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Legal norms, statistical concepts, and the functioning of african courts

Joëlle Affichard

EDITOR'S NOTE

Translated by Cecile Ouba, reviewed by Victoria Weavil

1 Several large-scale projects geared at the "modernization of the justice system" in developing countries are being promoted by international aid donors. Generally speaking, they aim to "strengthen the rule of law", enhance "the efficiency of justice", and improve "access to justice"[1]. For around twenty years, the European Commission has entrusted implementation of these projects to mostly private operators, selected after a tendering procedure. In each case, the logic is to apply Western standards of judicial functioning to judicial systems that are supposedly extremely dysfunctional.

2 The experience detailed in this article is directly related to the work of the *Institut International Pour les Etudes Comparatives* (IIPEC) – the International Institute for Comparative Studies – which was in charge of implementing several of these projects, the general aim of which was to bring the functioning of African courts closer to Western standards, in terms of operating methods and "performance"[2].

3 In the context of legal pluralism, these areas of study have not allowed for any particularly original assessments of the issues raised by the transfer of European-based legal rules to the African contexts. However, they have provided an excellent lens through which to observe the functioning of judicial institutions in Africa and the implementation of procedural rules relevant to dispute resolution.

4 I will analyze cases from these areas, with a particular focus on the relations between "traditional" and so-called "modern" forms of dispute resolution in Africa: often presented as different, or even fundamentally incompatible, they are in fact combined

within judicial bodies by justice actors, who find ways of accommodating with the rigid framework of the procedure codes. This combination is at the very heart of the courts functioning.

5 Our starting point is a series of missions aimed at the creation of statistics on the courts activities[3]. This process requires the main steps of the judicial processes to be quantified within standardized frameworks. In light of the methodological approach used across the *IIPEC*'s projects, it was unthinkable to transpose the statistical tools developed in French or European judicial contexts 'as is' (Part 1).

6 Over the course of these missions, it became apparent that the gaps between the codified procedures and the day-to-day practice stood in the way of the standardization process inherent to statistical analysis operations. These gaps can be analyzed as a hybridization between traditional forms and modern forms of dispute resolution. The first quantified results provide illustrations of these gaps (Part 2).

7 Projects aiming at "modernization of justice"[4] are not cognizant of the hybrid modes of operation of African courts, which are not always inefficient. Some of the standards promoted by these projects upset this delicate balance, or prove unsuccessful because they fail to take it into account (Part 3).

1 The creation of judicial statistics adapted to the african context[5]…

8 Justice modernization projects take interest in judicial statistics for two reasons: not only are they one of the fields of implementation of this modernization, but they are also a reference point for the formulation of the project's objectives and for measuring results achieved. In both cases, statistics are viewed as neutral instruments to provide quantified observations on the functioning of the judicial institutions, and to assess backwardness or progress.

9 Tackling the issue of legal transfer through the lens of statistical analysis may seem surprising, if statistics are understood as mere measurement. However, statistics are more than simple observation. They involve a largely invisible process of concept-creation, which I will bring to light by considering the various steps of this process.

1.1. Origins

10 In the African countries that I visited, the only available non-regular publications were few budgetary data and the list of courts, with occasional references to the number of judges. At the national level, no data were provided regarding either the functioning of the courts or the results of judicial activity. In 2008, the question first came up in Niger of developing an information system for the Ministry of Justice. One statistician expert, underlining these substantial gaps, advocated for the *ex nihilo* creation of an *ad hoc* system.

11 I noticed, however, that some courts achieved manual tallies of their activities, in order to support their requests for additional resources they asked for in the annual reports to the Ministry. These reports were inconsistently transferred and archived in Niamey where the tallies were never controlled, centralized, or exploited for statistical purposes. However, when analyzing the available documents, I realized that their

production routines dated back to the colonial period[6], which lived on within the courts' administration services. These statistical tables seemed relevant and coherent for the most part.

12 After observing these valuable practices, I suggested to create a system of manual statistical production[7]. Improving on the framework still in use in some courts, I designed a series of data collection frameworks to cover criminal and civil proceedings. The emerging Statistics Department of the Ministry of Justice organized missions to help the courts' administrators to fill in tables. For this Department I developed an Excel spreadsheet to enter and control the data provided by the courts. In little over a year, tabulations[8] and indicators[9] for the judicial years of 2007-2008 and 2008-2009 were produced, based on an almost exhaustive field.

13 I reproduced and improved on this process in Chad, Ivory Coast, Togo and Senegal. In all these countries I systematized the methodological options developed in Niger.

1.2. Methodological Options

14 I explicitly chose not to implement imported standard all-inclusive packages made up of software, concepts and methods. By contrast, the method I proposed continues a tradition of African statistics that the *INSEE* – the French National Institute of Statistics and Economic Studies – promoted and successfully implemented in the sixties. In this orientation, statistical tools[10] were crafted in accordance to local practices, knowledge and categories.

15 Ministerial officers, magistrates, and court clerks were somewhat reluctant to this approach when they believed that progress could only be achieved through computerization. Proposing a method that was used in France twenty years beforehand was interpreted as a lack of faith from the technical assistance in the abilities of the beneficiaries.

16 I stuck to the following methodological choices, established on the basis of short-term feasibility and the realistic account of the situation :

17 - Whenever possible, build on what already exists;

18 - Have the judicial bodies complete pre-established charts reporting on their activities ;

19 - Base counting operations on the data that are currently recorded and used by court clerks[11];

20 - Perform these operations manually, while seizing the opportunity of local computerization when available;

21 - Have the clerks use their own records during training sessions;

22 - Set up a "data collection framework" that strictly matches the legal and judicial categories enforced by courts, by using the exact (incrimination)names of offenses, adhering to the different steps of civil and criminal proceedings codified in procedure rules, etc.);

23 - Convince future users of judicial statistics, African ministerial officials but especially international donors, to use only indicators that can be quantified with the available data sources[12];

24 - Control the collected data (the internal consistency of the data collected over a year in each jurisdiction, and intertemporal consistency) and, if necessary, correct them before making use of them.

25 This method proved successful so long as it was possible to simultaneously set up a statistics department, even small but stable, in the central administration of the Ministry of Justice. This department needs to be staffed with driven statisticians, aware that above all else they have to become familiar with the field in which they operate, which requires that they become well-versed in judicial proceedings.

1.3. The Process of Judicial Statistical Analysis

26 At this point, it is useful to provide some specifics on the process of creating judicial statistics. This process is the same for any effort to pull quantified data from preexisting and preformatted sources, like administrative activities[13]. Difficulties linked to processing preexisting sources predate the recent digital big data boom: it requires the transformation of materials from these sources by rearranging them into categories that are relevant to the specific purpose the statistics serve (measurements, comparisons, evaluations, projections, etc.).

27 The format of the sources from which the data is pulled imposes very harsh constraints on the subsequent statistics. Firstly, the "primary" format of the data within these sources is rarely reusable as is. For example, the classification of offenses reported by police statements within registers at the Prosecutor's office has to be reclassified within a limited list of offenses prioritized by criminal justice policies. When the primary sources do not establish classifications, these must be created through the statistical process. For instance, when courts hearing minutes literally record the decisions issued by civil or criminal courts, these decisions must be coded as "adjourned", "under deliberation", "preliminary ruling", "judgment on the merits", or "time-barred case" when the pre-established chart will be completed.

28 The physical receptacles of these sources are also of crucial importance. So long as case files are processed manually, tallies cannot be expected to be compiled by looking through each individual file. Therefore, the data collection must be based on sources that already synthesize information (generally, registers held by the court clerks). As a result, it is impossible to determine average case processing times until individual files are not computerized into criminal or civil "chains".

29 The above-mentioned examples are taken from courts that do not have digital applications: this was the case in all the courts were I intervened. The issues at hand are different when digitalization occurs prior to the statistical process, but even then issues remain regarding the definition of concepts, the choice of data, and formatting.

30 In any case, the modeling of processes within judicial institutions that statistics must describe does not pre-exist. Such models need to be shaped according to specific aims: understanding the litigation trends; reforming the judicial map; improving the courts efficiency; measuring the workloads; planning recruitment; establishing guidelines for criminal policy, etc. Given the constraints that result from the primary sources, several key concepts need to be defined in order for statistics to account for the main activities of the courts (the Prosecutor's office, judicial investigation offices[14], criminal court's

judgments[15], contentious and non-contentious civil affairs, juvenile justice, social and commercial courts) and their evolution over the years.

31 In order to take into account the strong criticism levelled at the backlog plaguing civil courts, given the impossibility of calculating the average case processing time as mentioned above, I endeavored to develop as close a mapping of processing times as possible by calculating the *run-off duration of ongoing cases stock*[16]. As opposed to calculating average case processing times, which requires data on the starting dates and ending dates of each case, the *run-off duration of ongoing cases stock* within a specific court can be calculated by manually counting files and compiling different registries :

32 - Run-off duration of ongoing cases stock= (number of ongoing cases at the beginning of the year + number of new cases within the year) / number of cases definitively closed over the course of the year.

33 This indicator, measured in years and months, calculates the time that courts need to take out all the ongoing cases, *provided they continue to consistently operate in the same manner* (as regards organizing the workload, and resources). The indicator provides an overview of the court's capacity to clear its stock of ongoing cases and makes it possible to detect any risk of overload.

34 However, this presupposes quantifying the three variables used for counting: the number of ongoing cases at the beginning of the year; the number of new registered cases within the year; and the number of cases definitively closed during the same period. These variables cannot be readily observed in the courts, as they are statistical concepts that need to be defined based on categories listed in the legal provisions regulating judicial organization, and within codes of civil and criminal procedure. The crucial process of defining these variables is rather thorny: it requires making choices that have decisive effects on the results produced by the statistical process.

35 For instance, knowing the number of "ongoing" civil cases within a court is a relevant indicator, but it cannot be determined simply by counting all the non-archived files. If the ultimate aim is to measure a court's caseload, only cases that are truly "alive" should be included, namely those that are placed or replaced on the hearing schedule. Our objective of comparing different jurisdictions led us to make decisions regarding vaguely defined steps within the proceedings, and to define with certainty at which point a case is considered as "entered" and at which point it is considered to be formally resolved.

36 The starting point of civil cases is rather vague due to the existence of an unwritten preliminary phase, the modalities of which are unclear, if not entirely absent from codified civil procedure. Sometimes, after having received a court application, there is a first "qualification" hearing before the chief judge, which marks the physical creation of a file. In other cases, the Tribunal's Registry expects the parties to initiate conciliation proceedings of their own accord. If the conciliation succeeds, no written record of the settlement proceedings is kept. In each of these situations, any of the parties can interrupt the proceedings without such an interruption being recorded. In this context, if we define the "beginning" of a case as the moment at which a court application is made, then it is impossible to determine if such cases can be characterized as "ongoing" in the statistical sense. I therefore chose to define the concept of the "beginning of a case", for statistical purposes, as the point at which the case is enrolled for the first time after payment into court has been made.

37 Symmetrically, difficulties arise when measuring the number of cases that have been definitively completed over a given period of time. There is no real difficulty in counting the cases recorded in the civil judgments registers as having resulted in a judgment on the merits[17]. However, identifying and counting the cases resolved through proceedings other than a judgment on the merits poses two difficulties:

38 Some are basic tallying difficulties resulting from the absence of a register compiling cases removed from the register, decisions of lack of competence of the court, inadmissibility of the action, and withdrawal of the parties. Mostly, however, (literally) countless cases are adjourned "*sine die*", i.e. they are adjourned and not rescheduled unless there is a specific demand from the parties. These adjournments *sine die* usually occur after multiple adjournments, due to the parties failing to attend hearings to which they were summoned. In these instances, the cases are not formally removed from the court register, and so they cannot be considered to be closed in statistical terms, although the vast majority of them will never be heard again or decided by the court.

39 The fact that cases adjourned *sine die* are not counted as "closed" decreases the number of "closed" cases and adds to the number of "ongoing" cases, even though they do not actually translate into a real workload for the courts. In assessing the functioning of a court, the "Run-off duration of ongoing cases stock" indicator is therefore no longer relevant, at least not as it is understood in the context of Justice modernization projects: as a measure of increased efficiency, abating processing times, and rationalizing the workload.

40 This example highlights the ways in which the creation of judicial statistics requires a preliminary process of defining the relevant concepts, in order to understand the functioning of the institutions to which they are then applied. In our projects, even though the methodology took into account the specificities of its subject, the statistical modeling does not break away from European court standards of operation. Nevertheless our methodology has been put to the test of functioning modalities of justice that lie beyond its initial frame of reference.

2. … reveals a hybridization between traditional and state justice

41 No quantitative data exist on the number of conflicts settled according to traditional rules and by traditional institutions, or those processed by the State justice system. In any case, attempting to measure the proportion of customary modes if dispute resolution would make little sense, as the boundaries between the two modes are far more porous than they are generally thought to be.

2.1. The Endurance of Traditional Justice in the Realm of Dispute Resolution

42 An overwhelming majority of commentators agree that the existence of comprehensive State judicial systems set up after decolonization has not prevented two modes of dispute resolution from coexisting to this day[18].

43 This coexistence is regulated, in part, by positive law incorporating certain forms of traditional justice. Customary rules are applicable and in practice are applied (with the assistance of assessors embedded in the court), so long as they are not contrary to ratified international conventions, domestic legislation, fundamental rules of public policy, or personal freedom. In some instances, this incorporation goes further still, with procedural provisions mandating that the parties' first appearance be before a traditional judicial body.

44 In Niger, for example, legal provisions expressly grant traditional chiefs "conciliation powers", distinct from the "power to judge" that lies exclusively in the hands of statutorily created judicial bodies. Whatever the outcome of the conciliation process, the law imposes that a conciliation/non-conciliation report be drawn up and kept in an ad hoc register. The traditional community leader intervenes in a pre-litigation capacity, and if the conciliation fails, then the dispute falls under the jurisdiction of the relevant judicial body.

45 Nonetheless, most of the academic literature that accounts for the relationship between State justice and traditional justice distinguishes and even opposes the two entities. The decision to bring a case before one 'judicial body' rather than another is presented as the result of local configurations or power dynamics, or else it is explained with reference to the type of dispute at hand (family and land ownership disputes are within the purview of traditional justice, while the rest, notably criminal cases, fall to State justice).

46 In this context, some advocate for a reevaluation of the benefits of traditional justice and strive to promote its development, especially insofar as it can provide remedies to the shortcomings of the State justice system, which is often said to be culturally inadequate, too distant from its users, overburdened, corrupted...etc.[19]. Others, however, castigate the role assigned to customary law, considering it to be a remnant of the colonial legacy and deeming it incompatible with a rigorous and modern conception of the hierarchy of norms[20].

47 Rarely does academic work fine-tune its analysis and endeavor to account for the complex interrelations between these two modes of dispute resolution. A study by the IIPEC – the International Institute for Comparative Studies – on forms of justice in pluralistic contexts presents the findings of different field missions in Ivory Coast[21]. The monographs on the resolution of family and land ownership disputes demonstrate that State and customary bodies make take into account not only the possible solutions that other bodies could provide, but also the very fact that State and non-State institutions and procedures may concurrently or even simultaneously provide different solutions to the same dispute[22].

48 Adopting a different approach, a recent movement in British academia has shifted the focus onto the forms of hybridity of the two modes of dispute resolution. This movement is part of a larger trend that promotes alternative modes of dispute resolution (ADR)[23]. Its authors recognize African traditions that place consensus at the heart of dispute resolution, as sources of inspiration for creating ADR processes within courts. Projects that develop such experiments, however, differ from our own findings in the following ways:

49 - They promote these experiments as innovative means of “strongly reducing the overwhelming backlog of ongoing cases in the courts and improve access to justice for underprivileged individuals”[24];

50 - They present non-State forms of justice as institutions characterized by their informality (“what differentiates alternative modes of dispute resolutions from the practices of formal judicial bodies is not the status of their mediators –employed or not by the State – but the proceedings themselves, which are ‘delegalized’ and aim to an informal search for an amicable and equitable solution, as opposed to a judicial decision”[25]);

51 - They assume that, when faced with multiple ‘offers’ of judicial institutions, individuals engage in forum shopping and choose the most advantageous one for their case.

52 Our own observations of the reality of African court proceedings, based on the time I spent creating the judicial statistical tools, shed a different light on these three points.

2.2. The Difficult Encounter between Statistics and the Spirit of Traditional Justice in State Courts

53 As stated above, our mission was initially aimed at the development of statistics of the conventional forms of state court proceedings, established in positive law. While our approach was grounded in firm methodological convictions, the creation of statistics on the activities of African courts took our mission much further than anticipated, leaving us with a set of original observations on the cohabitation of state justice and forms of traditional African justice within the state judicial system[26].

54 As the mission unfolded, our work gradually revealed many manifestations of traditional modes of dispute resolution. The hybridization between traditional rules or institutions and the judicial of positive law can be read in the statistical results, as we will see. Even prior to that, it gave rise to complications during the crucial stage of defining the relevant concepts.

55 It was necessary to decide in the blur surrounding the moment when a case "enters" the civil procedure, before the most formal stage of the delivery of a deposit to the Court Registry. Proceedings often referred to as “conciliation” take place in that timeframe. Formally, this label is inaccurate, considering that, in most cases, the rules of civil procedure do not prescribe such practices. In reality, these practices stem from traditional modes of dispute resolution, and an important number of judges deem them to be mandatory[27] and consider themselves to be bound to allocate time to listen to the individuals who come for advice[28]. Many cases never go further, yet the application is not withdrawn and there is no formal ruling of “non-conciliation”[29]. The diversity of these non-standardized, off-the-record practices inhibits any efforts to consistently tabulate judicial activity across the entire state justice system, and as a result I decided not account for them in the statistics on “case entries”. This means that the concept of case entries does not include an entire share of the work that is actually being taken on by head judges as well as clerks, but also by potential customary assessors. The latter play an important role in dispute resolution proceedings such as these, which bear no resemblance to the rules and procedures of judicial decisions.

56 With regard to the definition of cases that could be considered "closed", as well as the counting of ongoing cases, another difficulty arose, in the form of a practice of adjourning cases *sine die*. This was still a widespread practice and in interviews judges themselves explained that it was in line with their strong reluctance to remove cases from the court register. Often, the parties have likely reached an agreement out of court and the dispute has in fact been resolved, without the court having contributed to its outcome or been informed. In the eyes of the judges, however, this likelihood is insufficient to justify the violence of removing the parties' case from the court register in their absence. Quite understandably, these judges do not care that this mode of operation considerably reduces the number of "closed" cases.

57 Regarding the ongoing civil cases, even when they can be counted without factoring in cases adjourned *sine die*, the numbers are often considerable[30], and their resorption remains out of the reach of a regularly functioning court. French judges who would be sent in as experts would consider that these cases include a majority of items to be removed from the register. Indeed, many are exceedingly dated, meaning that a sizeable portion of the "ongoing" cases are in fact no longer "alive". At present, a considerable amount of time is spent on calling cases in which the parties fail to appear before the court[31]. The judges are concerned less with the efficiency of the hearings than with restoring peace by allowing time to play its part in appeasing disputes.

58 As regards cases that are adjourned *sine die* and those that are adjourned but rescheduled, it would be inaccurate to claim that the resolution of the dispute remained entirely in the sphere of "informal" justice without any intervention from State justice institutions. It would be equally incorrect to regard these cases as failures on the part of the State institutions. Every time the parties have brought their case before the court, who has placed it on its court register, they have followed a hybrid form of dispute resolution involving both traditional and state justice institutions, the respective merits of which could not easily be allocated.

59 Where criminal cases are concerned, the average case handling time is undoubtedly shorter than for civil cases. However, it remains a slow process due to the many adjournments once cases are called to the criminal hearing[32]. This stems from the fact that judges do not judge without the victims being present, notwithstanding the absence from the penal code of any requirements that the victims be present or represented at the hearings. Under traditional modes of dispute resolution, it is inconceivable for the perpetrator and the victim not to be present simultaneously[33]. Here, the statute of limitations is used as a means of closing cases[34].

60 The slowness and dysfunction of judicial investigation procedures are also heavily criticized, and the attitude of investigating judges[35] highlights another feature that can be tied to traditional forms of justice. It was in N'Djamena that this particular feature became apparent to me, in my attempt to verify the statements that a local investigating judge had made regarding her caseload, which seemed to be underreported. The judge was obviously not uncomfortable when explaining that she was not dealing with the judicial inquiries her predecessors had initiated, limiting the scope of her work to those posterior to her appointment. This conception of judges as being the "owners" of their cases is reminiscent of the ways in which European courts operated when offices were venally obtained; in African justice, it ties into the conception of the traditional chief before whom the conflict has been brought.

61 Leaving aside the situation above described, which can be read as a malfunctioning within the office of one investigating judge, ultimately judicial statistics may produce negative results that would reinforce the catastrophic accounts given by some reports, denouncing the exceedingly high number of ongoing cases when, in fact, their data incorporate practices that pertain to traditional modes of dispute resolutions. If we endeavor to see beyond this evaluation based on Western standards of efficiency of justice, we can understand that by adjourning, judges transform into a formal procedure the work of time that is so important in appeasing disputes. Outside the codified procedures, adjournments *sine die* or prescription are likewise the forms used to close already appeased quarrels without offending the people involved.

3. The “modernization” of african courts championed by international donors upsets this delicate balance

62 In every Justice modernization project, the logic is to apply Western standards of judicial operations to judicial systems presumed to be seriously deficient. Calls for tender establish binding frameworks for the activities to be implemented. They define objectives and determine the means to achieve them, forming a set of requirements to which they assign specific indicators for measuring the obtained results. These provisions are formulated either as specific objectives within each project’s logical framework, or as imposed methodological approaches for achieving these objectives. As an example, the computerization of court operations – methodology – is supposed to make it possible to decrease case processing times (specific objective), which contributes to improving judicial efficiency (general objective).

63 The *IIPEC* was responsible for several of these projects in sub-Saharan Africa, and they offered rich opportunities for observation. In the limited latitude that exists within the strict framework of tendering, our approach has been not to impose standardized models and instruments. As such, we[36] developed original tools and methodological approaches, such as those applied to judicial statistics, as well as computer applications (*chaînes pénale et civile* [criminal and civil chains]) specifically adapted to the modes of operation of French-speaking African justice systems[37]. In most cases, however, our activities grappled with difficulties that arose from transferring standards designed without due consideration of application contexts.

64 I will develop four examples of the tensions that emerged during the course of the projects. These tensions illustrate how the transfer of such standards upsets the delicate balance maintained by hybrid organizations between State justice and traditional forms of justice, as developed above[38].

3.1. The Reduction of Case Processing Times

65 Preparatory studies for launching projects always criticize the excessive duration of processing times in African courts that goes hand in hand with a substantial backlog. African magistrates also invoke this backlog to justify requests for greater resources. Therefore, Justice modernization projects systematically bring the objective of reducing case processing times to the fore, viewing this as major efficiency factor.

66 Although anyone who visits the courthouses of major capital cities can witness the existence of this important backlog, it is impossible to find statistical data to support claims of a generalized backlog. The most seriously affected legal proceedings areas, the causal link to case processing times are also unknown because they are impossible to measure rigorously[39].

67 My work made it possible to unfold for the first time the diverse range of situations, by evaluating the run-off duration of ongoing cases stock. In Chad, for example, between 2012 and 2013 the run-off duration of civil cases stock was two years and eleven months in first instance, and this run-off duration was the same as the one measured in N'Djamena (which is hardly surprising considering that its tribunal handles close to 40% of the country's civil cases). However, what this average does not show the great variations between different courts. This indicator goes from one year and four months in small courts, up to four years and four months in middle-sized provincial courts.

68 Thus, reports denouncing dysfunctions, which inspire Justice modernization projects, concern the large courts and certain mid-sized tribunals. They do not reflect the situation of most provincial tribunals, whose modes of operation are little-known despite their handling a significant amount of cases[40]. The objective of reducing processing times in large courts most likely fit the expectations of parties in commercial disputes, especially the disputes involving high financial stakes and foreign operators who are accustomed to international standards. It remains uncertain, however, whether such an objective is relevant given the modes of operation of African courts as a whole.

69 A significant part of court activities cannot be criticized for its slow pace. These are non-contentious proceedings such as those involving personal status (*état civil*: births, marriages and deaths), and family and land ownership proceedings in the absence of disputes. African courts deal with an extremely high number of such proceedings, which are very useful to citizens but remain almost invisible when it comes to evaluating judicial activity[41]. In most cases, these non-contentious procedures are processed very quickly, proving the existence of efficient court proceedings that always go unmentioned.

70 Regarding litigation, even in the absence of statistical data there is no doubt that case processing times can be extremely long. As mentioned above, a portion of these cases "runs" from one hearing to the next, in civil court even more than in criminal court, making these hearings seem inefficient. Judges may possibly avoid removing cases from the register by adjourning them *sine die* or willfully waiting for the prescription at the end of this process. Yet this contributes to inflating the number of cases that appear to still be ongoing.

71 Donors promote specifically training activities and institutional reforms that target these shortcomings. For example:

72 - Judges in civil cases are trained and encouraged to implement practices of systematically removing old cases from the court register;

73 - Adjournments *sine die* are forbidden by ministerial directives;

74 - Drastic objectives are set for reducing the duration of commercial litigation;

75 - A newly created digital *chaîne pénale* alerts court actors when deadlines are breached;

76 - Wide-scale efforts are conducted to discontinue proceedings in which the statute of limitations has run out, particularly during the computerized entry of cases in the new digital chains.

77 The judges' reactions epitomize their ambivalence towards these changes. In Benin, the digital penal chain had been formatted so as to block the files of preliminary investigations that had gone over the authorized maximum length of detention, in order to force judges to rule on the detention. Judges requested the removal of this very restrictive setting. In criminal matters, it was suggested that proceedings for discontinuing cases in which the statute of limitations had run out be handled quickly through hearings devoted solely to them. However, judges chose to integrate them into their regular schedule of hearings so as not to draw so much attention to proceedings about which they felt uncomfortable[42]. As regards commercial litigation, judges do not take seriously[43] the objectives they find unrealistic.

78 These actions aim to improve the efficiency of proceedings by reducing processing times and caseloads, all the while ignoring the virtues of time for consensus-based dispute resolution[44]. The long duration of proceedings is a necessary condition for the proper administration of traditional justice, and was imported into the State justice system through procedures such as countless adjournments. European projects treat this duration as a flaw that needs to be corrected. The Justice modernization projects collide with the hybrid forms of justice, submitting them to a value of efficiency that hinge on a non-pluralistic way of defining dispute resolution.

3.2. The Standardizing Effect of Court Digitalization Activities

79 There are almost no donor-backed projects that do not include the implementation in courts of computer applications for processing cases, at least for a trial period. These measures are highlighted as central elements of progressing towards efficiency. They are meant to shorten processing times, decongest courts and improve upon the transparency of relations with users. Despite the recurrent failures and abandonments and the waste of resources they entail[45], illusions persist with regard to the short-term progress that can be expected from digitalization, and contracts flourish.

80 These court digitalization operations, combined with the strict standardized approach that they require, bring to light new tensions. Such tensions lie rather in the sphere of the relations between judiciary personnel and the population who has recourse to State justice. As already explained in the section regarding practices occurring before the formal start of proceedings, judiciary personnel – in a broad sense of the term, covering magistrates and court clerks – intervene within the framework of State justice. However they also behave as traditional justice actors – which they are as a matter of fact, outside of their court positions[46].

81 When we launched the development of a *chaîne pénale* in Benin, we did not just model the code of criminal procedure. We held workshops with magistrates and court clerks and asked them to describe their modes of organization and the progression of cases through tribunals. This preliminary work revealed that, in many situations, practice deviated from the procedures enshrined in the codes:

82 - There were diverse ways of proceeding;

83 - As compared to the rules of the codes, there were in fact many irregularities, which were not actually considered as irregular but were often accepted and stabilized.

84 Several examples illustrate these differences and reveal the potential consequences of standardization. In the absence of a digitalized *chaîne pénale*, when the prosecutor's office receives a statement from the police alleging that an offense has been committed, the court clerk writes out by hand, in an *ad hoc* register, the legal classification chosen for the offense by the prosecutor, as dictated by the prosecutor or by one of his/her substitutes. In a case of theft for example, the object of the theft is usually mentioned (the theft of a purse, of livestock, of a scooter, etc.), notwithstanding the fact that the criminal code establishes only one crime of theft, 'simple' or 'qualified' (due to aggravating circumstances), regardless of the object that was stolen. Documenting the exact stolen object may allow the prosecutors to signal the prevalence of certain types of delinquency within their jurisdiction in their annual report. Limiting the records to the classes of offenses established in the criminal code erases knowledge of this diversity, particularly concerning the persistence of "traditional" offenses such as the theft of sex[47]. Maryse Raynal suggests another interpretation of the reference to the stolen object[48], which relates to observations on theft in African traditional society: its response to theft is adapted to the nature of the stolen object, ranging from the least serious (food) to the most serious and sacred (a blacksmith's hammer for instance). In that context, the mention of the stolen object is an essential part of the classification of the offense.

85 In civil proceedings, our observations raise an important question regarding interactions between judiciary personnel and litigants from the moment of the filling of the application (at which point the case is entered into the computerized *chaîne civile*) to the delivery of a deposit to the Court Registry. These practices will either be subject to standardized visibility, or persist without being captured in computerized applications. Likewise, with regard to adjournments during civil or criminal hearings, the light that their computerization shed on such practices might encourage judges to reduce the number of cases by removing them from the court register or deciding to discontinue the cases. It is also possible that by and large practices will remain much the same. In all likelihood, monitoring the functioning of computerized courts will eventually show that some forms of hybridity with old habits have been rebuilt with the digital tools. However not enough time has passed to provide any evidence of this.

86 The persistence of commonplace practices that they are not compliant with legal rules, even due to magistrates who are well-versed in positive law, might be viewed as a consequence of a special type of norm accepted within traditional societies. Traditional norms are not fixed old rules, but they demonstrate their ability to adaption. The Justice modernization projects clash with the robustness of these norms. They do not identify them as such and reduced them to informal practices or deviations from the norm.

3.3. Improving the Compliance of Judicial Enforcement Proceedings With the Codes of Procedure

87 Within the African tribunals in which we intervened, the services in charge of the enforcement of sentences were in a dire condition. Located at the end of the *chaîne*

pénale, they suffered from chronic shortages of resources. In addition, magistrates and clerks lack interest in these highly technical tasks.

88 In practice, the only sentences that are enforced are non-suspended prison sentences that are handed down after the arguments for both sides have been heard, with a warrant for immediate detention. There is no follow-up on default judgments. Since required documents are not produced to the court, probation sentences have no effect: the judge is unaware of any prior probations and therefore cannot revoke them. This leads the majority of judges to make prison sentences the reference. The failure to register decisions prevents the collection of fines and legal fees. Finally, sentences that suspend rights (voting rights, commercial rights, public office) are not reported on the criminal record and therefore they are not enforced.

89 In civil cases, the enforcement of sentences encounters difficulties related to the frequent absence of postal addresses and the weakness of the network of bailiffs.

90 Justice modernization programs point to these failures as reasons why populations distrust the justice system. Technical assistance is expected to improve compliance with enforcement proceedings as laid down in the relevant codes.

91 We were surprised by the lack of interest generated by our efforts to help tribunals in this respect. Generally speaking, the current modes of operation of tribunals do not seem to be an issue, neither for the judiciary nor for citizens. In civil cases, contacts between the litigants and the courts' clerks are frequent throughout the duration of the proceedings, and ultimately the decisions are delivered directly to the parties, at the courthouse. In criminal cases, we have come to understand that outside of the aforementioned prison sentences that are immediately enforced, prosecutors' offices usually rely on traditional authorities to enforce sentences. In Benin, the Treasury Department sends its agents to hearings and jails to recover fines on the basis of willingness to pay, in spite of recognizing the absence of any statutory basis for doing so[49]. In Chad, it is common for a convicted felon to be held in custody by the prosecutor after the end of his or her sentence, until he/she or his/her family pay the fines and legal fees in full: although this detention is arbitrary, the magistrate orders it for the efficiency of recovering legal fees[50].

92 We can observe here the practical adjustments of legal procedures resulting from mixt forms of justice. In this context, the allocation of resources to Justice modernization projects that aim to bring African justice systems in alignment with Western models is useless. The personnel of the relevant judicial bodies have a hard time apprehending it, perceiving it as a poorly justified increase in the workload. Most of the innovations introduced through training modules are not followed up.

3.4. Restoring Criminal Records

93 The current situation is indisputably detrimental to criminal records. For a criminal record to be effective, different services must be simultaneously operational:

94 - Services for the enforcement of sentences in the prosecutors' offices, which are responsible for keeping records of sentences once they are final;

95 - A register of births, marriages, and deaths, which is needed to attribute a unique identity to each individual (including a name with a stabilized spelling).

96 Neither of these prerequisites are met, and criminal records are not operational in any of the African jurisdictions in which we intervened[51].

97 Aware of the gaps in criminal records are, judges have given up on requesting them during proceedings. This situation is highly prejudicial. It is an obstacle to the principle according to which the punishment must be tailored to the defendant: in the absence of criminal records, judges cannot gather information on the defendant's judicial past. They are even more reluctant to grant suspended sentences when they cannot find out whether or not the future convict is a primo delinquent.

98 Despite these limits, the agents issuing the statements of criminal records that are mandatory for taking certain exams, applying for certain jobs and public office, handle a considerable number of requests, as recorded by the statistics. Over 150,000 statements of criminal record "B3" were issued in 2013 in Ivory Coast. Of course, they all state that the person has no prior convictions.

99 All the magistrates sent as experts concluded in their audit that it was possible to dissociate the restoring of police records from the computerization of the *chaîne pénale*. It depends on the organization of the different services. Certified copies of the decisions to be included in criminal records should be delivered by the court that issued the decision, and this copy should be sent to the court of first instance of the convict's place of birth, where the criminal records would be attended to and manually updated.

100 These recommendations promote a realistic method that is adapted to the present situation and applicable without computerization. However, they have so far enjoyed little success, while projects to computerize criminal records in African courts prosper. The proposed methods, consisting in transferring a computerized criminal record model such as the one that exists, for example, in France, do not upset an existing operation since nothing exists. However, by abstaining from any analysis of the organizational context, they do not take into consideration the general deficiencies of the enforcement proceeding, the restoration of which is not deemed essential by local actors, for the reasons discussed above. Attempts to set up computerized criminal records regularly result in failures.

101 Our analysis has shed light on little-known features of African courts. The courts have assimilated elements of customary dispute resolution proceedings into their modes of operation. These traditional customs are unwritten but this does not make them "informal". They are still binding on the actors of the state justice system. The justice can apparently not be dispensed if they are ignored.

102 This hybridity is a source of difficulties for judicial statistics that are expected to describe and assess the functioning of the state justice system. The codes of procedure enshrine concepts that are supposed to provide the structure for these statistical descriptions. But the implementation of these concepts involves forms of conflict resolution that draw from other references, derived from tradition. The objectives and tools of Justice modernization projects are adapted only to part of the frames of reference of these justice systems. When faced with practices that they are not equipped to account for, they tend to make them "disappear" from the court's operations. Evaluations which rely on such partial approaches run the risk of indicating a "lack of efficiency" by Western standards, without explaining the hybrid nature of the proceedings at hand.

103 African justice institutions are not without their faults, chief among them being corruption and its consequences for the unequal treatment of actors in dispute resolution. It is, however, incorrect to make the sweeping claim that they do not provide the services expected of them. The incorporation of traditional methods efficiently contributes to these institutions' operations, so long as we accept an expanded definition of efficiency.

NOTES

1. This text is dedicated to Arman Noubarangué, a young Chadian statistician who helped us in creating judicial statistics in his country. He was a beginner when he was hired in 2011 but rapidly became passionate about his work, to the point that he started law studies. Within two years, he became the Director of judicial statistics in the Ministry of Justice. His brutal death in 2016 brought his promising future to an end.

2. In my missions in Africa, as the manager of several modernization of justice projects financed by the EU and the USA, I was involved in the following activities:
-Support for strengthening the rule of law in Madagascar (2004-2008)
-Support to the courts and tribunals in Benin (2004-2009)
-Technical assistance to the Benin Ministry of Justice (2009-2011
-Technical assistance to the "Support to justice and the rule of law in Niger" project (2007-2010)
-Three service contracts for the "Support to justice in Chad" project (2011-2014)
-Technical assistance to the Ministry of Justice in Ivory Coast (2011-2015)
-Assessment of the judicial statistics in Togo (2015).

3. I was personally involved as an expert for the creation of judicial statistics in Niger (2009-2010), Chad (2011-2014), Ivory Coast (2013-2015), Togo (2015), and Senegal (2017-2018).

4. Hereinafter referred to as "Justice modernization projects".

5. Given the observation fields (see above, note 3), I only refer here to French-speaking Sub-Saharan African countries.

6. The independence of these African countries was not accompanied by any change in their judicial systems.

7. Because of the total lack of equipment and internet or intranet connections in most jurisdictions, a computerized system was not foreseeable in the near future.

8. E.g. the number of cases received by the Prosecutor's office, judicial investigations, criminal judgments, civil and commercial cases.

9. E.g., the rate of criminal prosecutions, the average number of cases decided by judge, and the run-off duration of civil and commercial ongoing cases stock.

10. See, for example, the *Stateco* bulletin edited by the *INSEE* in the early seventies, in which articles were published the aim of which was to "spur the reflection on the need for a statistics and economic data instrument adapted to African and Madagascan countries"; see also, René Hallu, Anita Bensaïd, René Bascou-Brescane, Pierre Verneuil, « Réalités africaines et enquêtes budget-consommation », *Economie et statistique*, n° 11, avril 1970.

11. For the most part, the registers and judgments directories; sometimes, the courts hearing minutes.

12. It is impossible to produce data about phenomena that have not been captured by the sources. For instance, "assaults against women" cannot be measured as long as the law does not define it as a criminal offense. Some countries have now adopted provisions specifically incriminating violence against women or gender-based violence. In these cases, it will be possible to measure them, provided that these assaults are made known by a complaint or characterized differently.

13. On the one hand, there are statistics established on the basis of preexisting sources (administrative or not), while on the other hand there are so-called "survey" statistics, the results of which are obtained by directly questioning individuals or legal entities that are asked to answer open questions or to fill in their answers in pre-made nomenclatures.

14. "*Cabinets d'instruction*".

15. "*Jugements criminels*" or "Jugements correctionnels" for offenses and misdemeanor cases.

16. All methodological decisions with significant consequences for the results were taken in agreement with the judicial authorities in the countries where I intervened.

17. Subject to ensuring that only judgments on the merits of a case are counted, as opposed to preliminary ruling.

18. On occasion, representatives from State justice institutions will deny this, in a tacit effort to eradicate the remnants of a supposedly archaic past (our own observations in Ivory Coast).

19. *See*, Maryse Raynal, *Justice Traditionnelle, justice moderne : le devin, le juge, le sorcier*, L'Harmattan, 2000.

20. *See*, *e.g.*, Bachir Talfi, *Quel droit applicable à la famille au Niger ? Le pluralisme juridique en question*, Research Partenrship 4/2008, The Danish Institute for Human Rights.

21. IIPEC, *Formel et Informel en Côte d'Ivoire*, Rapport de synthèse, 2013. It was over the course of this study that Aline Aka Lamarche collected the material that she analyzes in her article on the issues afflicting Abidjan's land ownership, featured in this volume.

22. A magistrate at a court of first instance in Niger told us an anecdote that provides another illustration of this institutional hybridization. He explained that, for family and land ownership disputes, he generally asked parties and witnesses to swear on a Quran that he took out of his cabinet for this purpose (as a precaution, his cabinet also contained a small statue of the Virgin Mary for the rare cases involving Christian parties). The judge once came across a defendant who, without the slightest hesitation, swore on the Quran that he was the rightful owner of a herd. Doubtful, the judge offered to travel to the village of Lougou with the defendant so that he could renew his sworn testimony "on the Sarraounia's rock of justice". The man, who turned out to be animist, immediately withdrew his initial claim.

23. *See*, *e.g.*, Richard C. Crook, « Alternative dispute resolution and the Magistrate's Courts in Ghana: A case of practical hybridity", *Africa Powers and Politics*, Working Paper, July 2012, n° 25.

24. *Ibid.*

25. *Ibid.*

26. I was unable to distinguish, however, between elements belonging to the realm of African traditions and that of religious Islamic traditions. *See, more generally,* Rodolfo Sacco, *Le droit africain. Anthropologie et droit positif*, Dalloz, 2009 (coll. *A droit ouvert,* dir. by A. Lyon-Caen and H. Muir Watt).

27. Chad's Inspector General of Judicial Services was himself convinced that such a "conciliation" stage was mandatory under the Code of Civil Procedure.

28. This phenomenon extends even to employment disputes, prior to the first phase of 'conciliation' that is formally included in the procedure. There again, the judge may choose to follow the traditional rules : the President of Lome's Employment Tribunal explained that, before the formal conciliation process, he often heard parties who came to ask for his opinion on their case. Although his refusal to hear them would be nothing more than strict adherence to the rules

of procedure, he felt it was impossible for him to do so, as this would amount to a "denial of justice" on his part.

29. In N'Djamena's Court of First Instance, 40% of the cases whose files were still in the civil court Registry at the end of 2011, came from a request made for over a year without any further proceedings since that time. A large part of the cases had therefore been settled without the possibility of counting them as "closed".

30. In 2013, 46,000 civil cases on the court register in Abidjan's Court of First Instance.

31. For example, in a provincial court of Chad, we counted an average of 6 judged cases for 38 on the civil chamber's hearing register, which corresponds to a "yield" of 15% reflecting a very low efficiency of civil hearings.

32. In Benin, for example, in the hearings on direct summons (form of private prosecution where individuals or the Prosecutor may summon the accused directly before the court [translators note(TN)]), less than one case out of ten is fully judged, while the rest are either adjourned or the statute of limitations is found to have run out. For *flagrante delicto* hearings, 30 % to 50 % of cases were adjourned ; this is a lower number than in the aforementioned direct summons hearings, but it still remains unusually high, *See*, Marc Moinard, *Méthodologie de restauration des services de l'exécution des peines et du casier judiciaire dans les juridictions du Bénin*, Rapport d'expertise court terme, IIPEC, 2009.

33. As a matter of fact, customary law views criminal offenses as acts of a collective nature that arise between two communities; as such, in this realm the very concepts of perpetrator and victim are ill-adapted (Maryse Raynal, *op. cit.*).

34. In 2010, in Cotonou's Criminal Court of First Instance (*tribunal correctionnel*), 3,077 cases were awaiting trial. Out of these, the cases in which the statutes of limitations had run out made up :

-86 % of the cases having been referred to the court ;

-59 % of the cases on direct summons ;

-87 % of the simple police cases.

35. In an inquisitorial system of law the investigating magistrate is a judge who carries out investigations into allegations of criminality and arranges prosecutions.

36. "We" here refers to the individuals or teams involved in IIPEC projects.

37. In Benin.

38. The observations reported in this section emanate primarily from the three IIPEC experts who took part in Justice modernization projects in Benin: Sophie Thuillier (Chief Court Clerk, Project Manager), Yannick Jaglin (Chief Court Clerk, Senior IT Specialist), and Germain Dossa (Senior Analyst, Expert Developer).

39. See above § 1.3.

40. In Ivory Coast, the courts other than the two big Abidjan area's courts (Abidjan-Plateau and Yopougon) rule 56% of *criminal judgments (correctionnels)* and 29% of civil cases judgments.

41. Ivorians courts issued 507 000 non-contentious acts (*référés* [summary and extraordinary proceedings], *actes d'hérédité* [authentic heredity document] *et de tutelle* [authentic tutorship document], *ordonnances sur requêtes [orders issued on motion]* and other types of authentic documents) in 2012-2013, to be compared with 8.900 civil, commercial and social judgments, and with 19,000 criminal judgements *(correctionnels)*.

42. Maryse Raynal (*op. cit.*) underscores that the concept of discontinuing procedure is alien to traditional society, because of the sacrilegious nature of many felonies and offenses.

43. In Togo, we noticed an outstanding case of mitigating the standard. One of the framework programs, aiming at growth strategy, uses the average processing duration of commercial cases as an indicator. The objective is set at 180 days (which is, incidentally, the maximum legal duration). In the progress report intended to monitor efforts to meet this objective, the published figures for the reference value (at the beginning of the time period) and the achieved

value are precisely 180 days ! This values lack any statistical data on the actual duration of those cases, and did not trigger any reaction.

44. The time limit issue in commercial matters is laid down in other words, especially when international actors are concerned.

45. To our knowledge, in French-speaking sub-Saharan African courts, the program led by the IIPEC in Benin, was the only one to be still implemented several years after the deployment of the *chaînes pénale et civile* computer application. But this operation is facing major material difficulties. Broken equipment is not replaced, there is no breakdown service, and supplies are very expensive (especially printer cartridges). Clerks of courts continue to work manually, out of prudence because of the risk of losing track of the dematerialized cases, or when it is impossible to print summons or decisions because of the lack of ink. Thus, several courts have abandoned the *chaînes*, while they never gave up written records. This situation is the result of a badly anticipated transfer of technology ignoring the context. It does not pertain to our subject, however, which is limited to the transfer of standards.

46. We interviewed a high-level magistrate in Senegal who described his vision and his uses of *conciliation* in divorce cases (where conciliation is a mandatory step). He spared no time in listening to married couples tell their story as they had experienced it (removing his watch to show his full receptiveness). He considered his task to be done only when the married couple left reconciled. He even succeeded in some *conciliations* where the couple remained reluctant, despite long discussions ; he managed to do so by invoking what he was representing as a moral authority, out of consideration for his person, or the "*cousinage à plaisanterie*" between his ethnic group and the ethnic group of the parties (in West Africa, the *cousinage à plaisanterie* is a traditional form of alliance between ethnic groups, in which verbal sparring makes it possible to defuse tensions).

47. See *Le Matinal*, *Quotidien béninois*, n° 2370, 9/06/2006. However, the list of infractions does not completely overlook some widespread practices in African societies : in Chad, the "usual use of sorcery" is listed ; and in Benin, the "practice of charlatanism" is stated in the criminal code. We also note some situations in the criminal code where the object of the theft is mentioned, because of the importance of cattle breeding in these rural societies :

- in Madagascar, perpetrators of a "zebu theft" are accountable to a special criminal court, which usually sentences them to five years in prison, and with a maximum set at twenty years in prison for a simple zebu theft (P. De Charette, in "Chroniques Malgaches", 2005-2007, *Paroles de juge*, www.huyette.net);
- in Senegal, "livestock theft" was recently introduced into the criminal code ; after a first draft in which the infraction only existed if the owner bred cattle as a main activity (it would then have constituted a special economic infraction), all restrictions were removed, showing the persistence of the seriousness of the offense.

48. *Op. cit.*

49. M. Moinard, *op. cit.*

50. Observation reported by Patrice de Charette.

51. In Antsirabe Court, Madagascar, we found perfectly kept written criminal records.