

## The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin

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### Introduction

The central question addressed by this contribution is whether the manner in which the African Charter on Human and Peoples' Rights (African Charter) is invoked and applied by the Benin Constitutional Court provides good prospects for improving the quality of the judicial protection of human rights. Has the Benin Constitutional Court relied on the case-law and soft-law instruments developed by the African Commission on Human and Peoples' Rights (African Commission) and on the jurisprudence of the African Court on Human and Peoples' Rights (African Court)? If not, does this affect the ability of the African Charter to improve the lived realities of litigants who bring cases before the Benin Constitutional Court? These questions are central to the relationship and complementarity between the domestic and regional protection of human rights in Africa, a subject that was dear to the heart of the late Professor Christof Heyns to whom this contribution pays tribute. Christof Heyns believed that the 'ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people'.<sup>1</sup> For him, human rights research is a way of exposing the hypocrisy of rulers who undertake to protect human rights yet make little effort to 'translate these sentiments into practice'.<sup>2</sup>

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1 C Heyns 'African regional human rights system: in need of reform?' (2001) 1 *African Human Rights Law Journal* 155 at 156. See also C Heyns & F Viljoen *The impact of the United Nations human rights treaties at the domestic level* (Kluwer Law 2002) 1; C Heyns & others 'The right to political participation in sub-Saharan Africa' (2019) 8 *Global Journal of Comparative Law* 129-130.

2 C Heyns (ed) *Human rights law in Africa* (Kluwer Law 1996) viii; C Heyns (ed) *Human rights law in Africa* (Kluwer Law 1998) vii-viii. Other compilations of legal texts include C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (PULP 2016). This widely used compendium has been re-edited several times and translated into other African Union languages, see C Heyns & M Killander (eds) *Recueil des documents clés de l'Union africaine relatifs aux droits de l'homme* (PULP 2018); C Heyns & M Killander (eds) *Compêndio de documentos-chave dos direitos humanos da União Africana* (PULP 2008).

On a continent where pre-1990 authoritarian rule resulted in complete disregard of basic individual rights and freedoms, starting from Heyns' home-country, it is easy to understand why he laid so much emphasis on the impact of international and regional norms at the domestic level.<sup>3</sup>

This ambition was not wishful thinking on his part. In fact, the wave of post-1990 constitutional reforms in Africa provided drafters of African constitutions with an opportunity to prevent the resurgence of authoritarian practices by entrenching basic features of constitutionalism, among which the recognition and protection of human rights featured prominently.<sup>4</sup> Several constitutions granted special status to international human rights treaties ratified by the state, among which is the African Charter. Christof Heyns and Waruguru Kaguongo were emphatic that, 'by including certain norms in its constitution, a state notifies its population and the world at large that it is willing to be judged according to those norms'<sup>5</sup> and that this provides 'a useful starting point for them being held responsible to achieve these ideals, provided that the gap between promise and practice does not become too wide'.<sup>6</sup>

Benin provides a better example than most African countries to assess how one specific and African international human rights treaty – the African Charter – contributes to improving the lived realities of litigants owing to the special constitutional status conferred on the African Charter.<sup>7</sup> The drafters of the 1990 Benin Constitution (Constitution) incorporated a Bill of Rights and established a Constitutional Court as an attempt to prevent the resurgence of political and constitutional instability that was commonplace in the country for over 18 years.<sup>8</sup> Facilitated by liberal constitutional provisions on standing before the Constitutional Court and its broader jurisdiction,<sup>9</sup> individuals have approached the Constitutional Court invoking provisions in the Bills of Rights and articles in the African Charter to protect their rights and the constitutional order.

3 C Heyns & F Viljoen 'The impact of the United Nations human rights treaties on the domestic level' (2001) 23(3) *Human Rights Quarterly* 483-535; C Heyns & F Viljoen 'The impact of six major UN human rights treaties in South Africa' (2001) 16 *South African Public Law* 28-67.

4 CM Fombad 'Constitutional reforms and constitutionalism in Africa: reflections on some current challenges and future prospects' (2011) 59(4) *Buffalo Law Review* 1010; JM Mbaku 'Constitutionalism and Africa's Agenda 2063: how to build "The Africa We Want"' (2020) 45(2) *Brooklyn Journal of International Law* 581-582.

5 C Heyns & W Kaguongo 'Constitutional human rights law in Africa: current developments' (2006) 22 *South African Journal on Human Rights* 674.

6 Heyns & Kaguongo (n 5) 713.

7 Discussed further in section 2 below.

8 T Holo 'Préface' G Badet *Les attributions originales de la Cour constitutionnelle du Bénin* (2013) 9.

9 Arts 3, 117 and 122 of the Constitution.

The judicial application of any international human rights treaty, including the African Charter, is especially necessary when constitutionalism in a particular country is eroded, and the judiciary is called upon to arrest a ‘descent towards symbolic constitutionalism’<sup>10</sup> such as that which has resurfaced in Benin over the past four years or so. The Freedom in the World indicator moved Benin from ‘Free’ in 2018 to ‘Not Free’ in 2020 as a result of several legal reforms that curtailed the ability of several political parties to participate in the 2019 legislative elections and stifled electoral competition.<sup>11</sup> The Benin Constitutional Court has been partly blamed for not preventing these regressive laws by using the Constitution and the African Charter to promote an inclusive electoral process.<sup>12</sup> Blaming the Court must be understood within the context of powers conferred on it. In fact, the possibility for the Court to review the constitutionality of legislation before its promulgation and to adjudicate any human rights-related petitions, irrespective of who the alleged perpetrators could be, implies that it must strictly scrutinise any legislation, behaviour and conduct that overtly and covertly undermine the fundamental ideals of the Constitution and the African Charter.<sup>13</sup> The existence of human rights unfriendly legislation in spite of the centrality of the African Charter within the Benin legal system prompts the question to what extent the Charter has been invoked in the Court’s jurisprudence and whether stronger reliance on the Charter could have prevented the adoption of some of these laws. The next section reviews the legal status of the African Charter in the Benin legal system in order to highlight how it can be used to protect human rights more effectively.

10 CM Fombad ‘Strengthening constitutional order and upholding the rule of law in Central Africa: reversing the descent towards symbolic constitutionalism’ (2014) 14 *African Human Rights Law Journal* 412-448.

11 Freedom House ‘Freedom in the world 2021: Benin’ <https://freedomhouse.org/country/benin/freedom-world/2021> (accessed 16 November 2021).

12 ‘Bénin: Indignation des requérants après la décision de la Cour constitutionnelle’ 19 February 2021 in *RFI* <https://www.rfi.fr/fr/afrique/20210219-bénin-indignation-des-requérants-après-la-décision-de-la-cour-constitutionnelle> (accessed 16 November 2021). See generally, West Africa Early Warning and Early Response Network ‘Le Bénin risque gros à perdre son juge constitutionnel’ (September 2018) [https://wanep.org/wanep/files/2018/Oct/BENIN\\_POLICY\\_BRIEF\\_2018.pdf](https://wanep.org/wanep/files/2018/Oct/BENIN_POLICY_BRIEF_2018.pdf) (accessed 16 November 2021).

13 Art 117 of the 1990 Constitution of Benin.

## The legal status of the African Charter under the Benin Constitution

Article 7 of the Benin Constitution bestows on the African Charter unparalleled constitutional status in the field of African constitutionalism.<sup>14</sup> It reads:<sup>15</sup>

The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on 20 January 1986 *shall be an integral part of the present Constitution and of Beninese law.*

Something is said to be 'an integral part' of another when it is important or necessary and that the other part cannot function without it. In other words, the Benin Bill of Rights<sup>16</sup> and the Constitution cannot be separated from the African Charter. The Charter and other constitutional provisions form part of a system of equal constitutional norms that complement and strengthen one another and must be approached as a whole to provide solutions to constitutional and human rights petitions submitted to the Court.<sup>17</sup>

Given that the provisions of the African Charter are placed at the top of the hierarchy of norms in the Benin legal system, inferior legal norms – whether these are parliamentary acts, regulations and other administrative acts – must conform to the Constitution and the African Charter.<sup>18</sup> This requirement grants the Constitutional Court the competence of annulling inferior norms when they are inconsistent with the Constitution or the African Charter at the behest of any persons seeking to review their constitutional validity. The importance of the African Charter has been reiterated by the Constitutional Court, mainly

14 BG Gbago *Le Bénin et les droits de l'homme* (2001) 51. See also I Fall 'Témoignage d'un compagnon d'aventure' in FJ Aïvo (ed) *La Constitution béninoise du 11 décembre 1990: un modèle pour l'Afrique? Mélanges en l'honneur de Maurice Ahanhanzo-Glélé* (2014) 53.

15 Emphasis added. It is said that this provision is a mark of the faith of drafters of Benin Constitution in the African human rights system. See FJ Aïvo *Le juge constitutionnel et l'Etat de droit en Afrique: l'exemple du modèle béninois* (2006) 80. The President of the Constitutional Commission, Professor Maurice Ahanhanzo-Glélé indeed worked alongside Keba M'Baye during the drafting of the African Charter on Human and Peoples' Rights. Other scholars believe that article 7 is the logical consequence of article 1 of the African Charter. See H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011) 95.

16 From art 7 to art 40 of the 1990 Benin Constitution.

17 *Decision DCC 18-200* of 11 October 2018 at 4. See G Aïvo 'Les recours individuels devant le juge constitutionnel béninois' in FJ Aïvo (ed) *La Constitution béninoise du 11 décembre 1990: un modèle pour l'Afrique? Mélanges en l'honneur de Maurice Ahanhanzo-Glélé* (2014) 547.

18 OD Gnamou 'Juridictions constitutionnelles et norme de référence' (2019) 1 *Revue Constitution et Consolidation de l'Etat de Droit, de la Démocratie et des Libertés Fondamentales en Afrique* 87.

by reaffirming that the African Charter is part of the constitutional corpus (*bloc de constitutionnalité*).<sup>19</sup> The constitutional corpus is a set of rules, principles and values contained in legal instruments that are not formally constitutional. These instruments may include organic laws and international human rights treaties. They acquire constitutional status and become constitutionally binding on everyone. Constitutional jurisdictions can rely on them to assess the constitutional validity of inferior norms.<sup>20</sup> As an instrument of reference, the Constitutional Court relies on the African Charter directly or in conjunction with other constitutional provisions.<sup>21</sup> Similarly, litigants have the option to invoke the Charter alone or together with other constitutional provisions to achieve more effective protection for their rights.

Article 7 of the Benin Constitution must be read in conjunction with both the Preamble to the Constitution and article 147 to appreciate the significance of the African Charter in Benin positive law. Under the Preamble, ‘the Beninese people’

reaffirm attachment to the principles of democracy and human rights as they have been defined (...) by the African Charter on Human and Peoples’ Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on 20 January 1986 and whose provisions make up an integral part of this present Constitution and of Beninese law and *have a value superior to the internal law*.<sup>22</sup>

The Preamble reiterates the constitutional status of the rights guaranteed by the African Charter and their nature as rights provided under an international treaty ratified by Benin which, based on article 147 of the Constitution, take precedence over domestic legislation.

The African Charter is further ‘annexed’ to the Benin Constitution. This can readily be seen as a firm commitment of ensuring that the Charter is read alongside the Constitution and equally respected by everyone, including judges, state officials and ordinary citizens.<sup>23</sup>

19 See *Decision DCC 18-160* of 31 July 2018 at 3.

20 P Avril & J Gicquel *Lexique de droit constitutionnel* 16; D Baranger ‘Comprendre le « bloc de constitutionnalité »’ (2018) 20-21 *Jus Politicum – Revue de droit politique* 104-105. H Akerekoro ‘La Cour constitutionnelle et le bloc de constitutionnalité au Bénin’ (2016) *Revue d’étude et de recherche sur le droit et l’administration dans les pays d’Afrique* 5 [http://afrilex.u-bordeaux.fr/wp-content/uploads/2021/03/Le\\_bloc\\_de\\_constitutionnalite.pdf](http://afrilex.u-bordeaux.fr/wp-content/uploads/2021/03/Le_bloc_de_constitutionnalite.pdf) (accessed 16 November 2021); D Rousseau *Droit du contentieux constitutionnel* (2016) 231.

21 A Tanoh & H Adjolohoun ‘International law and human rights litigation in Côte d’Ivoire and Benin’ in M Killander (ed) *International law and domestic human rights litigation in Africa* (PULP 2010) 118; EN Youmbi *La justice constitutionnelle au Bénin: logique politique et sociale* (2016) 414; A Essono-Ovono ‘Decision DCC 98-043 du 14 mai 1998’ (2013) 1 *Annuaire béninois de justice constitutionnelle* 568; H Akerekoro ‘Le procès constitutionnel au Bénin’ (2013) 1 *Annuaire béninois de justice constitutionnelle* 68.

22 Emphasis added.

23 OOM Laleye *La Cour constitutionnelle et le peuple au Bénin: d’un juge constitutionnel institué à un procureur suzerain* (2018) 262; Fondation Konrad Adenauer

Expressed differently, annexing the African Charter to the Constitution serves to raise awareness around the Charter, which, in turn, can increase the likelihood of its being relied upon by litigants. Related to this, article 40 enjoins the state to raise awareness and conduct teachings relative to the African Charter.<sup>24</sup> Although the Constitutional Court has repeatedly held this provision to be ‘programmatic’ in nature,<sup>25</sup> it can serve to highlight the intention of drafters of the Constitution to move from an abstract recognition of human rights norms to their concretisation, starting with the infusion of the Charter’s ideals into the hearts and minds of citizens.<sup>26</sup>

Broadly speaking, the importance of the African Charter in Benin is enhanced in four ways. It is an instrument whose normative provisions are incorporated in the Constitution through article 7. The Preamble to the Constitution further clarifies its normative status. The African Charter is subsequently annexed to the Constitution, and the Constitution imposes an obligation to raise awareness about international human rights instruments including the African Charter.<sup>27</sup> Pursuant to article 1 of the African Charter, Benin courts and tribunals and the Constitutional Court,<sup>28</sup> as state organs, are integral parts of the enforcement mechanism of the Charter at the domestic level.<sup>29</sup> They must contribute to ensuring that ideals and values embodied in the Charter are utilised in the improvement of human rights protection in Benin so that the evils of authoritarianism and constitutional instability do not find their way into how parliament, the executive and the judiciary manage public affairs.

There are at least two implications of the legal status of the African Charter insofar as its application in constitutional rights litigation is concerned. First, since some rights in the Benin Constitution are formalistic in their formulation and their normative content is unclear<sup>30</sup> and certain aspects of other rights are not explicitly mentioned in the Constitution,<sup>31</sup> the application of the African Charter can assist in filling these gaps and clarifying the normative content of these rights. A more

*Commentaire de la Constitution béninoise du 11 décembre 1990* (2009) 27.

24 It reads, ‘The State has the duty to assure the diffusion and the teaching of the Constitution, of the Universal Declaration of Human Rights of 1948, of the African Charter on Human and Peoples’ Rights of 1981 as well as all of the international instruments duly ratified and relative to human rights’.

25 See *Decision 19-322* of 5 September 2019 at 2; *Decision DCC 19-323* of 5 September 2019 at 2; *Decision DCC 19-324* of 5 September 2019 at 2; *Decision DCC 19-325* of 5 September 2019 at 2; *Decision DCC 19-329* of 5 September 2019 at 2.

26 See the claim in *Decision DCC Decision 19-322* of 5 September 2019 at 2.

27 Adjolohoun (n 15) 96-97.

28 The Constitutional Court does not form part of the judiciary.

29 R Murray *The African Charter on Human and Peoples’ Rights: a commentary* (OUP 2019) 17.

30 For example, arts 12, 15 and 21 of the 1990 Benin Constitution.

31 Compare art 17 of the Constitution and 7 of the African Charter.

significant example of such a role played by the African Charter is the active protection of the right to be tried within reasonable time, the right to be heard by a competent tribunal and the right to family, which are not mentioned in the Bill of Rights.<sup>32</sup> Second, it will probably not make much sense if the Benin Constitutional Court fails to draw inspiration, in constitutional adjudication, from ‘international law on human and peoples’ rights’, particularly from provision of various African instruments on human and peoples’ rights as stipulated under article 60 of the African Charter and the interpretation the African Commission and the African Court have developed. This practice is today accepted with approval by the International Court of Justice and several national judges who suggest that dealing with human rights related questions requires interpreters to look at how regional bodies established to interpret and oversee the implementation of human rights treaties have interpreted similar rights.<sup>33</sup> Drawing inspiration from regional human rights bodies thus enables the Benin Constitutional Court to protect and develop human rights properly. While the African Commission, the African Court and the Benin Constitutional Court are different in many respects, they all either quasi-judicial or judicial organs are established to protect human rights against arbitrary deprivation and, importantly, to apply and interpret the African Charter when dealing with human rights petitions. They do not operate in isolation.

It follows from the above discussion that the legal status accorded to the African Charter under the Benin Constitution paves the way for its direct or indirect application in human rights litigation and confers on the Court the ability to tether many legal norms to the African Charter. The constitutional text does not require judges to interpret constitutional rights in a manner consistent with the African Charter.<sup>34</sup>

32 See among other *Decision DCC 03-144* of 16 October 2003, *Decision DCC 05-125* of 25 October 2005; *Decision DCC 20-029* of 23 January 2020; *Decision DCC 19-493* of 31 October 2019; *Decision DCC 19-496* of 31 October 2019; *Decision DCC 19-496* of 31 October 2019; *Decision DCC 18-155* of 24 July 2018 at 3; *Decision DCC 01-082* of 17 August 2001.

33 M Killander & H Adjoholoun ‘International law and domestic human rights litigation in Africa: an introduction’ in M Killander (ed) *International law and domestic human rights litigation in Africa* (PULP 2010) 21; TM Daly ‘Kindred strangers: why has the Constitutional Court of South Africa never cited the African Court on Human and Peoples’ Rights?’ (2019) 14(2) *Constitutional Court Review* 403; P Alston ‘A framework for the comparative analysis of Bills of Rights’ in P Alston (ed) *Promoting human rights through bills of rights: comparative perspectives* (Clarendon 2000) 12. In *Ahmadou Sadio Diallo v Democratic Republic of Congo*, the International Court of Justice pertinently recalled that ‘when [it] is called upon, [...], to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created [...] to monitor the sound application of the treaty in question’; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Merits, Judgment, ICJ Reports 2010, 639, para 67.

34 See for example sec 233 of the 1996 Constitution of South Africa & sec 326(2) of the 2013 Constitution of Zimbabwe. On consistent interpretation, see SB Traoré *L’interprétation des résolutions du Conseil de sécurité des Nations Unies: contribution*

This would have been legally redundant given that the constitutional status accorded to the African Charter implies an obligation to ensure that the outcome reached by the Court does not contradict democratic and human rights principles upheld by the African Charter.

## **The African Charter in constitutional adjudication in Benin**

The African Charter can contribute to improving the quality of human rights protection by applying it directly in human rights litigation<sup>35</sup> or, indirectly, by ensuring that the interpretation provided by the Constitutional Court and the outcome reached in litigation are consistent with human rights and democratic ideals, values and principles propelled by the African Charter, its normative protocols and subsequent interpretations of the African Commission and the African Court.<sup>36</sup> These two aspects are discussed in the following sections using cases decided by the Benin Constitutional Court.

### *Direct application of the African Charter*

The Court started by marking its protective territory since its formative stage in the mid 1990s by directly invoking the African Charter against executive orders that infringed the rights of individuals.<sup>37</sup> From the Court's early decisions, it delineated quite clearly how it would be relying on the African Charter to buttress the protection of rights already provided for in the Constitution or those that are indirectly constitutionalised by way of article 7 of the Constitution. In *Decision DCC 18-94* of 3 June 1994, it nullified an inter-ministerial decree that restricted the recruitment for Customs Services to civil servants employed by the Ministry of Finances, holding that it was discriminatory and inconsistent with the Constitution and article 13(2) of the African Charter on 'equal access to public service'.<sup>38</sup> In this case, the petitioner argued that the inter-ministerial decree did not conform to the logic of the Constitution and the African Charter, which is in favour of openness and inclusivity in the recruitment.<sup>39</sup> Relying on article 8(2) and 13(2) of the African Charter, the Court reasoned that one of the corollaries of

*à la théorie de l'interprétation dans la société internationale* (2021) 369.

35 F Viljoen *International human rights law in Africa* (OUP 2012) 527-528.

36 This flows from the Preamble to the Benin Constitution, article 7 and article 147. It is also the logical consequence of article 1 of the African Charter; see Viljoen (n 35) 528; S Szurek 'Article 1' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole y relatif portant création de la Cour africaine des droits de l'homme et des peuples: commentaire article par article* (Bruylant 2011) 109.

37 *Decision DCC 16-94* of 27 May 1994 at 60.

38 *Decision DCC 18-94* of 3 June 1994 at 70.

39 As above.

the principle of equality provided under those provisions is ‘equality in career development’.<sup>40</sup>

This decision undoubtedly sets the tone for the direct enforcement of the Charter by the Court and litigants. However, although the Charter was used to support the finding of the Court, in the end the Court simply finds a violation of the Constitution and not of the Charter.<sup>41</sup> This may be explained by the fact that, since the Charter is an integral part of the Constitution, there is no reason to separately assert the violation of the Charter. The African Charter is not relied upon as an international treaty but as a constitutional norm.<sup>42</sup> If it were relied upon as an international treaty in this instance, the Constitutional Court would have been exercising conventionality control – the review of the conformity or compatibility of legislation and other inferior norms including administrative acts to international treaties – for which it had no jurisdiction.<sup>43</sup> Conventionality control differs from constitutional review, which the Constitutional Court performs, in that the former reviews the conformity of legislation and other inferior norms to international treaties while the latter do so with respect of the Constitution. Using the African Charter as a constitutional norm is designed to ensure that the African Charter leads to greater transformation than when it is invoked as an international treaty, because, as a constitutional norm, the Charter can lead to the nullification of legislation and inferior norms through the authoritative interpretation and application by the Constitutional Court.

By directly invoking the African Charter, the Constitutional Court expunged from the Benin legal order retrogressive provisions of the Penal Code which entrenched double-standards in the criminalisation of adultery;<sup>44</sup> those of the Family Code which institutionalised polygamy;<sup>45</sup> and, very recently, article 6 of the Benin Family Code which empowered the husband to name the child.<sup>46</sup> All these cases are evidence of the combined use of the African Charter with the Constitution to reach conclusions that foster equality between men and women. In *Decision*

40 As above.

41 *Decision DCC 18-94* of 3 June 1994 at 71. See also Tanoh & Adjolohoun (n 21) 118.

42 On the constitutional and treaty nature of the African Charter in Benin legal system, see CK Tchapnga ‘Le juge constitutionnel, juge administratif au Bénin et au Gabon’ (2008) 75(3) *Revue française de droit constitutionnel* 571.

43 Article 117 of the Constitution. See for example *Decision DCC 18-202* of 11 October 2018 at 2-3.

44 *Decision DCC 09-081* of 30 July 2009 at 3.

45 *Decision DCC 02-144* of 23 December 2002 at 6. See the discussion in J-L Atangana-Amougou ‘Du code des personnes et de la famille devant la Cour constitutionnelle du Bénin. *Decision DCC 02-144* du 23 décembre 2002: observations’ (2013) 1 *Annuaire béninois de justice constitutionnelle* 433.

46 *Decision DCC 21-269* of 21 October 2021 at 6.

DCC 21-269 of 21 October 2021,<sup>47</sup> the complainant summarised the mischief of articles 6 and 12 of the Benin Family Code as follows:<sup>48</sup>

to allow the father of a legitimate child to confer his name on the child, whereas this possibility is not given to the wife (who also contributed to the birth of the child); to allow that in case of simultaneous recognition of the child born out of wedlock by both parents, the name of the father is given to the said child to the detriment of that of their mother; worse, if the mother had previously recognised the child born out of wedlock and had given him her name and later the father comes to recognise them in the last position, the child will lose the name given to them by their mother and will take the name of the father.

The impugned provisions were said to be contrary to the Constitution and the African Charter by providing, without doing the same for the husband, that the female spouse would add the husband's name to her own and that a remarried widow or divorced woman would take the names of their spouses.<sup>49</sup> While invoking the Constitution, the Court invoked two relevant provisions of the African Charter that supported its conclusion in this case, article 3(1) and (2) and article 18(3). The Court held that the latter provision 'gives priority to the protection of women when several fundamental rights are involved'.<sup>50</sup> The Court concluded that there was a violation of the Constitution by utilising arguments based on the Charter, especially article 18(3), which has no equivalent in the Benin Constitution.<sup>51</sup> It is seen that the African Charter played several roles in this case: it complemented the protection offered by the Constitution; it served to emphasise the need for protecting women and children; and it iterated that only a constitutional principle may objectively justify the violation of equality between men and women.<sup>52</sup>

The above examples, although progressive in relation to how the African Charter has been applied, do not capture instances when both the Constitution and the African Charter fall short of providing strong protection to certain marginalised groups. A case in point pertains to the absence in the Constitution and the African Charter of measures of affirmative action to increase the participation of women in the decision-making process despite glaring sociological evidence that they have been side-lined in various social and political spheres.<sup>53</sup> In 2010,

47 I am indebted to Professor Sâ Benjamin Traoré who brought this case to my attention when preparing this contribution.

48 *Decision DCC 21-269 of 21 October 2021* at 2.

49 *Decision DCC 21-269 of 21 October 2021* at 2-3.

50 *Decision DCC 21-269 of 21 October 2021* at 5.

51 *Decision DCC 21-269 of 21 October 2021* at 5.

52 As above.

53 M-O Attanasso *Femmes et pouvoirs politiques au Bénin: des origines dahoméennes à nos jours* (Friedrich Ebert Stiftung 2012) 61; 69-70. An affirmative action provision has been incorporated in the Benin Constitution by way of constitutional amendment in 2019. New Article 26(2) reads: 'Men and women are equal in law. However, the

a Member of Parliament challenged the constitutional validity of an affirmative action law which enjoined political parties to reserve 20 per cent of seats in parliamentary elections for women.<sup>54</sup> He alleged that this would be a violation of men's right to equality based on article 26 of the Constitution and articles 2 and 3 of the African Charter.<sup>55</sup> The Court eventually annulled the impugned provision. It reasoned that such discrimination contravened the 'letter and the spirit' of the Constitution and the African Charter.<sup>56</sup> A more dynamic interpretation was required in this case. Regarding women's participation, the African Charter has been improved through subsequent interpretations and the adoption of normative protocols,<sup>57</sup> of which the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, binding on Benin,<sup>58</sup> requires parties to take 'positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action'.<sup>59</sup>

In another case, the Court was confronted with the hard and politically sensitive task of defining the notion of 'people'. A member of an ethnic group alleged before the Court that their collective rights under articles 19 and 22 of the Charter were violated by a decision of the National Institute of Statistics and Economic Analysis to include their ethnicity in an ethnic group to which they are not affiliated.<sup>60</sup> In defining 'people', the Court adopted a definition which eliminated differences among groups of ethnicities and fostered a common republican identity. It argued that, '...in spite of the cultural, ethnic, linguistic, religious and social diversity that enriches the Nation, the notion of people, within the meaning of the Constitution and the African Charter on Human and Peoples' Rights, which unequivocally designates all citizens, without any distinction, is not reducible to the different socio-cultural groups; that

law may lay down special provisions for the improvement of the representation of the people by women. The State protects the family, especially the mother and the child. It shall provide assistance to persons with disabilities and to the elderly' (emphasis added).

54 *Decision DCC 10-117* of 8 September 2010 at 7.

55 As above. See the discussion in J-L Atangana-Amougou 'L'élection des membres de l'Assemblée nationale. *Décision DCC 10-117* du 8 septembre 2010: observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 452-454.

56 *Decision DCC 10-117* of 8 September 2010 at 8.

57 R Ben Achour 'Les protocoles normatifs à la Charte africaine des droits de l'homme et des peuples' (2020) 4 *Annuaire africain des droits de l'homme* 83.

58 Benin ratified it on 30 September 2005 and deposited the instrument of ratification two weeks later. Ratification table <https://au.int/sites/default/files/treaties/37077-s1-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 16 November 2021).

59 Article 9; F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16(1) *Washington and Lee Journal of Civil Rights and Social Justice* 23.

60 *Decision DCC 18-200* of 11 October 2018 at 2.

the indivisibility of the Republic necessarily entails the unity of people, without this constituting a negation of the right of each socio-cultural group to flourish ...'.<sup>61</sup> Reducing the concept of 'people' to 'citizens' does not accord with the practice of the African Commission and the African Court which have recognised that sub-groups within each state may qualify as people.<sup>62</sup> These two regional human rights bodies are generally flexible when defining the concept of people because they do so on a case-by-case basis, based on the nature of the contested right,<sup>63</sup> guided by considerations such as 'common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, ...'.<sup>64</sup> The invocation of the African Charter in this case establishes diverging standards for protection.

The Benin Constitutional Court has not developed a detailed and dynamic approach to the application of the African Charter. In the almost 25 years since the Court has been in existence, its approach with respect to the Charter has not evolved; the Court simply refers to the Charter provisions without further developments. The engagement with the African Charter has remained formalistic and similar in all the cases heard. Direct application of the African Charter has not resulted in serious engagement between the Court, litigants and state entities on the importance of the African Charter in Benin democracy in relation to what role it could play in preventing undemocratic practices of state services. A similar trend is observed in relation to the failure to give indirect effect to the African Charter as discussed in the next section.

### ***Indirect application of the African Charter or lack thereof***

If mere direct application of the African Charter by and before the Benin Constitutional Court could be regarded as being progressive in some cases, several other cases illustrate how the African Charter and the jurisprudence of the African Court and Commission could have been invoked to prevent some regressive constitutional and legislative changes from being allowed to take place. This section looks at a number of cases that came before the Court between June 2018 and June 2021, in relation to the 2019 and 2021 elections, where the Court passed by an opportunity to align its decisions with the Charter. These cases are also compared to and contrasted with similar pronouncements by the African Commission and the African Court, which would have aided the Benin Constitutional Court not to lower the standard of the protection of rights.

61 *Decision DCC 18-200* of 11 October 2018 at 5-6.

62 *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR) 2009, para 178.

63 Viljoen (n 35) 219.

64 *Gunme and Others v Cameroon*, para 170.

The first instance of the failure to align its decisions with the African Charter arose in a series of petitions challenging, on the one hand, the constitutional amendment which instituted the principle of sponsorship for presidential candidates,<sup>65</sup> and, on the other, the revision of the electoral law which clarified the modalities of application of the principle of sponsorship.<sup>66</sup> The context is relevant here. On 7 November 2019, 47 amendments<sup>67</sup> to the Constitution of Benin were adopted; one of which prohibited citizens from running for President unless they are sponsored by elected officials.<sup>68</sup> The new article 44 provides that '[n]o one may be a candidate for the office of President of the Republic or Vice-President of the Republic unless he or she [...] is duly sponsored by elected officials in accordance with the conditions and procedures established by law'. Parliament subsequently passed Act 2019-43 of 15 November 2021, which required presidential candidates to be sponsored by a minimum of 10 per cent of members of the National Assembly and mayors.<sup>69</sup> Each presidential candidate is required to garner 16 sponsors from the 160 MPs that make up the National Assembly. In practice, this threshold is not easy to meet because the ruling coalition has 154 MPs, making it difficult for many presidential candidates, including independent candidates,<sup>70</sup> to be sponsored.<sup>71</sup>

Clearly, invoking article 10 of the African Charter on the right to free association of independent candidates and article 13 on political participation, as developed in the *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania (Mtikila case)*<sup>72</sup> would have pointed Benin Constitutional Court decisions in another direction.<sup>73</sup> The *Mtikila* case is the evidence of the Charter's commitment to preventing unjustifiable restrictions imposed on the right to political participation and the freedom of association but the Court turned a blind eye to it. The *Mtikila* case was relevant in this series of petitions by emphasising the duty of ensuring that limitations to

65 *Decision DCC 21-011* of 7 January 2021 at 3; *Decision DCC 21-073* of 4 March 2021 at 2-3.

66 *Decision EP 21-001* of 21 January 2021 at 2-7; *Decision EP 21-003* of 17 February 2021 at 1-2; *Decision EP 21-005* of 17 February 2021; *Decision EP 21-012* of 17 February 2021 at 2; *Decision EP 21-013* of 17 February 2021 at 2; *Decision EP 21-014* of 17 February 2021 at 2-3; *Decision DCC 21-067* of 4 March 2021 at 2-3; *Decision DCC 21-069* of 4 March 2021 at 2; *Decision DCC 21-070* of 4 March 2021 at 2.

67 *Decision 19-504* of 6 November 2019.

68 Art 44.

69 Art 132(8).

70 *Decision DCC 21-067* of 4 March 2021; *Decision EP 21-008* of 17 February 2021 at 2; *Decision DCC 21-011* of 7 January 2021 at 3.

71 *Decision EP 21-013* of 17 February 2021 at 2.

72 (merits) (2013) 1 AfCLR 34.

73 See *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC), paras 38-40.

political participation are necessary and proportionate to the aim sought so that no amendment would be introduced to Benin legislation that would have the effect of reducing the participation of candidates.<sup>74</sup> This lack of interest in referring to African Court decisions cannot be blamed on the ignorance of their existence by the Benin Constitutional Court as some litigants brought them to the attention of the Constitutional Court.<sup>75</sup> Strikingly, the Court did not allude to these arguments when addressing the case. Furthermore, the claim that constitutional and legislative amendments discriminated against independent candidates was worth being investigated.<sup>76</sup> The enforcement of these amendments would most likely amount to what the African Court characterised as the negation to freedom of association because individuals would be forced 'to associate with others' or others are forced to associate with the individual<sup>77</sup> to expect elections. What the Benin Court missed was that article 10 of the African Charter could be construed to mean the 'freedom to associate and freedom not to associate'.<sup>78</sup>

The imposition of sponsorship within a parliament composed of supporters of the incumbent who was equally a candidate rendered the ability to obtain sponsorship perilous, difficult and beyond the reach of many candidates. As a consequence, running for president, a right recognised for all, would become impossible for many citizens.<sup>79</sup> The fact that candidates who did not obtain sponsorship turned to the Constitutional Court for it to enjoin parliamentarians to offer them sponsorship signalled total disarray, despair and loss of confidence in a parliamentary chamber led by a power-hungry majority.<sup>80</sup> The failure to give effect to the values of the African Charter by scrutinising limitations runs counter to the Benin Court's own decisions where it held that, for restrictions to be necessary, they should be proportionate and justifiable

74 Petitioners in similar political rights invoked *Mtikila* case. See *Decision DCC 19-266* of 25 July 2019 at 2 and *Decision 18-197* of 2 October 2018 at 2.

75 *XYZ v Benin* (merits and reparations), Application 10/2020 and *Houngoue Eric Noudehouenou v Benin* (merits and reparations), Application 3/2020 were referred to in *Decision EP 21-003* of 17 February 2021.

76 *Decision DCC 21-067* of 4 March 2021; *Decision EP 21-008* of 17 February 2021 at 2;

77 *Mtikila*, para 112.

78 *Mtikila*, para 113. For South Africa, see *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC), para 60.

79 For analogical reasoning, see Khampepe J in *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* (2017) 10 BCLR 1303 (CC), para 68: 'However, one may also conceive of legislative provisions that, while not explicitly ruling out a group of persons from choosing a particular trade, does so in effect, by making the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited'.

80 *Decision EP 21-006* of 17 February 2021; *Decision EP 21-013* of 17 February 2021 at 3; *Decision EP 21-015* of 17 February 2021 at 2.

in a democratic society,<sup>81</sup> a stance similar to international human rights bodies.

There is an emerging consensus that the principle of sponsorship should either not be resorted to in elections or, if it is, its implementation must be well thought out to facilitate political participation and electoral competition.<sup>82</sup> In a recent decision, the the Economic Community of West African States Court of Justice ruled that a legislative amendment introducing the principle of sponsorship in Senegal ahead of the 2019 elections violated the secrecy of the vote and was an impediment to the right to participate in elections as a candidate.<sup>83</sup> The Court reached such a conclusion after a careful consideration of several international (human rights) instruments that Benin had also ratified, including the African Charter.<sup>84</sup> Besides this, General Comment 25 of the UN Human Rights Committee (participation in public affairs and the right to vote) developing article 25 of the International Covenant on Civil and Political Rights is pertinent to this question. It indicates that '[i]f a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy'.<sup>85</sup> These developments reaffirm the necessity not to make participation in elections the preserve of certain individuals, as candidates, as it was once the case in many African countries before the so-called third wave of democratisation.

From another perspective, it may be suggested that, since the principle of sponsorship was introduced through constitutional, and not legislative, amendments, both the ability of the African Charter to prevent constitutional amendments which violate human rights and that of the Court to annul them was limited by the lack of the Court's jurisdiction to review the constitutionality of amendments introduced by the primary (the people) or the derived (National Assembly) constituent powers.<sup>86</sup> Put differently, the Constitutional Court lacked the power to control constitutional amendments because its power was limited to reviewing compliance with procedural rules for constitutional amendment or whether or not certain non-amendable provisions<sup>87</sup> had

81 See for example *Decision DCC 20-536* of 16 July 2020 and *Decision DCC 20-497* of 4 June 2020 at 2.

82 D Zounmenou & N Adam 'Les « réformes électorales » étouffent la démocratie en Afrique de l'Ouest' 25 March 2021 in *ISS Today* <https://issafrica.org/fr/iss-today/les-reformes-electorales-etouffent-la-democratie-en-afrique-de-louest> (accessed 16 November 2021).

83 *L'Union sociale libérale (USL) c. L'Etat du Sénégal*, Application ECW/CCJ/APP/59/18, Judgment ECW/CCJ/JUD/10/21 (28 April 2021), para 104.

84 *L'Union sociale libérale (USL)*, paras 99-102.

85 para 17.

86 *Decision 21-073* of 4 March 2021.

87 Article 156 of the Constitution reads: 'No procedure for revision may be instituted or continued when it shall undermine the integrity of the territory. The republican form of government and the secularity of the State may not be made the object of a

been changed.<sup>88</sup> It is contended that a court willing to align its outcome with Charter rights had two workable alternatives. In the first place, the constitutional provision introducing the principle of sponsorship left to the National Assembly the power to determine conditions for sponsorship and how the principle could be implemented. This legal possibility suggests that the Court, although it did not have powers to review the constitutionality of the principle of sponsorship, could at least make sure the conditions and the modalities for sponsorship established through law are 'reasonable'.<sup>89</sup> In addition, the Court has generally nullified constitutional amendments not obtained through 'national consensus'.<sup>90</sup> On these grounds, there was a possibility of the conformity of constitutional amendments to this principle being reviewed.<sup>91</sup>

In another petition, the Constitutional Court did not consider progressive interpretations of the African Charter that prohibited unconditional amnesty legislation. In November 2019, the President of Benin approached the Benin Constitutional Court to review whether Act 2019-93 relating to amnesty for criminal acts, misdemeanours and contraventions committed during the legislative elections of April 2019 conformed to the Constitution, and, thus, indirectly to the African Charter.<sup>92</sup> The terse response of the Court was affirmative. Reaching such a conclusion was almost surprising owing to the unusual content of the amnesty legislation.<sup>93</sup> Most scholars and international tribunals tend to favour conditional amnesties because blanket amnesties exclude any form of accountability.<sup>94</sup> The African Commission<sup>95</sup> and the African Court<sup>96</sup> have taken similar positions. The pronouncements of

revision'.

88 *Decision DCC 21-011* of 7 January 2021 at 5-6; *Decision DCC 19-504* of 6 November 2019 at 2-4.

89 General Comment 25 of the UN Human Rights Committee (participation in public affairs and the right to vote), CCPR/C/21/Rev.1/Add.7, para 17.

90 *Decision DCC 06-074* of 8 July 2006. See SH Adjolohoun 'Centralised model of constitutional adjudication: the Constitutional Court of Benin' in CM Fombad (ed) *Constitutional adjudication in Africa* (OUP 2017) 72.

91 This was the basis of one of the claims in *Decision DCC 21-011* of 7 January 2021 at 3.

92 *Decision DCC 19-503* of 6 November 2019.

93 Art 2 of Act 2019-93 on amnesty for criminal acts, misdemeanours and felonies committed during the legislative elections of April 2019 provides that, 'in application of the provisions of article 1 of the present law, all proceedings initiated shall be devoid of purpose, the judgments or rulings pronounced shall be null and void and the persons detained provisionally or in execution of the judgments or rulings pronounced shall be released if they are not held for other legal reasons'.

94 SA Dersso 'Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 383.

95 *Thomas Kwoyelo v Uganda*, Communication 431/12, para 293.

96 *Sébastien Germain Marie Aikoué Ajavon v Benin* (merits and reparation), Application 62/2019, para 239.

the latter two bodies based on the Charter have made it clear that the power of states to grant amnesty to perpetrators of various violations of international (human rights) law is constrained by states' obligations to investigate and prosecute human rights violations and ensure victims have their cases heard before competent tribunals. It is clear that the Constitutional Court's approach effectively endorses the violation of article 7 of the African Charter and fails to hold the executive and the legislature bound by the limitations imposed on their powers in an era of constitutionalism.

The strategic deference of the Court to the legislature and the executive may account for its unwillingness to choose alternative outcomes that could align decisions of the Court with the African Charter. In the last three years of operation (June 2018 - June 2021),<sup>97</sup> the Court has tended to declare any proposed laws presented to it by the President of the Republic constitutional even when some of them, such as the amnesty law, appear to be glaringly in violation of the African Charter.<sup>98</sup> The Court seems to align its policy preference with that of the executive and the legislature not only to gain support from it and shield itself from external attacks but also to prevent the type of tension which had emerged between the previous composition of the Court and the office of the President of the Republic and National Assembly. The previous composition of the Court was brave enough to nullify certain legislative amendments reviewed by it.<sup>99</sup> The current President of the Court initiated and defended some of the legislation nullified by the Constitutional Court in January 2018 before his appointment to the Court.<sup>100</sup> These laws were reinterpreted in favour of the government after he held the reins of the Court. His proximity with the Benin President has continued to raise suspicion about the Court's ability to

97 The period between June 2018 and June 2021 symbolises three years since new judges of the Constitutional Court were appointed. See 'La Cour Djogbénou trois ans après: Gilles Badet parle des innovations' 8 June 2021 <https://ortb.bj/a-la-une/la-cour-djogbenou-trois-ans-apres-gilles-badet-parle-des-innovations/> (15 December 2021). This period symbolises a jurisprudential shift from what can be characterised as 'judicial activism' previous judges tended to adopt on public interest and democratic issues to 'judicial restraint'.

98 See also *Decision DCC 18-141* of 28 June 2018 which re-interprets in favour of the National Assembly and government policy preferences, three earlier rulings, *Decision DCC 18-001* of 18 January 2018; *Decision DCC 18-003* of 22 January 2018 and *Decision DCC 18-004* of 23 January 2018; and *Decision DCC 18-142* of 28 June 2018 reinterpreting *Decision DCC 18-005* of 23 January 2018.

99 See *Decision DCC 18-001* of 18 January 2018; *Decision DCC 18-003* of 22 January 2018 and *Decision DCC 18-005* of 23 January 2018. See generally, S Bolle 'La Cour Djogbénou, ou la Cour de rupture' 11 September 2018 in *La Constitution en Afrique* <https://bollestephane.wordpress.com/la-cour-djogbenou-ou-la-cour-de-la-rupture-1/> (accessed 17 November 2019).

100 He was Minister of Justice at the time. See Bolle (n 99).

hold the current government and the National Assembly liable to the standards of constitutionalism.<sup>101</sup>

Whatever the reasons for the decisions of the Benin Constitutional Court to be regressive in terms of achieving the ideals of the African Charter, one serious implication has been the tension and backlash that has emerged between the Constitutional Court and the African Court, with the latter attempting to use the African Charter to ‘fix’ decisions that did not conform to it of the former, and the former denying that decisions of the latter had any superior authority. This is discussed in the next section.

### Understanding and handling tension and backlash with the African Court

Adopting a friendly approach to the application of the African Charter and related normative standards can create a dialogue between national and regional organs protecting human rights. It can also prevent contradictions and differing standards of protection developed by the two levels. This is especially pertinent for the Benin Constitutional Court given the growing activism of the African Court and its expanded jurisdictions in matters that have direct links with domestic constitutional law.<sup>102</sup> Benin ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights in June 2014. It has, thus, subjected itself to the jurisdiction of the Court. Besides, it has committed itself to ‘[complying] with the judgment of the Court in any case to which [it is party]’.<sup>103</sup> The signing of the declaration made pursuant to article 34(6) of the African Court Protocol by the departing government in February 2016, although withdrawn in 2020,<sup>104</sup> opened the jurisdiction of the Court to many Benin petitioners who have not hesitated to challenge, directly before the African Court, decisions of the Benin Constitutional Court which allegedly ‘violated’ the African Charter.<sup>105</sup>

In *Sébastien Germain Marie Aikoué Ajavon v Benin*, the African Court ruled that Benin had violated article 26 of the African Charter

101 Similar claims were made before the African Court in *Sébastien Germain Marie Aikoué Ajavon v Benin* (merits and reparation), Application 62/2019 but were not sufficiently proven (para 300).

102 AK Abebe ‘Taming regressive constitutional amendments: the African Court as a continental (super) constitutional court’ (2019) 17 *International Journal of Constitutional Law* 113.

103 Art 30 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

104 OD Akinkugbe ‘International decision commentary: *Houngue Eric Noudehouenou v Republic of Benin*’ (2021) 115(2) *American Journal of International Law* 286.

105 *Sébastien Germain Marie Aikoué Ajavon v Benin* (merits and reparation), Application 62/2019.

by failing to guarantee the independence of the Constitutional Court,<sup>106</sup> permitting interference of the executive in the appointment of judges and allowing members of the government to sit in the Supreme Council of the Judiciary.<sup>107</sup> This ruling is important because the Constitutional Court had declared the impugned law constitutional.<sup>108</sup> Clearly, when it reviewed this law, the Benin Constitutional Court turned a blind eye to the Charter ideals that ‘neither the executive nor the legislature should interfere, directly or indirectly, in the making of decisions that fall within the competence of the judiciary, including those decisions concerning the management of the career of the members of the judiciary’.<sup>109</sup> In the same case, the African Court found the amnesty law to be inconsistent with the African Charter despite its having been found to be constitutional domestically.<sup>110</sup> The African Court did so after having reviewed provisions of the African Charter itself and also developments at the African Commission, the UN Human Rights Committee, the Inter-American Court of Human Rights (Inter-American Court) and the European Court of Human Rights (European Court), all of which suggested that ‘an amnesty law is compatible with human rights only if it is accompanied by restorative measures for the benefit of the victims’.<sup>111</sup> Otherwise, it violates ‘the right to have the case of each victim of the 28 April 2019 legislative elections violence heard’.<sup>112</sup> Owing to the abundant jurisprudence of the Benin Constitutional Court on the importance of article 7 of the African Charter in building accountable state organs, one wonders how it disregarded its own normative progress.

Furthermore, in *Houngue Eric Noudehouenou v Benin*,<sup>113</sup> the African Court held that the constitutional amendments of 7 November 2019 violated the principle of national consensus that has been anchored in the Benin Constitutional Court jurisprudence over the years and recognised under article 10(2) of the African Charter on Democracy, Elections and Governance. Most of these violations found by the African Court could have been identified by the Benin Constitutional Court before the matter escalated to the continental plane.

It is clear that the Benin Constitutional Court is institutionally complementary to and in competition with the African Court in the

106 *Ajavon*, para 290.

107 *Ajavon*, paras 320-324.

108 *Decision DCC 18-142* of 28 June 2018 reinterpreting *Decision DCC 18-005* of 23 January 2018. See also *Ajavon*, para 316.

109 *Ajavon*, para 312.

110 *Ajavon*, para 239.

111 *Ajavon*, para 238.

112 *Ajavon*, para 239.

113 *Houngue Eric Noudehouenou v Benin* (merits and reparations) – Appl 003/2020, paras 65-66.

quest for improving the quality of human rights protection in Benin.<sup>114</sup> This state of affairs owes to the fact that, as stated earlier, the two courts are empowered to apply and interpret norms of international origin, namely, the African Charter. This can weaken the legitimacy and respectability of the Constitutional Court when its decisions are deemed inconsistent with the African Charter. The Constitutional Court is a state organ which must contribute to the implementation of the international obligations the country had entered into, pursuant to article 1 of the African Charter, and cannot be seen, for whatever reason, to be an opponent to those very mechanisms established to ensure that these norms are clarified and not tempered with.<sup>115</sup> The tendency of the Benin Constitutional Court to overlook the interpretation provided by regional human rights organs may, therefore, not be warranted by the institutional position in which it finds itself.

An increasing culture of resorting to the African Court<sup>116</sup> also puts more pressure on the Benin Constitutional Court to have a frank and sincere jurisprudential dialogue with the African Court, and possibly the African Commission, so that the reliance on the African Charter serves the purpose for which the Charter was meant. It has been observed, regarding the Inter-American Court and the European Court, that domestic (constitutional/supreme) courts may disregard the interpretation preferred by regional bodies when their interpretation seems to conflict with the preferred outcome and policy orientation of domestic courts.<sup>117</sup> As discussed in the following lines, the Benin

114 Analogically for France, see EL Abdelgawad and A Weber ‘The reception process in France and Germany’ in H Keller & AS Sweet (eds) *A Europe of rights: the impact of the ECHR on national legal systems* (OUP 2008) 116.

115 On similar tendencies elsewhere, see R Kunz ‘Judging international judgments anew? The human rights courts before domestic courts’ (2020) 30(4) *European Journal of International Law* 1134-1135 (see 1140-1141 for positive collaboration); D Spielmann ‘Jurisprudence of the European Court of Human Rights and the constitutional systems of Europe’ in M Rosenfeld & A Sajo (eds) *The Oxford handbook on comparative constitutional law* (OUP 2012) 1232; but see positive acceptance by the Belgian Constitutional Court at 1249-1250. On other positive experience, see O Pollicino ‘Toward a convergence between the EU and ECHR legal systems? A comparative perspective’ in G Repetto (ed) *The constitutional relevance of the ECHR in domestic and European law: an Italian perspective* (2013) 112.

116 See the most recent rulings in cases involving Benin *Romarcic Jesukpego Zinsou v Benin* (provisional measures) (10 September 2021), Application 6/2021; *Romarcic Jesukpego Zinsou and 2 Others v Benin* (provisional measures) (2 September 2021), Application 7/2021; *Romarcic Jesukpego Zinsou and Other v Benin* (provisional measures) (10 April 2021), Application 8/2021; *Landry Angelo Adalakoun and Others v Benin* (provisional measures) (25 June 2021), Application 9/2021. See also *Landry Angelo Adalakoun & Others v Benin*, Application 12/2021; *Lehady Vinagnon Soglo v Benin*, Application 11/2021 and *Houngoue Eric Noudehouenou v Benin*, Application 10/2021. It is doubtful, though, whether this trend will continue given that Benin withdrew in 2020 the Declaration made pursuant to art 34(6) of the African Court Protocol which mainly facilitated the submission of these cases.

117 A Chehtman ‘The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis’ 8 June 2020 in *EJIL:Talk!* <https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis/> (accessed 17 November

Constitutional Court has followed this pattern and has not followed decisions of regional and sub-regional jurisdictions. Some encouraging attempts by litigants to invoke decisions of the African Court to sustain their claims in political rights litigation – which one may view as calls for the Benin Constitutional Court to look at how other courts construe the meaning of similar rights – have also been met with chauvinistic indifference.<sup>118</sup> This runs counter to the practice of some other African apex courts which have started to invoke decisions of the African Court when construing constitutional rights.<sup>119</sup>

Based on its jurisprudential practice, however, it is doubtful whether the Benin Constitutional Court will follow the trend of relying on the decisions of regional or subregional human rights bodies. The Constitutional Court has also shown that it cannot overturn its decisions simply because they were found to be inconsistent with Community law<sup>120</sup> or the African Charter.<sup>121</sup> This position is premised on the idea that decisions of the Constitutional Court are based on the Benin Constitution while those of community or human rights courts are based on international treaties and other norms which are hierarchically inferior to the Constitution. In *Decision EP 21-003* of 17 February 2021, it held that

[w]hen a contradiction is found between a decision rendered by such a [Community or international] court and another rendered by the Constitutional Court, the decision rendered by the constitutional court takes precedence over that of the international or community court (...) and that [the Constitutional Court] decision which takes precedence over that of the African Court of Human and Peoples' Rights must be given effect.<sup>122</sup>

The Constitutional Court of Benin thus excludes any possible special status that could be conferred on decisions that interpret and apply the very same African Charter that is an integral part of its own Constitution. This creates space for standards of protection that may differ between it and the regional/international courts. In turn, the ability of the African Charter to improve the lived realities of people, at least through certain types of litigation, will be undermined. One reason is that there will, at the national level, be certain interpretations of Charter norms that

2021).

118 See *Decision DCC 19-266* of 25 July 2019 at 2 and *Decision 18-197* of 2 October 2018 at 2.

119 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC), paras 38-40; *Peta v Minister of Law, Constitutional Affairs and Human Rights* (CC 11/2016) (2018) LSHC 3. See generally, Centre for Human Rights *Guide to the African Human Rights system: celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021* (2021) 14..

120 *Decision DCC 20-641* of 19 November 2020 at 5.

121 *Decision EP 21-003* of 17 February 2021 at 3.

122 As above.

do not increase the scope of protection afforded to individuals. At the same time, litigants will be aware of the existence of the African Court decisions which grant them more protection, but which they cannot enjoy because there are contradictory decisions of the Constitutional Court that take precedence over those of any other court, whatever its nature.

## **Conclusion**

Looking at the practice of invoking and applying the African Charter in the jurisprudence of the Benin Constitutional Court, it is fair to posit that the Constitutional Court has not utilised the African Charter to its full extent so that the Charter could assist it in expunging critical human rights-unfriendly legislation, practices and behaviours. Drawing on the rich and outstanding experience of the late Professor Christof Heyns, whose main concern was to ensure the domestication and application of international human rights instruments, including the African Charter, at the domestic level, this contribution has attempted to examine whether the manner in which the African Charter is invoked in the Benin Constitutional Court jurisprudence provides good prospects for improving the quality of human rights protection in Benin. The Benin Constitution has constitutionalised rights guaranteed in the African Charter in a way that they could be a check against legislation and practices inimical to human rights and improve the protection of human rights. While the Court has relied on the African Charter from time to time, the invocation of the African Charter has remained formalistic and not been substantive in nature. The approach which it adopted in its formative stages – referring here and there to normative provisions of the African Charter without seriously engaging with their content and scope – has reduced the ability of the African Charter to transform human rights-unfriendly behaviours and legislation. This may seem surprising because, since the adoption of the Benin Constitution, many human rights developments have occurred at the regional level in terms of new human rights treaties and protocols which Benin has ratified and developments by African Union human rights bodies of standards and interpretations of rights which have advanced the content of the Charter and clarified its provisions in a manner consistent with human rights best practices in other regions.

The progressive failure to use the African Charter to reach outcome protective of human rights – excluding the instances when it protected rights related to the fair trial and equality – has emerged as the Court has not, over the past three years, attempted to ensure that legislation restricting fundamental political-related rights are construed in a way that fosters participation and checks parliamentary majoritarian abuses.

The Court has mainly been preoccupied with negotiating its legitimacy within the political sphere by deferring to the legislature and the executive to the detriment of advancing values and ideals of the African Charter. Such a quest for legitimacy by deference is also present in the hierarchical and chauvinistic interactions the Court has undergone with regional human rights bodies, the African Court in particular. This has led to serious jurisprudential setbacks and has undermined the quality of human rights protection at the domestic level. Christof Heyns did not want national and regional human rights systems to be pitted against each other. Rather, he held the view that they should complement one another and compete in a way that would promote and protect the fundamental rights for which many people shed their blood.