



SPECIAL ISSUE ARTICLE

# Magistrates marching in the streets: making and debating judicial independence and the rule of law in Benin

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## Abstract

Since 2012, judges and prosecutors in Benin have repeatedly protested against political interference and demanded compliance with their statutorily guaranteed independence. In 2014 and 2017, magistrates demonstrated in their judicial robes in the streets, protesting against the government's bill to deprive them of their right to strike and other freedoms. Benin has been described as a 'success story of democracy' (Stroh and Never, 2006, p. 1) and even as a 'model democracy' (cf. Kohnert, 1996, p. 78; Magnusson, 2001, p. 211; Bierschenk, 2009) since its peaceful transition to democratic conditions and its participation in a national conference in 1990/91. So why were magistrates in Benin demonstrating in the streets for the first time in the history of their profession? Based on fieldwork in Benin in 2009 and 2015 and archival research in 2017 in France, my paper analyses the change in the style of interactions between parts of the executive and parts of the judiciary in the history of the profession – a change from political negotiation to confrontation. Through their strikes and industrial action, magistrates fought for judicial independence; yet, at the same time they constructed legality and strengthened democracy because their actions emphasised the rule of law. My paper also considers the specifics of their strikes in the context of other striking civil servants. When magistrates, as bureaucrats, become politically active, it marks a transformation in their self-conception, as they are usually reserved and withdraw themselves from political and public spheres.

**Keywords:** rule of law; anthropology; judiciary; protest movement; Africa

## 1 Introduction

'The judge in this country is forced to fight. You have observed, we are going on strike every day, yes, to re-claim independence. In this country, the judges' main problem is independence.' (Judge of first instance, 26 March 2015)<sup>1</sup>

With these words, a judge in a court of first instance in the West African country of Benin described the main problem of the judiciary as the lack of judicial independence in his country's rule of law. Since 2012, Beninese judges and prosecutors have repeatedly gone on strike, sometimes for months at a time. They have protested against allegations of corruption, irregular appointments, punitive transfers and political interference; in short, they have demanded that their independence, which is guaranteed by the Constitution, be respected. In July 2014, the dispute between the judiciary and the government culminated in the magistrates demonstrating in their judicial robes in the streets of the Beninese capital, Porto Novo, protesting against the government's bill restricting their freedom(s), such as, notably, their right to strike. This strike marked a change in the mode of political dealing,

<sup>1</sup>All interviews for this paper were conducted in French and translated into English by the author.

switching from negotiation to confrontation, which I observed during my fieldwork among Beninese judges and prosecutors in 2009 and 2015 (Kolloch, 2014; 2021; forthcoming). My paper strives to understand how this came about and why the usually reserved magistrates suddenly became politically active actors in Benin's public sphere. In addition, I explore how the emergence of the political protest movement has impacted the judicial ideal of a reclusive, dignified judge.

Working for the judiciary in Benin – that is, on the bench and for the prosecution in the context of this paper – involves complying with a complex set of behaviour standards and rules of conduct. Beninese magistrates should act with integrity and be loyal, just, fair and above all withdraw themselves from political and public life. These professional norms are further complicated by various interventions by superiors, relatives, litigants and the government, who, for their part, want to influence the outcome of cases (For comparative perspectives on other civil servants, see Bierschenk (2014) and Lentz (2014)). So why did judges and prosecutors protest in the streets in 2014 and 2017, and act contrarily to their internalised professional ideals prescribing political restraint, dignity and withdrawal from public life? Why did state-employed magistrates go on strike in Benin, which, thanks to its peaceful transition to democracy, is described as a 'model democracy' and considered a 'success of democracy'? My paper examines the transformation of the Benin judiciary and shows the different generations' commitment to democracy and, lastly, their commitment to making the rule of law in Benin. I argue that a new generation of magistrates emerged, which ultimately strove to advocate for more democracy by going on strike – a means implemented by trade unions. Thus, magistrates publicly demonstrated in their robes in the streets – a behaviour that completely contradicts their professional ethos.

In 2015, Benin had a population of about 11 million people and 238 magistrates, including thirty-six women only.<sup>2</sup> Judges and prosecutors – in French, these related career groups are referred to together as *magistrats* – finish four years of study at one of the two universities in the country, graduating with a master's degree. Rigorous entry examinations limit access to the following two-year training programme at law school, which is not offered every year and for which the number of chosen applicants varies. All magistrates organise themselves in the union-like UNAMAB, *Union nationale des magistrats du Bénin*.

However, there is a fundamental differentiation within the profession. While judges are independent and irremovable, prosecutors are under control and bound by instructions given by the Ministry of Justice. According to magistrates, the Minister of Justice exercises considerable discretion, depending on his or her personal and financial politics. This means that the government, the executive, has a strong influence on how assignments and funding are allocated in the judiciary. Magistrates as bureaucrats are interesting actors, because of their high professional ethos and the industrial action they took, which contradicted this very ethos. They decide on important cases, are responsible for their decisions and have great discretion.

In this paper, I will first give some methodological information, followed by theoretical perspectives on my material. As role models, magistrates act and fight for society to enforce the rule of law and democracy. I will then describe the background against which the outrage of judges and prosecutors took place. I will analyse the moral and legal norms they refer to in their disputes to achieve justice. Benin's judges and prosecutors understand their role within and vis-à-vis the legal system. In this paper, I refer to magistrates working on the bench and in the public prosecutor's office as the judiciary. This does not include the entire judiciary in Benin, which also comprises clerks, bailiffs, notaries and others. The strikes by magistrates were unprecedented in Benin and therefore triggered different discourses and actions in different generations, as I will show.

<sup>2</sup>Compared to France, which has about five times the density of judges, or Germany, which has about ten times as many judges in relation to the number of inhabitants, the figures show that there are relatively few judges working in Benin. Measured against the number of inhabitants, there are five times as many courts in Germany as in Benin (Berndt, 2010, p. 126).

## 2 Methodology

Based on empirical research – with three field trips with a total duration of over six months – in Benin in 2009 and 2015 and a two-week archival research phase in 2017 in France, I will show that the different legacies of colonialism, socialism and democracy shape Beninese justice and have continued to have an impact on the practice of the judicial profession until today.<sup>3</sup> During my fieldwork, I lived with host families, in total four months in a family of a judge and a prosecutor. I did participant observation; accompanied magistrates to court, in hearings, in their offices or on family visits; and did 119 interviews with sixty-six magistrates as well as politicians, journalists and litigants. I also spent two months with my husband and two kids in Benin, staying with the families of two different judges. Taking my family with me allowed me to witness a dispute being resolved in an alternative manner, which points to the high importance of alternative regulatory bodies in Benin, especially in the context of a constantly striking and thus very slow judiciary.<sup>4</sup> Largely written from the perspective of the judges and prosecutors, this text may sometimes seem to portray them as heroic fighters for law and democracy. Therefore, I would like to emphasise the ambivalences among the people seeking justice. The strikes, which had been going on since 2012, further prolonged the already long duration of trials and possible pre-trial detention. A large number of the population considered the Beninese judiciary to be riddled with corruption and bias, very slow and highly dependent on various authorities and the government. Nevertheless, many Beninese and numerous media outlets considered the strikes and the magistrates' stand for independence to be justified, because the judiciary as a third power is indispensable for the rule of law and must remain an independent power (Djogbénu, 2014, pp. 17, 165–171).

The high importance of judicial independence for the individual magistrates ran through almost all of my interviews. Independence can be defined in different ways – legally, all judges are independent before the law. This means that they cannot be transferred without their consent, unlike prosecutors who are bound by instructions. In their judgments, they are bound only by the law. Due to the increasing interference of the government – which ordered certain verdicts to be annulled, made punitive transfers or sweeping accusations of corruption and lack of trust – the judges saw their independence in great danger. In recent years, two magistrates who handled politically sensitive cases were murdered, and others were burgled. In addition, snakes were found in magistrates' private cars, which is why most magistrates stressed to me that they worked in a very risky profession. Some magistrates even told me that their only way out was to assert their independence on a personal level, to not be talked into judgments and to try to reject any influence.

## 3 Theoretical perspectives

In this section, I will set out the theories that inspired my research and the perspectives on political trials, law and politics from the literature that I refer to. The fact that magistrates, as unpolitical actors, became political is something new, which I will explain in the following. In the literature, judges in West Africa are often described as corrupt, incompetent and biased (Fall, 2003; Mutua, 2001; Darbon and Du Bois de Gaudusson, 1997), and West African courts as overburdened, poorly resourced and plagued by staff shortages (Bierschenk, 2008; MJLDH, 1996). Dysfunctionality and corruption are at the forefront of analyses that are very often presented from a macro-perspective (Blundo and Olivier de Sardan, 2007; Tidjani Alou, 2001; Gupta, 1995; Anders and Nuijten, 2008; Anders, 2009; see also Höffling, 2002). My paper builds on the existing literature, but more strongly emphasises

<sup>3</sup>I stopped my fieldwork in Benin before the election of Patrice Talon in 2016. Nevertheless, this paper includes important context points in the history of the magistrates' political protest movement until the restriction of their right to strike in August 2018.

<sup>4</sup>Numerous crimes that are not dealt with by the state judiciary in Benin are solved by waiving of regulations, by alternative regulatory bodies (legal pluralism) or by vigilante justice (Alber, 2001; Paulenz, 1999). Apart from serious crimes, numerous conflicts, such as in Niger, are also solved or 'repaired' by gendarmes in order to maintain peace in the community (Göpfert, 2016, p. 447).

the perspectives of the actors themselves, focusing on the legal practitioners' discourses and experiences, helping us to develop more nuanced view on the corruption. I examine the question of what it means when magistrates, who are supposed to be apolitical by law, become political. With this question, I also explore the larger issue of the functioning of stateness in Africa and, particularly, in Benin. By raising their voices, Benin's magistrates were at the forefront of industrial action. They challenged power and participated in the democratic process by implementing different strategies, which are named 'exit, voice and loyalty' by Hirschman (1970).

Another analytical perspective that allows a better understanding of my material is the debate on the law–politics divide, which is widely discussed in critical legal studies (Tamanaha, 2010; Ashenden, 2020) and in research on political trials (Shklar, 1964). According to Ashenden (2020, p. 219), political obligation and its binding centrality to law are a problem. Shklar (1964, p. 223) already commented that 'the separation of legal and political thinking ... ought to be ended'. This debate shows that law and politics are not clear-cut categories and probably not clearly separated fields of action anywhere. However, Benin's magistrates drew lines between law and politics, especially by using legal instruments against their government and by referring to legal norms to obtain their legally guaranteed independence. This did not constitute political interference by the judiciary (see also Verheul, 2013). This perspective is a useful tool to make sense of the social structure within which Benin's magistrates were acting. The Beninese government, on the contrary, did not seem to draw a clear line between law and politics, as it employed a variety of means to interfere in the judiciary.

Through their orientation towards legal norms, such as the Beninese Constitution, and to global norms, such as the rule of law and judicial independence, the magistrates referred to a global frame of reference that played an essential role on the success of their movement and ultimately stood for a new globalisation of law in Africa (Dezalay, 2015, p. 5). Indeed, the striking magistrates in Benin were no longer the only insurgent judiciary in West Africa. Possibly inspired by the strikes of their Beninese colleagues, magistrates in Togo went on strike in 2013, in Burkina Faso and Gabon in 2016 and in Mali in 2017 (Dicko, 2017; Nabile, 2016), demanding better material resources and higher salaries. Ghanaian judges went on strike after one of the biggest corruption scandals in the Ghanaian judiciary in 2016 (Laary, 2016); in Mali, magistrates went on strike for judicial independence and, in particular, independence of judicial careers (Fomba, 2016). In this paper, I will elaborate on the particularities of the strikes of the Beninese judiciary and show why they were unique by West African standards.

The magistrates' political engagement and growing political protest movement also give rise to the question as to how magistrates in Benin *make* the state. I contribute to the field of the anthropology of 'stateness' (Beek, 2016, pp. 8–9), on 'doing the state' and 'state-making (and un-making)' using the example of the everyday functioning of education and justice in Benin, Ghana, Mali and Niger, and the practices of civil servants and their users (Bierschenk and Olivier de Sardan, 2014). Ghanaian judges, for example, see themselves as a morally impeccable state group and confidently pursue their 'politics of integrity', although they are aware that they are negatively perceived by the Ghanaian population (Budniok, 2014). One important point is boundary work, which controls judges' lives. I build on this thesis, because boundary work enables magistrates to draw boundaries between themselves and other groups (see also Beek, 2016; Bourdieu, 1985, p. 21; Lamont, 2000, p. 3). To cope with their workload, justice actors in northern Benin draw on practical norms and strategies in addition to official norms (Tchantipo, 2013). However, only part of all cases end up in court, and Beninese magistrates have a wide margin of discretion regarding the (local) language used in court and the judgments (Badou, 2013; Tchantipo, 2013). Andreetta (2018), in her study of the judicial system in Cotonou, looks at family magistrates who want to implement an educational mandate and dispense good justice in order to reconcile family members. Her evaluation of their perspectives reveals that the magistrates do their best in spite of poor equipment and poor working conditions (see also Andreetta and Kolloch, 2017; 2018). Like the magistrates in Benin, Nigerien magistrates cope with their often insufficient working conditions 'despite everything' (Hamani, 2011). Like in Benin, power relations and informal politics also play a role in magistrates' careers and appointments in

Congo, which sometimes leads to great insecurity among the judiciary (Rubbers and Gallez, 2015). Verheul (2013) explored the politicisation of everyday practices of prosecutors in Zimbabwe and distinguished between two types of prosecutors in Harare: ‘rebels’ and ‘good boys’, who deal differently with instructions from ‘above’. Benin’s magistrates also use different strategies to deal with instructions from their superiors and with political influence in order to remain independent at least on a personal level – drawing a clear line between law and politics (see Kolloch, 2021, pp. 201, 236). Malian magistrates aspire to independence and want transform the judiciary from a dependent into an autonomous power with (formal) guarantees of independence (Fomba, 2016). Interesting parallels with the development of the judiciary in Benin emerge: while the profession was part of the apparatus of state administration after independence from France in 1960, its formal structure changed under the new statutes created in 1965, 1983 and 2001 through the ever-increasing attribution of judicial independence. Adding to the above-cited works, I will show how magistrates openly use the law against their government.

This paper is part of the Special Issue on politicised bureaucrats who actively or indirectly criticise their administration, like the Belgian bureaucrats Andretta refers to. In the case of the Beninese magistrates, bureaucrats even try to change politics.

My paper explores the question as to how the emergence of the political protest movement impacts the judicial ideal of a reclusive, dignified judge. I analyse the ambivalences of the Benin state governed by the rule of law, its inter-conflicts and the struggle among the bearers of the Benin ‘model democracy’ (Kohnert, 1996, p. 78; Magnusson, 2001, p. 211; Bierschenk, 2009). The strikes and protest marches by the Benin magistrates were rather exceptional, creating a great deal of political pressure and having a direct impact on the rule of law, which is why I call them a political protest movement.

To underpin the draft law, the Beninese parliament sought to introduce a ban on strikes by magistrates – a ban that had been in force in its former colonial power France<sup>5</sup> since 1958.<sup>6</sup> In many Western countries, a ban on strikes is one of the principles of a professional civil service (Di Fabio, 2012, p. 31; Lindner, 2018; Raehlmann, 2017, p. 8); in some West African countries, such as Burkina Faso and Senegal, magistrates are prohibited from striking (Kambou, 2015; Sy, 2003; Harsch, 2017). While judges in the Global North pursue their political strategies differently, for example through lobbying via *Deutscher Richterbund*,<sup>7</sup> their Beninese colleagues resorted to far more drastic means after 2012. Benin, thus, was somewhat exceptional, as civil servants had the right to strike and could use the freedoms guaranteed in the Beninese Constitution. Article 25 protects the right to demonstrate, and Articles 31 and 98 endow them with the right to strike.<sup>8</sup> Moreover, strikes are not limited to the judiciary in Benin. There is a high willingness to strike, possibly even a kind of ‘strike culture’, in other areas of the public service and administration (Banégas, 2014, pp. 449–451; Allabi, 2015; Kouton, 2014; Richard, 2014b; Sékodo, 2012). There have been strikes by various professional groups for the last fifty years or more. Teachers, for example, have fought for a better school system, working conditions and salaries – always in the interest of the users and, ultimately, the nation.<sup>9</sup> Doctors strike. Universities strike, and sometimes students fight for better learning conditions (Houessouga, 2020; Amassiko, 2020; Barma, 2020). Strikes, for civil servants and citizens alike, have become a means of making themselves heard in the Beninese context, as an

<sup>5</sup>As a French colony, Dahomey, now Benin, was part of *Afrique Occidentale Française*, French West Africa, together with Senegal, Mauritania, Guinea, Sudan, Niger, Côte d’Ivoire and Haute Volta until 1958. In 1960, Dahomey obtained independence. In the course of this, the French introduced a state judiciary (cf. Charpy, 2010, p. 293; Grohs, 1967, p. 23).

<sup>6</sup>Art. 10, Ordonnance N°58–1270, 22 December 1958.

<sup>7</sup>In Germany, the German Judges’ Association organises the *Deutscher Richter- und Staatsanwalttag* (German Judges’ and Public Prosecutors’ Day) every three years – an event at which important lobbying work is carried out ([www.drj.de](http://www.drj.de); [www.rista-tag.de](http://www.rista-tag.de), accessed 26 February 2021).

<sup>8</sup>Loi N°90–32 du 11 décembre 1990 portant Constitution de la République du Bénin.

<sup>9</sup>Chabi Imorou (2010; 2011; 2014). As Chabi Imorou (2010, p. 9) describes, one of the first general strikes in Dahomey took place in October 1963, led by a teacher.

investigating judge explained to me.<sup>10</sup> Yet, 2012 was the first time in the country's history that *magistrates* in Benin went on strike and even marched in the streets. What made the magistrates lay down their work and protest in the streets wearing their robes?

'But there is also this reality in Benin. When you don't strike, when you don't radicalize your position, people often don't listen to you.' (Investigating judge, 7 April 2015)

Judges are high officials who are sworn in when they take office and, among other things, swear not to take a public position in relation to the judiciary and its courts. Their professional oath obliges them to behave with dignity and loyalty.<sup>11</sup> This obligation of political restraint stems from their special status as public servants and civil servants, and also influences their private lives, as I will analyse in the following.

#### 4 Acting and fighting as role models for society to enforce the rule of law

Numerous rules, constraints and standards of conduct determine the profession of magistrates. Magistrates experience influence and pressure from all sides. Family members, friends, colleagues, superiors and politicians try to influence court proceedings in their favour. What makes a good magistrate in these circumstances? All magistrates described to me their ideas of a *bon magistrat* in detail and saw themselves as role models for society. A good magistrate is portrayed as having integrity and being impartial, credible, just and humble as well as strict and courageous. He or she orients himself towards and respects the law, is faithful to the Constitution, works a lot and loves order. He or she should not be politically active, not participate in any newspaper or party and not exercise a political mandate. This self-ideal draws a clear line between law and politics. A good magistrate adheres to the obligation of restraint, which is deemed a particularly important characteristic. When they take office, judges and prosecutors agree to be reserved (*obligation de réserve*); this can be translated as political and public restraint (Bokelmann, 2008, p. 148).

In addition to the oath made at the beginning of their professional life, the magistrates described further unwritten rules of conduct for their private lives to me, some of which included prohibitions. For example, a good magistrate may not eat on the street, should not go to pubs in the evening, not visit a discotheque and not drink in public. He or she should not use a motorcycle taxi and should not arrive at work late. Above all, a good magistrate should not be influenced or corrupted. The magistrates even mentioned practical norms governing how they were expected to live and dress, and what they should or should not do with respect to their role model function (Olivier de Sardan, 2015). As a magistrate, they argued, they are a role model for society – a high-level civil servant, responsible for applying the law and punishing other citizens. That is why they are not ordinary citizens – and may not behave as such. Most magistrates were aware of their own position in society and considered themselves the elite of the country. For them, their dignified and noble profession had entailed a special moral obligation throughout history – an aspect that I will discuss in the following section (Behrends and Pauli, 2012, p. 311).

#### 5 A short history of magistrates and politics in Benin

In my research in 2009 and 2015, I observed a change in the style of political confrontation between the executive and the judiciary. This new generation of magistrates was striking for their legal independence for the first time. In my work, I divide the Beninese magistrates since 1960, the year of

<sup>10</sup>During the socialist regime (1972–1989), all trade union activities were brought together for better control under the single trade union *Union nationale des syndicats des travailleurs du Dahomey/Bénin* (UNSTD) (Chabi Imorou, 2010, p. 13). Since the democratic upheaval in 1990, seven umbrella unions and numerous grassroots unions have made up the fragmented trade union landscape – each occupational group maintains its own union. Almost all of them are financed mainly by European trade unions, which can thus exert influence (Banse, 2015, pp. 81–84). There are more than thirty teachers' unions alone (Chabi Imorou, 2010, p. 19).

<sup>11</sup>For a comparative perspective on Ghanaian public servants, see Lentz (2014).



independence from France, into five generations.<sup>12</sup> From 2011 onwards, the fifth generation of magistrates emerged. This new generation was increasingly oriented towards global norms, such as the rule of law and judicial independence, and pro-actively sought to secure their rights through strikes and political protest (Kolloch, 2021, pp. 32–35). Mainly younger judges raised their dissenting voices to fight for their judicial independence guaranteed by law. Their strike was, in a sense, the last expression of a long process of insisting on judicial independence, because their daily work should be characterised by incorruptibility, integrity, dignity and reclusiveness.

The first strike in the history of the judicial profession in Benin started after allegations of corruption by the then Minister of Justice Marie-Elise Gbèdo in December 2011. In a press conference on the (international) day of the fight against corruption, she announced that her country's judiciary was corrupt and that she was ashamed of her ministry. This statement, widely discussed in the local media, offended the Beninese magistrates.

The magistrates' union UNAMAB sought to talk with the president, which it had always done since the first association was founded in 1967.<sup>13</sup> Historically, the union had always made politics in a subtle way – through talking and negotiating.<sup>14</sup> Thus, historically, aspirations for judicial independence have either been suppressed by the executive or stifled through negotiation and dialogue by making concessions to the judiciary. This time, however, dialogue did not resolve the issue; on the contrary, the tensions between the magistrates and the Minister of Justice increased steadily. In January 2012, UNAMAB went on strike. The Minister of Justice reacted by irregularly appointing new judges, violating the basic principles of immovability and priority for the more experienced magistrates. Younger judges were placed above more experienced, senior colleagues; prosecutors were transferred to other locations. In response to the mounting strikes, the government sought to establish a second judges' association with the help of some career-minded judges to destroy UNAMAB's strong cohesion. However, this attempt to divide the judges failed. In 2014, after two years of constant strikes, forty-five out of eighty-three Members of Parliament signed a bill to retain control of the judiciary, prohibiting magistrates from assembling in a trade union and exercising civil, political, economic, social and cultural rights and freedoms. Any criticism of the government was banned and punished with immediate compulsory retirement. The bill left the magistrates very concerned about their independence:

‘The only thing we have is strikes! And the government is doing everything to remove our right to strike. We had to fight a battle. We walked! The magistrates, we marched in our robes to Porto Novo, to the National Assembly to say “No, we are against that”!’ (Judge of first instance, 26 March 2015)

Encouraged by the general atmosphere amongst its members, UNAMAB finally called upon them to march. As this was the first strike in the history of Benin's judiciary in which judges, wearing their robes, stopped working, the situation was already exceptional. There had been strikes in the history of Benin's judiciary, but never by judges and prosecutors. During my initial research in 2009 and in the years before that, clerks had gone on strike – for better training, higher salaries and their own statute. The judges I interviewed about the striking clerks in 2009 complained a lot about the work stoppages, because without the clerks, the entire work of the judiciary was slowed down significantly. Several times I observed court hearings, which had been prepared by judges into the night, break down due to the absence of clerks. This was particularly disruptive in the courts in the

<sup>12</sup>The concept of generations goes back to Mannheim (1964) and serves to create order, to allow analytical categorisation and thus to show processes of societal change. For further details, see Kolloch (forthcoming, pp. 38–40).

<sup>13</sup>This is relatively late in comparison to other regions, as the first forms of trade unions in Dahomey emerged as early as during the colonial period in the 1930s (Chabi Imorou, 2010, p. 6).

<sup>14</sup>This kind of constant confrontation and negotiation is also described for Sankarist socialism in Burkina Faso, where magistrates founded the new, politically motivated association *Syndicat autonome des magistrats burkinabè* (SAMAB) as early as 1983 to reform the judicial system. Their demand for independence of the judiciary led to great tensions between the government and the judiciary and resulted in the dismissal of two dozen members of SAMAB (Harsch, 2017, pp. 62–63).

North of Benin, where plaintiffs had to travel up to 200 kilometres at their own expense to attend hearings, only to return home empty-handed. In addition to their indignation about the strikes by court employees, some magistrates also told me that going on strike was not in keeping with the dignity of the office of judge.

Now, let us examine how Benin's magistrates made and debated legality and democracy, and identify the moral and legal norms they referred to.

## 6 'If the government provokes us, we will strike again!': making and debating legality and democracy

'The deputies want to ban the right to strike and freedom of expression about current political events and assembly in a union. This is very bad, because this is a country where the executive does not know its limits. There is the principle of independence – when the bill passes, what means do we have? The strikes allow us to correct violations of existing laws.' (Judge of first instance, 26 March 2015)

This quotation shows that judges often refer to principles anchored in the law in their political disputes. The independence of the judiciary from the executive is enshrined in Article 125 of the Constitution, which applies the principle of the separation of powers. Article 23 of the Statute of the Magistrates prescribes the independence and irremovability of the judges, who are subject only to the law. However, Article 127 of the Beninese Constitution stipulates that the president – that is, the executive – guarantees this independence.<sup>15</sup> This sounds astonishing at first and was considered highly problematic by many magistrates, as it confers extensive power on the head of state with regard to the country's judiciary. He or she chairs the supreme judicial council, which decides on the careers of the judiciary (Art. 129) and appoints three of the seven members of the Constitutional Court as well as all magistrates and court presidents of all instances (Art. 56). Besides, he or she is not only head of state, but also head of government, commander-in-chief of the army and chairman of the Council of ministers (Arts 41, 54, 62 and 55). The executive therefore has considerable decision-making power over the judiciary, resulting in political interference. The power to appoint and sanction magistrates, influence their careers and ultimately allocate funds allowed the executive to instrumentalise the judiciary almost without hindrance for decades. It shows that there was no clear cut between law and politics (Kolloch, 2021; forthcoming). With democratisation, however, new roles were demanded of the judiciary and questions were raised about its autonomy (Tidjani Alou, 2007, p. 174). The magistrates felt that their convictions were being provoked, threatened and attacked by the government and defended their independence and thus, ultimately, democracy with the rule of law in Benin. In almost every conversation I had with magistrates, they emphasised the high value of judicial independence. Many saw the rule of law in danger. A president of a court of first instance said to me: 'If the government provokes us, we will strike again!' (26 March 2015).

Through their legal expertise, the magistrates were able to point out that the executive was violating important legal principles and laws almost each time they went on strike. This knowledge gave them a distinctive advantage in negotiations with the government, and they succeeded every time (Raehlmann, 2017, p. 9). Invoking the law, they sued for moral norms of responsibility and, as a movement, thus contributed to the 'juridification of protest' (Eckert, 2016, p. 252). Interestingly, the protests of the judiciary are thus comparable to other political protest movements that also draw on the law to achieve their goals, similar to the prosecutors in Zimbabwe described by Verheul (2013) and the street-level bureaucrats in Turkey investigated by Saglam. The Beninese magistrates referred to legal norms, mobilising them as legal instruments against the state (Eckert *et al.*, 2012, pp. 12, 6). They used the law to advance their own political goals. Even though it may seem banal that protesting magistrates – with their knowledge of the law – based their arguments on legal norms, I suggest

<sup>15</sup>Loi N°90-32 du 11 décembre 1990.



that their movement should be considered political. This is because they were trying to assert their rights publicly and in the media, and their strikes exerted high political pressure. The magistrates' strikes were more effective than the strikes of other occupational groups. Legally, they were a special group, since the judiciary has an important function for the state (similar to striking teachers). Through their work stoppages, they directly damaged the rule of law. Through their strikes, they also acted much more quickly, generating much more publicity and exerting much more (political) pressure than if they had gone to court, for example, which would possibly have been equally effective, but not nearly as quick. Court cases in Benin drag on for a long time and are often adjourned due to various factors. For this reason, angry Beninese magistrates had to resort to going directly to the streets:

'The government reacted by finding solutions because the strike of the magistrates penalizes, it blocks the country. People can't have papers, people can't do official acts anymore. It becomes unavoidable! There's a regime, you mustn't say, "I don't know anything, we have to discuss it with the unions." The strike is constitutional. It's a constitutional right, and the magistrates, by going on strike, are not at fault. They pose a problem in front of the nation.' (Jérôme Carlos, founder and editor of CAPP FM, 27 October 2015)

So, if the government had not reacted, the strikes would not have ended. In addition to its structural power, UNAMAB had extensive organisational power, as almost all magistrates were members of the association; according to Bewernitz and Dribbusch (2014, p. 397), these are two criteria for successful strikes.

The magistrates also referred to moral norms that were violated. For example, the aforementioned Minister of Justice Marie-Elise Gbèdo transferred four female prosecutors from the South to the North, moving them away from their families. The magistrates called this a moral violation of family life. The prosecutor I lived with in 2009 was transferred from Cotonou to Abomey in 2012, even though the youngest of her three children was only four years old and her husband had a physical handicap. The prosecutor told me how exhausting this phase had been for her family. Only later, with the help of her superiors, did she manage to work from home some days and to be present only on days with court hearings. In this way, she did not have to commute the long distance every day and could continue to take care of her family. She thus described the women's transfers as playing not only with their careers, but also with their household and family: 'So, it was so hard for us! ... They play with people's careers and now the household and the home. It's difficult and it was a woman who did it' (Prosecutor, 2 April 2015).

I know of another judge who was supposed to be transferred from the North to the South, but was able to refuse because of her position as a judge. The fact that she was able to successfully reject such a transfer request, unlike previous generations, illustrates the increased independence of Benin's judges. Interestingly, the only unmarried and childless female judge was not transferred. This transfer policy is remarkable as Benin Labour Law stipulates that women should work near their husband's workplace and their families, and that they cannot be transferred to other parts of the country without their consent. Moreover, a woman and mother of two ordered the transfers. The judges mixed moral concepts from private and professional spheres, and hoped for special understanding from the minister due to her personal family situation.

The motivation behind the magistrates' intensive political struggle was therefore initially not to increase their payment. During my research in Benin, I observed clandestine and irregular transfers of prosecutors who handled politically sensitive cases and ordered the pre-trial detention of politicians.<sup>16</sup> From one day to the next, magistrates were transferred to other courts or to the Ministry of Justice, where they no longer had any decision-making power. One magistrate was threatened by

<sup>16</sup>Normally, transfers were announced publicly. In five cases I observed, prosecutors were transferred to other courts in other locations from one day to the next and sometimes not even allowed back into their former offices.

the military because he attempted to file a case against the president and then sought asylum in the US, which led to great fears about security among other magistrates. In addition, some transfers did not comply with the promotion criteria set out by law. In 2015, the government attempted to ethnify and politicise the entrance examination for the judiciary and issued several decrees not to enforce certain sentences. These measures and the bill passed to revoke the right to strike were the government's attempt to control the judiciary.

As a result, the Beninese magistrates' willingness to strike continued to grow and UNAMAB found further reasons to strike. The security of persons and goods in the courts was not guaranteed; petrol money was not provided; overtime was not remunerated; no risk premiums were paid; and the budget of the Ministry of Justice was far too low (Richard, 2014b). General political and corporate political motives were now intermingled, like in the teachers' strikes, as described by Chabi Imorou (2010; 2011; 2014). Finally, the magistrates made salary demands. In fact, the government reacted to the tough clashes and finally improved magistrates' working conditions somewhat. The magistrates received fuel vouchers; video cameras and electric door openers were installed in all offices at the courts of first instance, allowing the magistrates to control access to their offices. In addition to the demand for independence, which dominated the foreground during the industrial action, the strikes served as a means of asserting their own interests. One judge even described the strikes as a means of maintaining privileges.<sup>17</sup> Interestingly, however, the strikes did not lead to any improvements in the higher courts, which were still equipped with privately purchased surveillance cameras in 2015.

We will see that younger magistrates were actively committed to enforcing democracy and the rule of law, and older generations did not want to become political or be involved in politics at all (see Göpfert, 2019).

## 7 Different discourses and actions throughout the different generations

When looking at pictures in the newspapers of judges and prosecutors demonstrating in the streets, it becomes apparent that they were mostly young and wore black robes. It therefore appears that mainly magistrates of the first instance were on strike. In Benin, no judges of the Court of Appeal or even of the Supreme Court wearing red robes were involved in the demonstrations. So, as reported by local news outlets, not all Beninese judges demonstrated in the streets (Harit, 2014). This is in line with the findings of Lambert, who reported that mainly young staff were criticising the administration, and those of Saglam, who described how older generations were more likely to support the government. One young judge, Michel Adjaka, was particularly outraged by the situation when he took office in 2006 and quickly became involved in the Executive Office of UNAMAB.<sup>18</sup> Under Adjaka's presidency, which began in March 2012, UNAMAB became increasingly politicised, especially externally. Working with numerous Beninese media outlets, Adjaka gave interviews and wrote commentaries and papers, becoming a popular leader in what had become a public struggle for judicial independence. The mediatisation of judicial affairs and of the conflict between the judiciary and the government increased (Djogbénu, 2014, p. 162). With the help of Beninese news coverage, the population learnt about the disputes, and international media also took up the issue, thus helping the magistrates to gain greater visibility and possibly enabling them to better assert themselves. This development was very different from earlier, more subtle forms of policy-making behind closed doors and similar to that of the teachers' union, which was equally animated or did not depend on the role of its actors (Chabi Imorou, 2010, p. 2). After the three marches in July 2014, Adjaka published a long and serious appeal to the Beninese government on his Facebook page about the high importance of the rule of law

<sup>17</sup>Interview on 26 March 2015.

<sup>18</sup>Because a position in the Executive Office can only be held for two consecutive three-year periods, he took a (strategic) break in the next term to run again in 2012. With some other colleagues who, like him, perceived the increasing political influence on the Beninese judiciary, he even thought about forming an alternative union. However, their superiors at the Supreme Court advised against it and suggested getting involved in UNAMAB.

and the independence of the judiciary, setting out the reasons for the long strikes by UNAMAB. Adjaka's paper was later published in the daily *La presse du jour* (Richard, 2014c). His strong commitment made him particularly popular among his young colleagues, who re-elected him in 2015.

Thanks to Adjaka's dedication as chair of UNAMAB and his central position in Cotonou, a suitable location for networking, UNAMAB became an increasingly social institution. At the court of first instance in Cotonou, I observed a strong presence of the members of UNAMAB's Executive Office. Even outside of official meetings, its members met frequently in Adjaka's office, which also served as UNAMAB's networking centre and where all necessary documents were kept in a roll container. Together, they not only discussed events or procedures related to their movement, but also joked with each other, talked about private matters and noticeably appreciated the presence of their colleagues. The interest group UNAMAB thus began to play an active role in national politics on behalf of its members. This observation was already made by Warner and Low (1959), who are among the pioneers of anthropological observation of strikes. They analysed a workers' strike in the shoe industry in Yankee City and found that trade unions are more than merely a means of defending own interests. Rather, they become social institutions that involve their members through various activities (Warner and Low, 1959, p. 182; see also Gluckman, 1958; Cooper, 1987). In the case of UNAMAB, this mainly concerned the leadership office and all members in the South who frequently travelled to Cotonou.

Adjaka himself received several transfer offers, but he rejected all of them because, in his opinion, they involved a clear career jump. Moreover, he felt that with his responsibilities within UNAMAB, he should set an example and not take advantage of his position for career purposes. The government was attempting to buy him with these offers, although the positions were suited for colleagues who were above him in the hierarchy. In 2013, he also turned down a lucrative position as president of the court of first instance in a smaller town with numerous privileges:

'Afterwards, in 2013, I was consulted as president of the TPI Ouidah. Again I refused. .... It's not very Catholic: The government wants to buy the president of UNAMAB. First of all, being president of UNAMAB is a lot of responsibility. If Cotonou doesn't work, the others don't work. Cotonou is also a strategic place for the subjects of the association. There are major files in Cotonou. My presence in Cotonou, I have the impression that it is embarrassing.' (President of UNAMAB, 27 October 2015)

Adjaka's impression was that his presence in Cotonou was a thorn in the government's side as it was logistically and strategically useful for the protest movement, like his chairmanship of UNAMAB and the daily communication with colleagues at this central networking point. In other words, the Benin government tried to apply the same strategy as the colonial government and the independent governments before it – that of transferring disagreeable bureaucrats to the province.

There was a clear demarcation between the magistrates' increasing politicisation and mobilisation as a protest movement and the previous negotiation processes in the history of the trade union federation in Benin. According to Hirschman (1970), there are different forms of voice, and this politicisation can be described as an alternative 'voice' strategy. Thus, the question arises as to why in Benin civil servants often chose the variant that involved strike and demonstration (see also Schaffer and Lamb, 1974, p. 86). This development was also related to the composition of the younger judiciary. Between 1989 and 2003, the Beninese state hardly recruited any magistrates. Many magistrates of this third and the following fourth generation first worked in other professions – as teachers, in NGOs and even in the police – after successfully completing their law studies. Due to this professional experience, they had a different understanding of state and government from the first two generations. Especially the magistrates of the second generation, like all university graduates between 1972 and 1989, were very quickly recruited into the civil service under the socialist regime and were often appointed directly to the courts. They therefore perceived the state as a provider who gave them jobs and under whose wing they could pursue their careers in peace and without worries (see also Andretta and Kolloch, 2017; 2018). Under the transition to democracy from 1990 onwards, however,

the younger magistrates increasingly oriented themselves towards the global norms of ‘rule of law’ and ‘judicial independence’, and demanded the rights guaranteed to them by the Constitution. The global frame of reference thus had a high influence on the political protest movement; the emergence and impact of law and justice were not locally limited (Moore, 2005, p. 361). With their political protest, the magistrates claimed participation in the democratic rule of law and the strengthening of the judiciary, which was unique in comparison to other countries. Paradoxically, the anchoring of the rule of law and democracy increased the potential for conflict, illustrating the ambivalences of the confrontation with the Beninese ‘model democracy’ (Kohnert, 1996, p. 78; Magnusson, 2001, p. 211; Bierschenk, 2009). While most of the literature on elections focuses on their outcome, Günauer (2020, pp. 11–12) shows that results give only minimal insights into democratic politics.<sup>19</sup> The amount of support for and participation in various means of industrial dispute differed between generations. Younger magistrates felt that the government did not care about the judiciary and its staff, generally underpaid them and did far too little for them. This shows that corporate interests were mixed with general political interests. Therefore, they were much more willing to take to the streets, while older magistrates tended to support the government and did not want to become politically active in public. Thus, there was some resistance within the magistracy regarding the protest marches. Not all magistrates had the courage to protest publicly in their robes, and some did not want to expose themselves. The magistrates seconded to the administration and the Ministry of Justice did not go on strike, as they were part of the executive in this function. It is estimated that a quarter of Benin’s magistrates took part. While the young magistrates used the media as an outlet for their indignation, the older, more experienced magistrates at the Supreme Court kept a low profile. At the beginning, they supported the strike, but then the demands became too political, the general secretary explained: ‘Strikes – Yes and no. Yes, at the beginning. But when we saw that the strike was politically motivated, we didn’t go anymore. We don’t do politics’ (General secretary, Supreme Court, 9 April 2015).

However, the high judges drafted a seven-page statement on the importance of an independent judiciary for a functioning constitutional state that their younger protesting colleagues handed over to the National Assembly. It was also published in the newspaper (Richard, 2014a). In the statement, the judges sharply criticised the French-colonial notion, which was also adopted by replacement regimes, according to which the judiciary was considered as part of the general administration and not as an independent power in the rule of law. The Beninese judiciary had been in crisis for a long time and the government’s only proposal now was to abolish the magistrates’ right to strike. A national debate on the judiciary and a dialogue between the judiciary and the government were urgently needed; a constitutional state could only function with an independent judiciary. Remarkably, the magistrates of the Supreme Court described the advocacy for the independence of the Beninese judiciary as a ‘noble and just struggle’ that they were waging in the interest of the rule of law – a duty set out in their statute that they were exercising. Although they did not march in the streets, they spoke in the ‘we form’:

‘The fight we are waging is just and noble. It is even an exacting duty that our status imposes on us. It is conducted in the interest of the rule of law, which also prohibits unnatural collusion. We must, at all costs, preserve the independence of the judiciary. Let us be vigilant and clear-sighted! Let us set an example to the world, and above all to our country, of how to fight effectively in the law, with the law and for justice.’ (Supreme Court Judges, 2014, p. 8; see Richard, 2014a)

It is true that in a way they had to talk of their fight as just and noble; the tones of their discourse were reminiscent of those of striking teachers in Benin, claiming to protest in the interest of the nation (Chabi Imorou, 2010; 2011; 2014). After three protest marches in July 2014 and a thirty-hour debate

<sup>19</sup>In her ethnographic study on parliamentary election campaigning in India, Günauer (2020, pp. 7, 15) suggests considering the whole electoral process as a complex negotiation process, including the analysis of campaigners.

in parliament, the government withdrew the bill. However, this did not end the protest movement of the Beninese magistrates. In 2017, they marched in the streets again, wearing their judicial robes.

## 8 Conclusion

It was a new phenomenon that judges and prosecutors were demanding that their legally enforced judicial independence be observed, publicly fighting for their rights and the implementation of the rule of law in Benin. Although the protest movement prolonged the already lengthy litigation process for many people seeking justice, many Beninese and numerous media considered the strikes justified, viewing an independent bench as essential for the rule of law (Djogbénou, 2014). Although the real role and obligation of Beninese magistrates since independence has been to maintain restraint and not become involved in politics, through the strikes, they were acting politically. This ambivalence between their self-perception and behaviour manifested itself in their increasing mobilisation as a political protest movement. This reveals the complexity and contradictoriness of the issue; while Beninese magistrates clearly distinguished themselves from politics through their role in the judiciary, they were taking a stance on politics through their actions. They exerted political pressure, expressed themselves and their demands clearly and vigorously in public, and were united as a political protest movement. Thus, my paper supports the debate on the law–politics divide and makes clear that these two fields are not clearly demarcated.

However, the phenomenon that magistrates, as bureaucrats, become politically active is situated within a conceptual gap in the literature. Usually (and globally) judges present themselves as reserved and apolitical and keep out of public. Judges in Europe also pursue political and professional interests, as do councillors and professors. However, they do so through association and media work, as they do not have the right to strike or to demonstrate (Di Fabio, 2012; Lindner, 2018). The Beninese judges were protesting against the interference of the executive in the judiciary. Especially for young judges, who were shaped by global norms, a limit had been reached that they could no longer address with their activities in their professional association. Another explanation could be the concept of ‘self-evident’ stateness (Beek, 2016). My paper contributes to the existing literature on the everyday lives and work practices of judges and prosecutors in Africa by analysing this change of the profession in Benin. Beninese magistrates, with the help of their association UNAMAB, consciously stood up for their independence, which was guaranteed by law. Basically, they were waging an industrial dispute against major parts of the executive. This is a marked difference from judges who went on strike in other West African countries. They were mainly demonstrating against allegations of corruption (Ghana) and for higher salaries and better material resources (Togo and Gabon). Although these demands also played a role in Benin to some extent, the magistrates were predominantly striving to achieve judicial independence. Nevertheless, my paper also reveals that the judiciary is far from being a unified entity.

Despite the transition to democracy in 1990, the governments that have operated since continue to interfere in the judiciary, showing that law and politics are still not clearly separated. The case described in this paper therefore highlights the shortcomings of Benin’s ‘model democracy’. The literature on Benin’s ‘model democracy’ focuses mostly on independent elections, which seems to be symptomatic of worldwide discussions on democracy (see Günauer, 2020). However, there are other shortcomings of Benin’s democracy, such as the weak position of parliament described in the literature. Thus, my case shows that democratisation in Benin was not completed in 1991, and that the premise for a liberal democracy should not and cannot be only the presence of election results.

The different discourses and levels of action of the magistrates belonging to the various instances and generations were particularly revealing. As experts in law, the magistrates always invoked the violation of existing laws. Therefore, the government often made concessions after the tough clashes, which was not the case when other professions went on strike in Benin. In contrast to using much more subtle forms of criticism, as elaborated on in other papers in this Special Issue, especially younger Beninese magistrates stood up for their independence. Particularly in exchanges with local and social media, Beninese magistrates sought dialogue with the public and ultimately the government. As a result, like the teachers in Benin, they gradually occupied public space (Chabi Imorou,



2010, p. 22). With their fight, they struggled to restore justice, form the nation, establish democracy and the rule of law, and develop a new society. With their fight, they were lastly realising citizenship (Chabi Imorou, 2010, p. 23).

To conclude, the strikes can be explained as a variant of voice, as proposed by Hirschman (1970), which was favoured by two factors. First, I have shown that the emergence of a new generation of judges with different professional experiences and aspirations from previous generations led to different means of struggle for judicial independence and politically motivated protest. Second, the strikes seemed to be a symptom of a deeper conflict between two different visions of the role of the judiciary: an old, French- and colonial-influenced idea of the judiciary as a department of the general state administration vs. an idea of the judiciary as an independent third power in the state, influenced by global, especially Anglo-American ideas. Thus, the conflicts I have described constitute a further step in the Beninese democratisation process.

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