

These last two attributes form a necessary *tandem* that ensures the total immunity recognized to the judge in the exercise of his judicial functions. We believe that if in the Democratic Republic of Congo, the judge must be independent in the exercise of his mission, this independence must not only be held by the control body that is the "CSM" High Council of the Judiciary.

This independence must also be individual, that is to say, attached to the person of the judge. This is why it is important that the judge demonstrates personality and intellectual capacity, each time he intervenes in a dispute. These are qualities that litigants expect from all parties. In reality, from the moment he takes office, the judge is alone, but he must also be able to work in a team. Nevertheless, this quality must not prevent him from being connected to his professional and social environment so as not to be isolated from society. This quality is similar to the social role of judge. The recognition of greater independence is a requirement for the function of judge. With regard to African countries such as the Democratic Republic of Congo, which apply the (*Romano-Germanic*) civil judicial system, the notion of independence, even if it is only theoretical, requires that the independence of judge be both *functional* and *material*, because it is at the heart of his profession. Indeed, as we have seen, the judge, although alone in his office, belongs to an Institution, that is to say to a body, that of the Judiciary, which must be independent of other powers.

This is precisely why we believe that judges must benefit from a certain social stability, they must not be in a situation of proven "*poverty*" throughout the exercise of their functions but also after their retirement. Consequently, it is appropriate to consider that this revaluation inevitably involves the need to restore the attractiveness of the function of judge (A) and, at the same time, encourage the judge to be responsible (B).

A- The need to restore the attractiveness of the function of judge

Attractiveness is a concept that is not defined by the doctrine. The Larousse dictionary refers to it and speaks of the "*character of what is attractive*", that is to say, which "*pleases, seduces and attracts*". Very fashionable, these last two decades, the notion of attractiveness is more used in economic sciences. The fact remains that the concept is multidimensional, which explains why many disciplines use it, including legal sciences. With regard to the subject of our study, we will refer to the term attractiveness to cover all the ways of improving the conditions of recruitment and exercise of the profession of judge that the public authorities can implement to encourage more people to join the judiciary in order to meet the needs of the public service of Justice.

In the Democratic Republic of Congo, the economic crises of the 1990s resulted, among other things, in increased unemployment, particularly among young graduates of higher education. Thus, it is commonly accepted that access to the civil service remains a good means of social stability, due to the job guarantee it offers, including in the judiciary. However, it is clear that, over the last three decades, the deterioration in the conditions for exercising the function of judge has undermined the prestige that was previously recognized.

Today, many young people participate in the entrance exam to the School of Training for the Judiciary in spite of themselves. What is more, some judges with whom we were able to speak in the Democratic Republic of Congo as elsewhere in some African French speaking countries, even wish to leave the judiciary if they find better in the private sector, thus confirming the existence of a *malaise*. We believe that the central issue is to make the function of judge attractive, particularly among young graduates of Law Schools because it is also in this category that there are prejudices "*negative image that weighs on the function of judge*" linked to the profession of judge remain persistent.

The revaluation of the function of judge also supposes that the judicial institution strives to offer each judge a real prospect of career development, to climb the steps of the judicial hierarchy, regardless of the place of assignment. If the revaluation issue is to increase the skills of each judge in place through internal training, it remains that better continuing training, as well as greater recognition of acquired experience would contribute to making the function of judge attractive.

However complete the training may be, the profession of judge calls upon human qualities that are required to assume the function of judge. The analysis of the attractiveness of the function of judge supposes the identification of the factors that must be evaluated upstream. On the one hand, human capital and the quality of initial training and continuing education are essential to any search for solutions. Traditional recruitment methods have shown limitations that require rethinking other avenues that are little or not exploited. In the Democratic Republic of Congo, tradition has it that to become a judge, the person must pass a competition organized by the Ministry of Justice, according to forecast needs and budgetary data, in accordance with the requirements of the State Civil Service.

In short, it is accepted that this is the implementation of a universally known principle according to which: "*All citizens, being equal (...) are equally eligible for all dignities, places and public employment, according to their capacity and without any distinction other than that of their virtues and talents*"¹. Through this recruitment method, the objective is to ensure equal opportunities between candidates, and to verify a good basic level and aptitude for access to the functions of judge, regardless of social origin. Today, this method, which is supposed to best enable the control of legal skills, does not ensure their sustainability. The training provided at the School of the Judiciary should not be dominated by the classic subjects already studied at the Law School; it should be different, thanks to the practical aspect and discipline. The attractiveness of the judge's function during his training must also include an "*initiation*" phase to business practice, in particular through the possibility of internships, by choice or according to availability, in the company, at the bank, in certain state administrations and in a Law firm.

¹ *Déclaration des droits de l'homme de 1789, article 6§2.*

We believe that the completion of the internship (over a period of twenty-one days) of the future judge with an Attorney-at-Law is particularly essential given the importance of the role of the latter actor of justice in the execution of most acts of justice. Furthermore, if we can unreservedly accept the maintenance of practical training in the Courts, we believe that it should be done as a priority in the "pilot" Courts which must be equipped and authorized to train trainee judges. Also, it would be good if among the qualities, the judge should have charisma in the exercise of his function. Dean CARBONNIER emphasized that "*charisma was the extraordinary quality of a person who, by virtue of his attributes, or supernatural, or divine or superhuman, is taken as leader. The charismatic judge will thus be characterized by an extraordinary personality, he is an "inspired, a legal prophet, like the druids in Gaul"*"². The charismatic judge can, in certain respects, distinguish himself from another judge in that he decides according to his charisma which can be either intimate conviction, or charity or the transaction outside legal criteria. The charisma of judge rhymes with the sense of responsibility that litigants expect from him.

B. The need to encourage more responsibility of judge.

In modern African societies, including the Democratic Republic of Congo, the question of judge's responsibility most often arises following legal scandals, at the same time as the question of his legitimacy. However, as Paul RICOEUR³ noted, responsibility is a *vague concept*. Consequently, we believe that the concept of responsibility must be approached with caution, particularly when considering the role of judge. We believe that the question of judge's responsibility is inseparable from that of ethics, with which it forms a *tandem*. Focusing on the judge's responsibility is an effective way to enable the latter to improve his individual skills. This involves, in particular, instilling in the judge a culture of self-improvement of his theoretical knowledge which, in the Democratic Republic of Congo, is insufficient, due to the short duration of the training provided at INAFORJ (National Institute of Judicial Training), the equivalent of the School of the Judiciary.

The judge must be imbued with a professional Code of ethics that is accompanied by an obsession to learn, to cultivate oneself further. This personal activity of the judge does not oppose continuing education, quite the contrary, the latter comes to energize the experience acquired in the field. As for continuing education, it is a private activity of the judge, it is above all personal, it consists of updating or acquiring knowledge; it must be encouraged by the heads of jurisdictions and, possibly, supported by the hierarchy when it comes to sessions organized outside the home jurisdiction.

² CARBONNIER (J.), *Sociologie juridique*, in *Cours de D.E.S., Paris II, 1973-1974*, p. 37.

³ RICOEUR (P.), *Le concept de responsabilité. Essai d'analyse sémantique*, *Esprit* 1994, pp. 28-48, spéc., p. 28.

The quality of a Court decision depends on its motivation. Thus, the lack of motivation of a decision or its minimal or vague nature, is similar to a denial of justice. We believe that the fact that a legal provision exempts or makes optional the motivation of the judge's decision constitutes legal uncertainty and, by the same token, a means of favoring the intellectual laziness decried by the judge in the Democratic Republic of Congo. It will only be recalled that the function of judge is entirely financed by taxpayers and that, therefore, the latter are entitled to demand quality justice in return. While it is accepted that quality justice must be ensured in the Democratic Republic of Congo, the fact remains that its effectiveness depends largely on the means made available to the judge, which presuppose the recognition of acceptable indicative salaries to which he is entitled.

II. Recognition of acceptable indicative salaries

Dean Gérard CORNU defines recognition as "*a manifestation of will by which a person agrees to consider a pre-existing situation of fact or law as established*"⁴. With regard to the function of judge, recognition is one of the attributes of motivation that any "*agent*" can claim in their professional relations throughout their career and after their retirement. The effectiveness of recognition depends on the way in which it is implemented within the professional "*structure*". In addition, recognition is a time-sensitive tool, which is why it requires regular and constant.

In the context of the function of judge, recognition finds its origin in the index treatments. The culture of recognition is not the sole preserve of private sector companies. Thus, each "*agent*" of the State Civil Service can claim the benefit, in accordance with the provisions of the special status to which he belongs. This recognition is also a way of eliminating a certain number of imbalances between the different categories of judges belonging to the judicial order.

In the Democratic Republic of Congo, the revaluation of treatments should be considered as an opportunity to rehabilitate the judge whose function is constantly criticized during his interventions. If most often this type of criticism comes from litigants, it can be noted that the executive is not left out, while it is supposed to protect the judge. As a result, the materialization of this revaluation involves the effective application of the treatments due to the judge (A) and, by the use of treatment accessories which are an integral part of the corrective measures (B).

⁴ CORNU (G.), *vocabulaire juridique, op. cit.*, p. 865.

A. The effective application of treatments due to judge

The problem of the judge's treatments in the Democratic Republic of Congo is delicate in that it does not concern the absence of texts setting the compensation scale and providing for the revaluation of the social and professional status of judge. It is rather the fact of their application and their adaptation over time. They are structured around points such as the revaluation of salary, the allowances, the material means, the rights of judge after his retirement, the social coverage and the increase in the workforce in order to reduce the workload weighing on the judge. To provide a start of answers to these various demands which are all legitimate, the option of setting up a supported index framework seems the most appropriate. In the same vein, it will be desirable to determine the issues of general working conditions. An index framework for the function of judge must be supported by the effective application of the texts in force, by their modification and by their adaptation, to take full account of various changes relating to the purchasing power of judge.

This framework, the main part of which concerns the social conditions of judge, is only effective if it is supported by those who developed it, who agree to ensure its application, because it is above all the result of consultations between the executive and the most representative Unions of magistrates of the judicial order. This also raises the thorny question of the role of Union representation within the judiciary. Traditionally, these Unions are composed of magistrates from the public prosecutor's office and the seat of the judicial order. The fact that the Unions are associations, their resource comes largely from the monthly contributions of members. However, in a country like the Democratic Republic of Congo for example, due to the low rate of salary indices for the judge's position, many members have difficulty paying their contributions regularly. This reality affects the missions of these Unions which, in order to remain operational, are sometimes forced to resort to private subsidies.

The system currently applicable in the Democratic Republic of Congo provides for a low salary for judges both at the beginning of their career and at the time of retirement. This low salary is assessed both in terms of the length of studies, the level required to compete for entry to the Training School, and the volume of responsibilities exercised by the judge. Regarding the situation in the Democratic Republic of Congo, Professor Évariste BOSHAB wrote: "*(...) Congolese magistrates are among the lowest paid in black Africa (...)*"⁵. Indeed, Congolese judges feel they are suffering a double prejudice. On the one hand, their salary scale is set according to the rate of the Central Bank of Congo, which is assessed in relation to the US dollar.

⁵ **BOSHAB (E.)**, *La misère de la justice et la justice de la misère en République démocratique du Congo*, *Revue de la Recherche Juridique*, n° XXIII-74, Presses universitaires d'Aix-Marseille, 1998, p. 1183.

On the other hand, judges are required to withhold income tax (IPR) from their salaries, the current rate of which is 12.5%, while this withholding is only 3% for their colleagues at the Court of Cassation, the Constitutional Court and the Council of State (considered the best paid) even though they all belong to the judiciary. In other words, the Congolese State is the cause of the gaps observed between magistrates' salaries. For example, in Senegal, since 2011, the salary scale for judges at the start of their career is the equivalent of one thousand four hundred and fifty-two euros (1,452 euros), to which are added the compensation bonuses. It should be recalled that in application of Article 17 of Organic Law No. 2017-10 of January 17, 2017 on the status of Senegalese magistrates, the latter: *"(...) are entitled to category A official housing, failing which a compensatory allowance is allocated to them (...)"*.

Concretely, the implementation of the aforementioned provisions allows the Senegalese judge to obtain a real estate loan from a local bank. Unlike the situation in the Democratic Republic of Congo where, in similar circumstances, for example, the applicant will have to attach a surety to his application, without being assured of obtaining a favorable response from the credit Institution. On the one hand, the judge is exposed to solicitations (from the party whose case seems lost in advance); this results in corruption and other forms of practices (for example financial assistance, etc.) contrary to his status, to the ethics and to the professional conduct of the Judiciary. Indeed, it is difficult for a judge who benefits from certain advantages from litigants to demonstrate independence and impartiality when intervening in a dispute. On the other hand, it is noted that a large number of judges refuse to practice their profession outside large cities, which undermines equal treatment. For example, since March 2018, the authorities of the Democratic Republic of Congo have implemented the constitutional provisions relating to the expansion of the number of provinces, which have increased from 12 to 28. The improvement of working conditions of judge can also justify the use of treatment accessories as one of the corrective measures (B).

B. The use of salary accessories: a corrective measure

In the context of the revaluation of the function of judge, accessories are *"supplements of remuneration"*, such as bonuses, benefits in kind, professional expenses and allowances paid on a non-permanent basis. Accessories are taken into account for the calculation of the paid leave allowance, etc. And yet, we observe that in the Democratic Republic of Congo, there are mechanisms for paying judges' allowances. On the other hand, in Senegal for example, the provisions relating to the allowances of the judge's function are effectively applied. Thus, we believe that the alignment of the allowances due to the judge in the Democratic Republic of Congo could be done on the Senegalese *"model"* in that it allows the judge to lead a decent life. The Senegalese model also provides for judicial and functional allowances. Overall, a correction would include other compensation such as those for the seizure of judgments, bonuses on the execution of judgments, overtime.

For example, the head of a Court in Kinshasa suggested to us that "*it seems unacceptable to us that a court president, who works weekends, is not compensated for these additional hours of work*". The difficulties observed by the Congolese judge lead to the emergence of survival initiatives.

Conclusion

Many Congolese wrongly associate the Rule of Law with the ongoing democratization process in this country via a multiparty system that is otherwise poorly controlled. The article has demonstrated that the existence of the rule of law has nothing to do with it. The Rule of Law is above all the barometer of the state of government's civil service, in that it is linked to the indicative treatments reserved for any civil servant, including the judge, despite his "*special*" status. The article has analyzed the function of judge because it allows the judge to fully but calmly play his role, namely, to state the law in all fairness. Thus, not every Law graduate who is lucky enough to be admitted to the entrance exam for the judiciary becomes a judge. If the function of judge requires intellectual qualities and charisma, it requires the judge to have above all qualities of morality and individual independence. The study also showed the limits of the traditional recruitment method currently used in the Democratic Republic of Congo.

We believe that the judge is the only civil servant that by virtue of his professional status of irremovability and also as he does not receive instructions in the exercise of his function, when he becomes immoral and corrupt can claim to become a "*superman*" who has the lives of litigants and more broadly the existence of the State in his hands. However, a State where corruption gangrenes justice no longer exists except in name.

For all these reasons, the judge must be placed in good living and working conditions, such is the meaning of revaluation of the function of judge. Our study that is the result of an empirical survey, showed that in Senegal, for example, it was under the reign of President Abdoulaye WADE that the judge was recognized as having a place in society. Indeed, for this former eminent Attorney-at-Law, it was necessary on the one hand, to revalue the function of judge and on the other hand, to require him to have the ability to objectively apply the law based on the case before him. Therefore, to interpret law to accommodate changes in society and social norms, failing that, he had to be severely punished.

We keep hearing everyone, including top members of the executive, admit "*helplessly*" that the Congolese justice system is not working, without looking for the original causes. Let us keep in mind that contrary to the widespread or even taught idea, in African French speaking regions, the legal concept stemming from Roman law does not provide for the existence of a '*judicial power*'. On the other hand, there is a '*judicial authority*' only. This is the case in France. The nuance is significant. That said, the Congolese executive can legitimately restore order to the judicial Institution as it does in other civil service administrations. And, it is not by recruiting thousands of young judges that we will achieve a Rule of Law. It is rather by revaluing the function of judge.

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