

Forth regional conference Nairobi, Kenya in Autumn 2016 about "Requirements for an independent and effective judiciary in Burundi, DR Congo, Kenya, Rwanda, Tanzania and Uganda – current problems in criminal and civil proceedings".

Notes of the Work-Shop Group about “Efficient judicial procedure – suggested improvements”

Groupe II : Améliorations pour une procédure judiciaire efficace (1ère journée)

- A. Adopter l’utilisation des nouvelles technologies en vue de permettre la numérisation des dossiers judiciaires;
- B. Déterminer le critère d’attribution des dossiers en considérant par exemple l’ancienneté, la qualification ou l’expertise de juges sur des questions spécifiques;
- C. Lutter contre la corruption des juges et travailler pour leur redevabilité en adoptant des codes de conduite et d’éthique pour les juges;
- D. La nécessité de spécialisation et de formation continue des juges,
- E. Faire participer les experts indépendants au travail de la cour (chercheur,
- F. Allouer un budget conséquent pour le fonctionnement des parquets, cours et tribunaux;
- G. Améliorer les conditions socio-économiques des juges;
- H. Renforcer le système des sanctions des juges et des magistrats en durcissant les peines;
- I. Ouvrir les conseils supérieur de la magistrature ou commissions judiciaires à d’autres catégories socio-professionnelles (avocats, fonctionnaires, etc.);
- J. Encourager les mécanismes alternatifs de règlement des différends;
- K. Simplifier le langage judiciaire

Notes of the Work-Shop Group about “The execution of civil judgments and arbitral awards in DRC Challenges and obstacles”

By *Stephanie Nsomwe Musangie*

INTRODUCTION

From the outset it should be remembered that the ills that plague the execution of judgments are general. They apply to all judgments whether criminal or civil. As for us, we chose to dwell on the enforcement of civil judgments and arbitral awards in the DRC.

Indeed, it is important for us to pinpoint the obstacles to the execution of civil judgments and arbitration awards and to offer challenges for distribution of sound and impartial justice.

A. The obstacles encountered in the enforcement of civil judgments

Far from us the thought is to list all the obstacles. The list is not exhaustive.

Nevertheless, we will mention a few that we would clarify as to understanding the difficulties facing the enforcement of civil judgments.

I. The institutional obstacle

It is fundamental.

We thus consider because it comes precisely from the General Judicial Inspection Service and Penitentiary.

Will we have to point out that the real problem in the enforcement of judgments is not necessarily at the level of the bodies, the right? The right can be said in good standing but is paralyzed in its execution by the General Inspectorate of Judicial and Prison Service.

The latter appears as gifted machine one ability: to prevent the enforcement of judgments by the mechanism of the production of records.

Indeed, once the decision is made by the judge, Inspection requires that the record be communicated under the pretext that it must check the veracity of the decision. That is to say, he must be aware of strict compliance. Yet it is at this level that freezes the records because refusing to hand them over for execution. And often in this behavior, there are implications of the political authorities and influential people.

“There is no great tyranny that is exerted in the shade of laws with colors of justice.”
Montesquieu

II. Barriers related to bodies of execution of civil judgments: the Registry of execution.

1. Poverty agents,
2. Corruption
3. Theft of parts,
4. Insufficient means: the clerks are not sufficiently equipped.

The very low level of training for enforcement officers betrays them. They make mistakes in the execution of judgments. Sometimes we refer to the clerks of other superior courts.

III. Mitigation of judicial decisions by the President of the Jurisdiction

IV. The interference of political authorities and individuals who think they are above the law.

"It is an eternal experience that everyone who has power is inclined to abuse it. "Montesquieu

V. The embezzlement of the enforcement proceedings

VI. Impossibility of execution against the state.

In practice, the principle that state assets are inalienable and indefeasible works in favor of those animated in bad faith when this is for "public undertakings" to run. The "state enterprises" show themselves insolvent because under this principle they think they have nothing to fear.

What the law says?

Above all, it is important to debrief on the 1978 text on public companies.

According to the law n ° 78/002 of 06 January 1978 laying down general provisions applicable to public companies, all companies formerly nationalized and subject to different regimes should be designated public companies. It to say this law came to end the diversity of legal regimes to devote only one general legal regime applicable uniformly to all these companies become public companies.

These companies were subject to public law regime.

It should be noted that since 07 July 2008, the 1978 law on public enterprises had to undergo reform. Therefore it known processing.

After many chess recognized by reporting to the objectives assigned to them, they should be transformed. Thus, they are transformed into either commercial companies or by public institutions or public services, or even dissolved and liquidated because in default or their business is no longer justified.

For what concerns us is the transformation of public companies into commercial companies of interest in the context of this work.

When public companies were transformed into commercial companies, their legal personality also changed. They had ceased to be governed by public law to be governed by private law or common law. In other words, all rules that apply to legal persons of private law they are also taxable.

Furthermore, it should know that all the state's portfolio companies are governed by common law. However, all portfolio companies are not public companies. Where units of the State or its actions are the majority that is to say 51% or more in a company, that company will be regarded as a public company only its legal nature will remain that of commercial companies under the law on the transformation of public companies trading company. By cons, when the actions of the state are a minority that is to say below 51% in a company, that company will be deemed a business of State portfolio but will not be considered for the company public.

Thus, these companies are wrong to continue to see themselves as public companies in the strict sense. They are now commercial companies well when the State is the sole shareholder or majority shareholder.

Therefore, they should run contrary to the case of enforcement they will be submitted like all other commercial companies.

It is important to note that this would be an aberration to continue to think that these companies must continue to behave far as public enterprises since the state has already disengaged public companies.

Even at a time when public enterprises were subject to the 1978 law, there was no reason for them to refuse to pay its debts.

What was the underlying purpose? The underlying objective was the state is responsible. However, as a responsible state should run voluntarily. So he has to pay his debts.

Unfortunately in practice, it is believed that the DRC is still under the public enterprises and that this is a valid reason for the state to evade its obligations. For these companies are running one is called to negotiate with certain persons for commission payable. And we think you do a favor of which you do not deserve.

The efforts of the first Minister to sensitize entities in their guardianship appear ineffective. They have no effect. The situation remains unchanged.

VII. The insolvency of legal entities of private law

Some people consider themselves above the law because of the interference of political authorities. They refuse to pay their debts.

At banks, some would cooperate more. As an example we cite the case of seizure attribution. When it comes to seize money from a company located in any bank, most banks refuse to cooperate or make false statements due to their complicity with some companies protected by political authorities.

VIII. The part in making procedure

The attack on the judge for taking such a decision and if he did not defend well, we condemn and reverse its decision.

IX. The high cost of justice.

Justice is expensive. It is not within the reach of everyone. It is a luxury for people without sufficient means to procure it

X. civic education deficit on the part of the population

The population can not digest certain decisions made by the courts.

XII. Change of address.

A debtor who changes addresses a problem. In the DRC, it does not report the change of address and the state controls nothing. This creates impact on the enforcement of judgments in the case of the seizure of property for example.

XIII. Misappropriation of seized items

This difficulty prevents finalize the sale when discovered at the time fixed for the sale, the items seized were hijacked.

Moreover, it is worth knowing that with OHADA (Organization for the Harmonization of Business Law in Africa) the situation becomes even more complicated. Here, we give the person one month to voluntarily sell their property. Meanwhile it is capable of many things to escape justice.

XIV. Fictitious Companies

There are shell companies set up by crooks who really have no heritage in their own names. All the properties they possess, they have them in the name of third parties. Often this is discovered when it comes to the seizure of property.

XV. Inaccessibility of some locations

In practice some bad people are using the security guards to evade justice. They teach them to receive no legal duty officer while he is present. With such behavior is very difficult to indicate when comes with an achievement.

XVI. The dilatory action of a person who is a third opposition

Some are third party proceedings to await the end of the criminal trial.

Note that this is real difficulty in enforcement of civil judgments. The goal is to save time.

XVII. Difficulty in interpretation while everything is clear.

XVIII. Difficulty with the assistance of the police force that is not available in most cases.

B. enforcement of arbitral awards

Beyond all the above obstacles, it is also important to know that the problem does not arise so much for the awards.

The award is the decision of the arbitrators in accordance with the powers conferred by the arbitration agreement; settle the disputes which were submitted to them by the parties.

Here, the situation is different because of civil judgments for the awards its own means of implementation is anticipated that does not pass through the transplant.

However, it should be noted the difficulty encountered in the New York Convention.

It should be known that Law No. 13/023 of 26 June 2013 authorizing the accession of the DRC to the Convention on the Recognition and Enforcement of Arbitral Awards signed in New York on 10 June 1958. Cette emits law reserves 4 including the 4th present some obstacles that constrain the enforcement of the foreign arbitral award in the DRC.

Indeed, the convention gives signatory states the possibility to issue reciprocal reserves or those relating to commercial matters as defined by national legislation at the time of signature, acceptance, approval or accession the Convention.

However, regarding the 4th reservation made by the DRC, it does not respect the limit on two opportunities that the Convention granted. That is to say, it is made or on the principle of reciprocity and not on commercial matters to be defined according to national legislation.

Since the agreement has not stressed that apart from the above two reserves, other reserves issued would be invalid, considering that the reserve is valid. Besides 4th, come under the Convention on the law of treaties of 1969, a state has the right at the time of acceptance or accede to a treaty to make certain reservations unless the treaty prohibits the reservation determines the reserves without which any reserve would be invalid or the reservation is incompatible with the object and purpose of the treaty.

What does the 4th reserve?

It provides that the Convention does not apply to disputes relating to immovable property situated in the State concerned or on a law such property. By that restriction, it should retain the DRC rule of the Convention any dispute that would directly or indirectly on the land and property of the State and public entities such as mining rights are real property under art.3 of the Mining. Also Code, property of the State and certain entities such as the

Central Bank and public establishments within the meaning of the law n ° 08/009 of 7 July 2008 laying down provisions Terms applicable to public establishments.

However, this restriction may cause some difficulties in the enforcement of arbitral awards in DRC even if it is not incompatible with the object and purpose of the Convention. It decreases its effectiveness in DRC. That is to say, the Convention can not be applied to disputes involving real estate and related rights located on Congolese territory.

In other words, DRC limit the scope of the Convention. It restricts the enforcement of foreign arbitral awards only to movable property.

Also, it is important to add another difficulty related to the accession of the DRC to OHADA.

We face, as we have already mentioned above, that the enforcement of foreign arbitral awards in the DRC will be in accordance with national law on enforcement, which are now exclusively governed by the Uniform Act of OHADA organizing simplified recovery procedures and measures of execution from 1 June 1998.

C. Challenges (Remedy for improvement)

1. Despite the various written correspondence by the 1st Minister nothing changes. It would be best for him to make an order that would decide the Inspectorate intervened after the execution of the judgment or the decision of the judge.
2. Train staff of enforcement of civil judgments.
3. The state must make available the assistance of the police. He must loosen the mechanism by making available to each jurisdiction the police instead of always passing by the General Police Inspectorate to further advocate.
4. These companies have ceased to belong to the portfolios of the work Etat.D'où 1 Minister would not be to sensitize entities that no longer exist, but to make an order that would support the 2008 law and enlighten public opinion)
5. Remove any interference in the management of court cases.

All in all, we will not know the remedy list to bring to each type of obstacles.

Everyone knows that the policy has a rule on the law. However the policy should not show without scruple to crush and stifle the development of a state. Note that there is no development of a state without proper justice.

To do this, political will is necessary for the proper functioning of justice either for the execution of civil judgments or arbitral awards. It must lead and guide the Congolese state so that the separation of three powers (legislative, judicial and executive) to be effective.

"The most consistent with the nature government is the one that best relates to the disposal of the people for which it is established" *Montesquieu (Spirit of the Laws)*

Also, we need to add in the end that impunity is the basis of many evils. The day we start to punish severely many things will sort themselves.

"You better governs men by their vices than their virtues." *Napoléon Bonaparte*

Notes of the Work-Shop Group about « L'EXECUTION DES JUGEMENTS PENAUX »

By *Stéphanie Nsomwe Musangie*

Au regard de tout ce qui a été évoqué dans le cadre de cette conférence, nous avons jugé d'apporter nos propositions pour améliorer ou remédier aux lacunes ou aux difficultés constatées dans nos différents pays qui sont la Tanzanie, le Burundi, le Kenya et la RDC.

Nous avons constaté que l'exécution des jugements pénaux est plus simple qu'au civil. Pour le crime spécifique, il existe des sanctions spécifiques ou bien déterminés.

Seulement, certains facteurs viennent entraver cette exécution. Il s'agit notamment :

1. Du coût de la gestion des prisons.
Gérer une prison demande beaucoup de moyens. Dans nos différents pays, les détenus sont dans des conditions déplorables. Le respect des conditions minimales des prisonniers pose problème.
D'où nous proposons de doter aux prisons des moyens suffisants pour son administration afin qu'elles répondent au standard international.
2. Des difficultés liées à la réinsertion sociale
L'on a remarqué que la prison au lieu d'être un lieu de réinsertion sociale ne l'est plus. On entre dans la prison moins criminelle pour en sortir plus criminel.
D'où eu égard au premier et deuxième facteur nous proposons qu'on crée un mécanisme qui consisterait de le réinsérer en dehors de la prison en créant par exemple des structures d'encadrements où les condamnés pourraient travailler, où on pourrait les rendre utiles pour la société. Des structures qui favoriseraient sa réinsertion sociale.
3. De l'interférence des autorités politiques
Pour améliorer cette situation nous suggérons qu'on inculque la culture de la légalité, du respect des lois à toutes les classes.
4. De la pauvreté qui est à la base de beaucoup de crimes.
Nous proposons à ce qu'Essaye de combattre la pauvreté en diminuant les écarts trop grands entre les riches et les pauvres.
5. De la promiscuité entre les mineurs et les adultes
L'on a suggéré la séparation des adultes avec les mineurs dans les milieux carcéraux.
6. Des difficultés liées à l'interaction avec la police
La police se décourage de bien faire son travail car souvent on remarque quelques temps circuler librement à travers les rues une personne qui doit en principe se retrouver en prison.
7. Du manque des moyens de fonctionnement pour la police
Nous proposons que l'on dote la police des moyens suffisants pour faire son travail. Parfois, elle manque du carburant pour son travail.
8. Du lieu carcéral qui n'est pas toujours la solution.
Au lieu de laisser la personne purgée sa peine dans la prison, elle peut payer la caution et continuer à travailler. Seulement, il faudrait tenir compte de la nature de la peine, de

l'importance de cette personne dans la société. L'Etat a besoin d'argent et la caution peut entrer dans le trésor public et contribuer aux fonctionnements de ses institutions.

9. La durée de peine

La durée de certaines peines doit être réduite. Il n'est pas toujours nécessaire de retenir les gens en prison pour certains cas.

Notes of the Work-Shop Group about “Improvements concerning the appointment and removal of Judges and the assignment of Files (Schedule of responsibilities)”

- A. The role of the executive in the appointment should be completely removed
- B. Persons involved in the appointment of judges should not be appointed by the Executive
- C. Exclude also the Legislature in the appointment process
- D. Appreciate the Kenyan experience in recruitment(which is an open process).Appointment of the Chief justice, Deputy Chief Justice and the Supreme court judges
- E. Include civil society representatives in the body managing Judiciary affairs.
- F. In the removal of judges, let the retirement age be prescribed in the law
- G. Removal of judges should be regulated by the law. Removal should only be for disciplinary reasons or upon reaching the age of retirement.
- H. Removal should be effected by an independent body but not the other arms of the government
- I. The transfers of judges should be done administratively and within the judiciary. External institutions should not be involved
- J. The security of tenure of judges should be protected by the law
- K. The removal procedures should be devoid of corrupt practices or misconduct.
- L. The Judicial Service Commissions should be empowered to carry out their duties while preserving the independence of the judiciary
- M. On allocation of files; there should be emphasis on expertise in the allocation of files
- N. Minimise executive influence in the allocation of files- Have guidelines in place that help in the allocation process
- O. Digitize the process of allocation of files. This will enable tracking of files.

Notes of the Work-Shop Group about “POLITICAL INFLUENCE ON CRIMINAL CASES – SUGGESTED IMPROVEMENTS“

After an in-depth discussion of the topic above, members of group number 2 made the following suggestions:

- A. There should be good will starting with the state, not to interfere with the judiciary and to respect the doctrine of separation of powers. That good will shall exist if heads of state access power democratically. In that way there will be rule of law where the people and the rulers respect the law. If the good will comes from the top, other politicians below will fear to interfere with the judiciary because there will be sanctions.
- B. Law makers should avoid making laws which give too much power to the executive hence enabling them to interfere with the judiciary.
- C. There should be independent judicial commissions composed of neutral people who will not take orders from politicians.
- D. Recruitment of judicial officers should not rely on the will of politicians, because once those officers are recruited by the politicians, they will feel that they have a moral debt towards the politicians who recruited them.
- E. Abolition of statutory powers of ministers which enable them to instruct courts on how to determine disputes.
- F. Powers of presidents to appoint judges should be trimmed substantially.

Notes of the Work-Shop Group about « Les magistrats et la corruption – propositions de recommandations pour éradiquer la corruption »

Par Juslain Nsambana Bonkako

A. *Ayant parcouru les causes avant de présenter les propositions attendues, les membres du groupe en ont retenu autant qui peuvent se résumer de manière suivante :*

- Les mauvaises conditions de vie des magistrats provenant de mauvais traitement (discutable mais pas moins négligeable);
- L'impunité; et
- Le manque de moralité qui se traduit par la cupidité, l'insatisfaction, le vouloir être riche à tout prix, etc.

Propositions de recommandations

Le groupe a relevé que la question de la lutte contre la corruption est un problème complexe dont les solutions sont multidimensionnelles. Elles dépassent les simples solutions juridiques pour atteindre d'autres dimensions. L'intérêt de résumer préalablement les causes réside dans le souci d'anéantir ces causes qui paraissent très déterminantes dans la pratique de la corruption à travers les cinq pays représentés.

B. *Les solutions suivantes ont été retenues :*

- **L'amélioration des conditions de vie des magistrats** : cette proposition est importante mais non déterminante. Ceci se justifie dans la mesure où il existe des magistrats incorruptibles ayant le traitement (rémunération) que les corruptibles. Néanmoins, c'est un élément à prendre en compte pour vider la cause liée aux mauvaises conditions de vie.
- **La répression** : celle-ci joue un rôle très déterminant mais elle ne suffit pas à elle-seule. En effet, elle permet de redresser le magistrat corrompu et de servir d'exemple aux autres. Il est vrai que dans la vie des humains, la conséquence corrige mieux que le conseil. La sanction étant la conséquence d'un mauvais comportement peut, dans ce cas de corruption, être un moyen efficace d'éradication de la corruption; en ce qu'elle entame également l'honneur de la personne sanctionnée. La répression doit toutefois être complétée.
- **Le redressement de moralité par l'éducation civique** : plus déterminant encore est cette dernière proposition qui résume plusieurs autres. Elle concerne tout le monde sans exception, du plus petit au plus vieux sans égard aux fonctions ou occupations sociales. La corruption est principalement une question de mentalité qu'il faut à **tout prix** combattre pour réussir un Etat de droit, instrument du bien être social. Le changement de mentalité doit, pour chaque pays, être pris comme une priorité. C'est dans ce sens que le groupe a suggéré que l'éducation civique sur les bonnes valeurs commence dès l'école

maternelle, en passant par le primaire, secondaire, universitaire jusqu'à la vie professionnelle. Elle ne s'arrête qu'à la mort d'une personne. Sur ce point de vue, tout le monde pourrait être surveillant de tout le monde et la corruption tant active (celle où le magistrat propose lui-même) que passive (où l'on propose au magistrat) ne s'imaginerait plus.

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