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Legal traditions and constitutional interpretation in Africa: An introduction

1 Introduction

This book explores the interpretation of constitutional rights in Africa. More specifically, it examines how constitutional jurisdictions, whether styled as constitutional courts, councils, tribunals, or supreme courts, interpret constitutional rights, and to what extent their approaches are influenced by distinct legal traditions. It further illustrates how courts shaped by diverse colonial legacies strive to foster a culture of human rights across the continent. The book focuses on constitutional adjudication and the interpretation of three rights, namely equality, fair trial and due process, and political participation, as these rights offer a sufficiently developed and comparable jurisprudential basis across different legal traditions. By contrast, other categories of rights including socio-economic and collective rights have not been adjudicated with sufficient depth or consistency across jurisdictions to allow for meaningful comparative analysis.

The 'rights revolution'[1] that swept through Africa during the early and late 1990s was transformative in many respects. It led to the adoption or revision of numerous constitutions that recognised and protected a broad array of fundamental rights and freedoms. While African constitutions embraced this revolution in varying ways, most incorporated the three generations of human rights, drawing from the International Bill of Rights[2] and the African Charter on Human and Peoples' Rights. These constitutions also entrenched protections against arbitrary amendment, established relationships with international human rights law to allow for mutual reinforcement, and, in different forms,

1 M Lasser *Judicial transformations: The rights revolution in the courts of Europe* (2009).

2 The 1948 Universal Declaration on Human Rights; the 1966/1976 International Covenant on Civil and Political Rights and the 1966/1976 International Covenant on Economic, Social and Cultural Rights.

created or empowered (constitutional) courts to uphold fundamental rights. Several of these courts wield significant authority and, since their establishment, have played a critical role in the judicialisation of human rights and constitutionalism. They have ensured that both political and judicial powers are exercised in ways that align with the constitutional commitments to fundamental rights.

Through bold and, at times, innovative jurisprudence, courts such as the Constitutional Courts of South Africa and Benin have earned both continental and global recognition as authoritative guardians, indeed, the Alpha and Omega of constitutional rights protection.[3] In this context, state and non-state actors that violate the Bill of Rights do so at their own peril. Since its inception, the Constitutional Court of South Africa has played a pivotal role in affirming and protecting contested or controversial rights, significantly enhancing the quality of protection afforded to individuals whose voices might otherwise go unheard.[4] In instances where ordinary democratic institutions, particularly parliaments shaped by majoritarian representation, have failed to safeguard fundamental rights, the Court has stepped in as a crucial counter-majoritarian institution. It has often functioned, metaphorically, as a 'third chamber' of parliament, wielding the Bill of Rights, in the words of Chief Justice Mogoeng Mogoeng, as 'the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck'.[5] Similarly, the Constitutional Court of Benin has distinguished itself among Francophone jurisdictions for its robust protection of fundamental rights. The Court has expanded its material jurisdiction to address human rights violations not explicitly contemplated in the Constitution and has held both state and non-state actors accountable. In doing so, it has reaffirmed the essential role of constitutional adjudication in the evolution of modern African democracies.

There are several other constitutional or supreme courts which are producing landmark constitutional rights jurisprudence across the

3 H Corder 'SA's Constitutional Court at 30: A solid foundation but cracks are showing' 7 June 2024 https://www.news.uct.ac.za/article/-2024-06-07-sas-constitutional-court-at-30-a-solid-foundation-but-cracks-are-showing (accessed 3 July 2025).

4 N Ally & L Boonzaier (eds) *Edwin Cameron: Influence and impact* (2025).

5 *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2018 2 All SA 116 (WCC); *Democratic Alliance v Speaker of the National Assembly and Others* 2016 SA 580 (CC) para 1.

continent to fulfil the ideal bequeathed to them by the third wave of democratisation.[6] But the quality of their jurisprudential production is affected by the interpretive approaches they adopt and the legal tradition in which they evolve, or which have influenced their design.

Simply put, constitutional interpretation is a legal process by which the interpreter, the constitutional judge or a body empowered to do so, construe or ascribe a meaning to a constitutional provision when applying the constitution and/or resolving a matter submitted to them. Constitutional interpretation of the Bill of Rights aims to construe the meaning of a constitutional right to both resolve the matter submitted to the interpreter and enhance a polity's human rights culture. The interpretation of the bill of rights may pertain to the way judges construe the meaning of human rights provisions in order for individuals to present a 'claim for protection' or a 'claim for recognition of the right'.[7] It may also pertain to the way the substance – nature, meaning and scope – of a right or a human right provision is interpreted.[8] The interpretation of substantive human rights provisions occurs, among others, during 'litigation challenging legislation', or constitutional review, 'adjudication of action brought directly against public authorities' or individuals and application from selected political authorities on the interpretation of specific provisions of the constitution.[9]

However, the type of courts that are competent to adjudicate human rights issues, and consequently to interpret the bill of rights, differ, primarily due to the dominant legal traditions, the common law and civil law, that African countries inherited from colonialism.

In the common law legal tradition, constitutional adjudication (including the interpretation of the bill of rights) is dealt with within

6 J Mavedzenge 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years' (2020) 20 *African Human Rights Law Journal* 181-205; MJ Nkatha 'The High Court of Malawi as a constitutional court: constitutional adjudication the Malawian way' (2020) 24 *Law, Democracy and Development* 442-463; BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 9(1) *African Human Rights Law Journal* 1-22.

7 GC Christie 'The adjudication of human rights' (2005) 13 *Jahrbuch fur Recht und Ethik* 431.

8 D Rousseau, P-Y Gahdoun & J Bonnet (eds) *Droit du contentieux constitutionnel* (2016) 297.

9 C McCrudden 'The pluralism of human rights adjudication' in L Lazarus and others (eds) *Reasoning rights: Comparative judicial engagement* (2014) 10. Other procedures include interpretation of the Constitution.

the hierarchy of ordinary courts (High Court, Court of Appeal, Supreme Court and/or Constitutional Court).[10] Conversely, only the constitutional court, as the court of first and last instance is tasked with providing authoritative interpretation of the bill of rights and nullifying legislation inconsistent with the bill of rights in the civil law legal tradition.[11] For the purposes of this book, the comparative analysis will concern only the interpretation of the bill of rights by (apex) constitutional jurisdictions given that in both civil and common law countries they are the highest courts empowered to deal with constitutional matters, including human rights adjudication.

Geographically, the common law legal tradition is located in former British colonies in Africa, while the civil law legal tradition is located in the former colonies of France, Belgium, Spain and Portugal.[12] A few African countries' legal systems are based on a mixture of the civil law and common law legal traditions, and are named 'hybrid' or 'mixed jurisdictions'.[13] Botswana[14] and South Africa[15] are examples.

Therefore, 'the legal institutions, procedures and rules'[16] of African countries were influenced by the legal tradition they inherited at independence although these legal traditions are inherently different.

Differences between the common law and civil law legal traditions are philosophical, structural and ideological in nature. Philosophical differences concern the mental process by which the legal tradition understands the legal process.[17] The civil law legal tradition is rational and dogmatic: its reasoning is deductive, in that solutions are provided by 'broad principles that are then applied to individual cases'.[18] Conversely, 'the common law approach is inductive and operates on the premise that

10 CM Fombad 'Constitutional adjudication and constitutional justice in Africa: Current trends and future perspectives' in O Narey (ed) *La justice constitutionnelle: actes du colloque international de l'ANDC* (2016) 122-123.
11 CM Fombad 'An overview of contemporary models of constitutional review in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 18-20.
12 C Ntampaka *Introduction aux systèmes juridiques africains* (2005) 6-7.
13 See VV Palmer 'Introduction to mixed jurisdictions' in VV Palmer (ed) *Mixed jurisdictions worldwide: The third legal family* (2012) 3-16.
14 C Fombad 'Botswana' in Palmer (n 13) 481-525.
15 CG van der Merwe and others 'The Republic of South Africa' in Palmer (n 13) 95-106.
16 J Merryman *The civil law tradition: An introduction to the legal systems of Western Europe and Latin America* (1984) 1.
17 G Mousourakis *Comparative law and legal traditions: Historical and contemporary perspectives* (2019) 133.
18 EK Quansah *The Ghana legal system* (2011) 24.

knowledge is derived from experience'.[19] As Holmes puts it, the civil law tradition emphasises logic, whereas the common law tradition develops its reasoning from experience of people in society.[20] Some common law lawyers believe that, the 'life of the law has not been logic: it has been experience',[21] and as such it is not about dogmatism but day-to-day realities. The structural differences relate to the material procedures used by various jurisdictions, the way norms are made, and authority is tasked with enacting rules, and the interactions among various norms and institutions within a particular legal tradition.

The ideological differences are the result of the fact that the civil law legal tradition and the common law legal tradition reacted to different historical and political phenomena.[22] According to some scholars, the codes, statutes and other legislation in the civil law legal tradition were designed to provide solutions to each and every problem of the society.[23] This was the result of the insistence of the Roman Emperor, Justinian, on compiling exhaustive legal norms to reduce the discretion of judges in interpretation.[24] This tendency was compounded by the French Revolution (1789-1799) and the Italian Unification (1815-1871), during which laws were framed in such a way as to provide solutions to every issue to arise in society and thus reduce judges to the role of mere technical expounders of the law.[25] Prior to these historical events, the formation of the civil law tradition was influenced by movements to secularise natural law and separate powers, movements championed by Enlightenment philosophers such as Montesquieu and Rousseau, who aimed to constrain the role and powers of judges so as to prevent the resurgence of 'governments of judges'.[26] In sum, the civil law tradition was a reaction to the tyranny of aristocratic judges, whose powers needed to be reduced to those of mere 'mouthpiece of the law'.[27] Merryman concludes that the civil law tradition saw judges as not 'playing a very

19 Quansah (n 18) 24.
20 As above.
21 A Barak *The judge in a democracy* (2008) 98.
22 Merryman (n 16) 16.
23 As above.
24 Merryman (n 16) 27.
25 Merryman (n 16) 15-16.
26 As above.
27 A Barak *Purposive interpretation in law* (2007) 52; T Hanisch 'La puissance de juger chez Montesquieu face à la tradition juridique anglaise' (2010) 2 *Annuaire de l'Institut Michel Villey* 131-133.

creative part due to anti-judicial ideology of the European revolution and the logical consequence of a rationalistic doctrine of strict separation of powers'.[28]

Unlike the civil law tradition, the common law, or Anglo-American, tradition was shaped by the English and American revolutions, which aimed to strengthen the powers of judges to protect individual rights.[29] Even during the Norman Conquest in 1066, principles to protect rights were furthered.

These contrasting ideologies engendered differences in views on the role of judges and courts, in particular differences in what the executive and the legislature believe a judge may and may not do. While the dialogue among judges, lawyers, and scholars from diverse legal traditions, which facilitates the migration of legal, constitutional, and human rights ideas, may suggest that some of these inherent differences have been rendered less significant over time, their influence on how the law is conceived, taught, and applied remains evident across several jurisdictions. By the end of the colonial era, African countries had adopted the common law and civil law traditions, along with all their differences.

2 The centrality of legal traditions in Africa

European 'powers' that formally established their political and economic domination over African countries in the late 19th century brought along their legal institutions and norms.[30] They believed that no proper legal tradition existed in Africa before colonisation.[31] 'Primitive' and 'uncivilised' indigenous norms that existed were not fit to regulate the life of Europeans, their relationships among themselves and their relationships with the colonised populations.[32] Western European legal traditions were thus exported to Africa. The dominant colonial powers in Africa – Belgium, France, Germany, Italy, the Netherlands, Portugal,

28 Merryman (n 16) 37. See also M Lasser *Judicial deliberations: A comparative analysis of transparency and legitimacy* (2009) 1.
29 Merryman (n 16) 16; Fombad (n 11) 122.
30 SF Joireman 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39 *Journal of Modern African Studies* 571-572; LC Keith & A Ogundele 'Legal systems and constitutionalism in sub-Saharan Africa: An empirical examination of colonial influences on human rights' (2007) 29 *Human Rights Quarterly* 1097.
31 Joireman (n 30) 577-578.
32 Joireman (n 30) 578.

Spain, and the United Kingdom – could only transplant in Africa legal traditions that they themselves were applying in Europe, that is, the continental civil law in the case of the first seven countries and the common law legal tradition in the case of the United Kingdom.

The civil law tradition, as currently applied in African countries and in most countries in Western Europe, Latin America and Japan, originated in ancient Roman law. It was 'the private law which was applicable to the citizen, and between citizens, within the boundaries of a state in a domestic context'.[33] It spread in continental Europe via the *corpus iuris civilis*, which collected Emperor Justinian's decrees[34] and 'four text books which had the force of law'.[35] This spirit of codification is an important distinguishing feature of the civil law tradition. It entails that law must be detailed in codes approved by the Emperor or the legislature, while scholars who helped in the formation of the law must contribute, through writings, to clarifying the normative content of legal norms.

Civil law countries differ among themselves: the most enduring sub-categories within the tradition, and the ones to have spread across Africa, are the Romanistic-Latin or French, the Germanic[36] and the Dutch civil law. They differ in terms of the process of codification of civil codes that took place in each country. The codification movement started in the 18th century, leading to the Bavarian Code (1756), the Prussian Civil Code (1794), and the French Civil Code (Napoleonic Code) of 1804.[37] They also differ in terms of the impact of historical events that occurred in each country. The French Revolution of 1789 replaced the existing legal system with a radically new system that placed full faith in enacted acts as the source of law rather than judges.[38] The existence of sub-categories within civil law also meant that this tradition evolved in various languages – French, Portuguese, German, Italian, and Spanish – whereas the common law is predominantly in English.[39]

33 PD Cruz *Comparative law in a changing world* (1999) 43.
34 Mousourakis (n 17) 133.
35 Quansah (n 18) 23.
36 Mousourakis (n 17) 238.
37 'German civil code' https://www.britannica.com/topic/German-Civil-Code (accessed 25 June 2021).
38 Quansah (n 18) 6.
39 U Mattei & L Pes 'Civil law and common law: Toward convergence?' in KE Whittington, DR Kelemen & GA Caldeira (eds) *The Oxford handbook of law and politics* (2008) 277-278. They argue the following: 'Because in the law, as Arthur Leff once said, "form is substance" and because legal form expresses itself in language, the connection of common law with the dominant language is a

The historical development of the common law goes hand in glove with the evolution of English law.[40] The Norman Conquest in 1066 served to 'introduce a strong centralised system of administration over the whole country',[41] with the monarch or his representative administering the law in courts.[42] The common law evolved as case-based law, 'a body of legal principles developed through the decisions of judges'.[43] Different from statute law in civil law traditions, 'it is derived from courts applying legal principles developed in past cases involving similar factual situations'.[44] As Mousourakis puts it, 'this system of judge-made law is dependent on a hierarchical court structure, where decisions of higher courts are binding on lower courts according to the doctrine of precedent (*stare decisis*)'.[45] The common law influenced the development of law in countries such as New Zealand, Australia and Canada, excluding Quebec. It also influenced the United States, India, Pakistan, Ireland, Singapore, and Hong Kong, which share roots in the common law. However, the legal systems of these six countries were influenced by other sources as well.[46]

The landscape of colonial influence on legal traditions in Africa presents three different pictures. There are countries whose legal systems are based on one legal tradition, common law or civil law, countries which combine common law and civil law elements (hybrid or mixed legal systems), and bi-jurial atypical countries where the two traditions were applied in different regions. The British imposed the English common law in their colonies of Nigeria, Ghana, Zambia, The Gambia, and Malawi, among others, with a predominantly judge-made law and hierarchy of courts, as was the case in the United Kingdom. Countries such as Mali, Niger, Upper Volta (Burkina Faso), Côte d'Ivoire and Senegal were influenced by the French civil law and constitutional tradition. Similarly, the Portuguese imposed their civil law in Mozambique, Angola, Sao Tomé and Principe, Equatorial Guinea and Cape Verde.

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crucial factor that might suggest as a general statement, not so much convergence or diffusion as rather hegemony and domination of the common law (mostly in its American version).'

40 Quansah (n 18) 6.

41 Quansah (n 18) 7.

42 Mousourakis (n 17) 252.

43 As above.

44 As above.

45 As above.

46 The same is true for Africa. See in particular, S Mnisi *Alter-native constitutionalism: Common-ing 'common' law, transforming property in South Africa* (2026).

Several African countries were influenced by both legal traditions, making them more mixed and hybrid than other such countries. In southern Africa, Dutch settlers introduced Roman-Dutch law when they landed in the Cape in 1652, a system of law that was maintained by the British in 1806, making the English common law secondary to the already applied legal norms.[47] The same was applied in colonies and protectorates in the region, such as Botswana and Zimbabwe, which received the dual common law and Roman-Dutch heritage; as a result, their legal systems could be described as 'Anglo-Roman-Dutch Law'.[48] As was noted by some observers, the hybridity of these systems means that some areas of the law, for example constitutional and administrative law, are derived fully from English common law, while private law (mercantile law, law of persons) is a mixture of English law and Roman-Dutch Law.[49] The Mauritius legal system has some forms of hybridity, combining the English common law with the French civil law codes as a result of the country's having been colonised initially by the French before the British took over in 1810.[50] Cameroon may be considered a bi-jural system since the French civil law was imposed in the eight French-speaking regions and the common law in the two English-speaking regions.[51]

The imposed Western legal traditions did not uniformly dismantle pre-colonial legal traditions,[52] given that colonial powers adopted different stances towards customary norms, ranging from soft acceptance of them in issues relating to personal status (family, marriage, divorce, inheritance) to seeking their eradication in matters of public administration, commerce, and investment, among others.[53] British colonisers instituted indirect rule, which gave customary courts and

47 'Law and legal systems' https://geography.name/laws-and-legal-systems/ (accessed 2 April 2021).

48 O Saki and others 'The law in Zimbabwe' (2017) https://www.nyulawglobal.org/globalex/ Zimbabwe1.html (accessed 2 April 2021).

49 Palmer (n 13) 9-10.

50 'The Mauritius legal system' https://www.gloverchambers.com/the-mauritius-legal-system/ (accessed 25 June 2021).

51 CM Fombad 'Researching Cameroonian law' (December 2015) https://www.nyulawglobal.org/ globalex/Cameroon1.html (accessed 25 June 2021).

52 F Ouguergouz *La Charte africaine des droits de l'homme et des peuples: Une approche juridiques des droits de l'homme entre tradition et modernité* (1993) 7; K Mbaye *Les droits de l'homme en Afrique* (2002) 75.

53 M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) 17.

authorities control of the adjudication of a number of legal matters;[54] the French, Spanish, Portuguese and Belgians[55] applied an assimilation policy, which gave customary law and courts only marginal control over legal disputes. As Mamndani puts it, through direct rule, colonisers sought to exclude indigenous people from the enjoyment of 'freedoms guaranteed to citizens in civil society', while indirect rule sought to rule natives and protect them through culture and tradition.[56] What direct rule achieved was the 'appropriation of land, the destruction of communal autonomy, and the defeat and dispersal of tribal populations', leaving indirect rule to regulate non-commercial relationships.[57] In most instances, these legacies survived into the post-colonial era.

As Baxi puts it, '[w]hat has been "inherited", through the ways of colonial legality, is then both the corpus of practices of freedom and the practices of management of freedom and, simultaneously, the repertoire of the means and the ends of the law's violence'.[58] Independent African countries organised their judiciaries, their legal professions and normative aspects of their positive laws on the basis of Western legal traditions.[59] As the departing colonial powers were not ready to leave behind constitutional and legal systems that could jeopardise their economic and political interests[60] and the interests of those of their citizens who decided to stay in newly independent states,[61] colonial powers ensured

54 Mamdani (n 53) 19. A bulk of issues were still regulated under institutions and courts established by the British. See D Johnson and others (eds) *Jurisprudence: A South African perspective* (2011) 113-122.

55 Belgians for example introduced in 1895 a system of immatriculation (registration) that enabled colonised individuals that have reached a certain stage of civilisation to be assimilated to Belgians and enjoy full civil rights. See L de Clerck 'L'administration colonial belge sur le terrain au Congo (1908-1960) et au Ruanda-Urundi (1925-1962)' (2006) 18 *Annuaire d'histoire administrative européenne* 200. Menski argues that the Belgians assimilation permitted, therefore, the application of customary laws to some persons. In former French colonies, the politics of assimilation was hostile to local customs. See Menski (n 3) 447-449.

56 Mamdani (n 53) 19.

57 As above.

58 U Baxi 'The colonialist heritage' in P Legrand & R Munday (eds) *Comparative legal studies: Traditions and transitions* (2003) 57. See also U Baxi *The future of human rights* (2002) 7.

59 Joireman (n 30) 576.

60 IG Shivji 'Three generations of constitutions in Africa an overview and an assessment in social and economic context' http://repository.udsm.ac.tz:8080/xmlui/bitstream/handle/20.500.11810/2118/Three_Generations_of_constitutions_in_Af.pdf?sequence=1andisAllowed=y (accessed 3 April 2021).

61 Keith & Ogundele (n 30) 1068.

that they designed legal and constitutional systems that could little work in favour of newly independent states.[62]

Moreover, new African states were exposed, pre-colonial judicial systems aside, only to European judicial systems,[63] because of which they were not provided with alternative judicial models to follow. In fact, most of the African elites who fought for independence and eventually presided over post-independent states, lawyers included, were educated in the metropole.[64] In relation to constitutions, the absence of constitutional experts in newly independent states and the desire by colonial masters to ensure that the constitutional framework maintained the *status quo* prompted them either to draft the first generations of constitutions for Africans[65] or ensure that Western constitutional lawyers dominated the drafting committees of new constitutions.[66]

Post-independent constitutions thus became carbon copies of those of departing colonisers, lacking an identity of their own and sometimes failing to reflect the aspirations, hopes and desires of Africans.[67] The insensitivity to context of the first-generation of African constitutions and the subsequent desire of founding fathers to rid themselves of the few checks on their powers that were enshrined in these constitutions made most constitutions ephemeral.[68]

3 Relevance of constitutional interpretation

In this section, I start by situating the problem of constitutional interpretation of fundamental rights in the African evolving judicial context (3.1). I then review how the lack of constitutional foundations

62 AM Mbata 'Constitutionalisme, constitutions et limitation des pouvoirs et des mandats présidentiels en Afrique' 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) 739-740.

63 Joireman (n 30) 576-577.

64 Joireman (n 30) 577.

65 Mbata (n 62) 739-740.

66 CM Fombad 'The evolution of modern African constitutions: A retrospective perspective' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 15.

67 Keith & Ogundele (n 30) 1068.

68 HWO Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 13-15; Y Ghai 'Constitutionalism: African perspectives' in P Kameri-Mbote & C Odote (eds) *The gallant academic: Essays in honour of HWO Okoth-Ogendo* (2017) 156-157.

on interpretive approaches affect the construction of rights across various legal traditions (3.2) before I can review the meaning, nature and purpose of constitutional interpretation (3.3). In the last part, I argue for an interpretive approach that transcend positivistic formalism (3.4).

3.1 Situating the problem

Constitutional interpretation and the role of (apex) courts in democracies are increasingly the subject of scholarly and political debate.[69] Africa's post-1990 constitutions have shaken the relationship between the judiciary and the legislature,[70] as well as the relationship between law and politics. There has been significant adoption of justiciable bills of rights, which are innovative in that they recognise human rights and impose unprecedented obligations on the executive, the legislature, the judiciary, and non-state actors.[71] Furthermore, the continent has witnessed the widespread establishment of powerful constitutional adjudicators.[72] Thus, judges and courts in the bill-of-rights era can no longer behave as passive observers of rights violations, as they did when constitutions did not provide strong protection for human rights and freedoms.[73] Furthermore, judges cannot take the same approach to interpreting bills of rights and restraining executive authoritarianism as they did under authoritarian regimes, or as they do in the context of statutory interpretation, because the nature of the text to be interpreted is different

69 J Fowkes *Building the Constitution: The practice of constitutional interpretation in post-apartheid South Africa* (2016); D Grimm *Constitutionalism: Past, present, and future* (2016) 213; T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106; T Roux *The Politics of principle: The first South African Constitutional Court, 1995-2005* (2013); R Gargarella, P Domingo & T Roux (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006).

70 SH Adjolohoun '"Made in Courts" democracies? Constitutional adjudication and politics in African constitutionalism' in Fombad (n 11) 255.

71 CM Fombad 'African bills of rights in a comparative perspective' (2011) 17 *Fundamina: A Journal of Legal History* 33; I Currie & J de Waal *The Bill of Rights handbook* (2016) 30-32; B Kanté 'Les droits fondamentaux constituent-ils une nouvelle catégorie juridique en Afrique ?' L'homme et le droit, En hommage au Professeur Jean-François Flauss (2014) 417-434.

72 M Böckenförde 'Introduction' in M Böckenförde and others (eds) *Judicial review systems in West Africa: A comparative analysis* (2016) 17.

73 E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 359-360; KE Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human rights* 150.

– so too are the respective goals and the norms it encapsulates.[74] The rules and principles enshrined in the constitution may therefore require interpreters to move beyond formalism to construe meaning and resolve the issues before them.

Nonetheless, constitutional interpreters within the judiciary are not homogenous; they are plural, particularly in common law traditions, where courts other than the Supreme or Constitutional Court adjudicate constitutional matters, or in civil law traditions, where constitutional interpreters may include non-jurists who are not always familiar with legal and constitutional technicalities. Moreover, the background of constitutional interpreters generally differs, even when they are all jurists, as do their judicial philosophies, which may at times complicate efforts to establish a unified approach to constitutional interpretation, while still enriching debates, dialogue, and conversations about the meaning of the constitution, its importance to the polity, and the ways it might be better used to improve individuals' living conditions.

From a legal traditions standpoint, it is worth asking whether judges trained in different legal traditions have similar understandings of the meaning, relevance, and approaches to interpreting the constitution, especially human rights provisions, given that these provisions, which encapsulate universal and interdependent rights, aim to achieve similar goals across traditions: to protect individuals from tyrannical behaviour by the state, its organs, and non-state actors; to promote a culture that respects human rights, fundamental freedoms, and the duties of both citizens and the state; and to fulfil transformational aspirations – from human-rights-violating states and citizens to those who live and breathe human rights for greater prosperity.

The argument on *textual convergence*, that most bills of rights recognise similar rights, often couched in similar language across legal traditions, and *ideological convergence*, that the 'constitutionalisation' of human rights across Africa sought to curb executive authoritarianism, suggests that, irrespective of legal traditions, constitutional judges are likely to interpret human rights provisions similarly or reach outcomes promotive of human rights. They are likely to ensure that the imperative to enhance the protection of individual and collective rights prevails over

74 *David Ndii and Others v Attorney-General and Others,* High Court of Kenya, Petition E282 of 2020, 13 May 2021, para 399.

the protection of individualistic state interests, and they are likely to learn from one another given the similarity of purposes. They are also expected to be 'consequential' in their interpretation, in the sense that the latter must necessarily advance human rights ideals and not undermine them.

Nonetheless, a country's socio-political history, and the nature and scope of its political regimes, institutional habits, and the relationships between the executive, legislature, and judiciary, including constitutional jurisdictions, vary and may affect how constitutional interpreters construe the meaning and significance of constitutional rights provisions.[75] Furthermore, despite linguistic convergence between bills of rights sharing the same legal tradition in the way rights are framed, aspects of certain rights may remain tied to specific country contexts, highlighting their singularity compared to other bills of rights and influencing their interpretation.[76] The increasing 'internationalisation' of constitutional rights adjudication before regional (human rights) courts and bodies provide new challenges to constitutional courts,[77] although offering new horizons for comparative interpretation of fundamental rights in Africa,[78] worth assessing as they may affect the way national constitutional judges construe human rights provisions.[79]

Constitutional interpretation therefore evolves within a complex mixture in which legal traditions, socio-political contexts, and the framing of fundamental rights and freedoms are essential elements, elements that may either advance or hinder the possibility of judges construing rights in similar ways or in ways that promote a human rights culture.

75 N Ramalekana & JA Mavedzenge 'Courts as forum for safeguarding the right of opposition parties to participate in democratic processes: A comparative analysis of South Africa and Zimbabwe' (2024) 4 *World Comparative Law* 533-559.

76 As above.

77 TM Makunya 'Overcoming challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights: Perspectives from the *Ngandu* case' (2022) 22 *African Human Rights Law Journal* 379-402.

78 TM Makunya 'Comparing constitutional adjudication of fundamental rights: Issues, methodologies and new horizons for comparative constitutional law in Africa' in F Viljoen & SN Kamga (eds) *Advancing constitutionalism in Africa: Essays in honour of Professor Charles Fombad* (2026) (forthcoming).

79 CM Fombad 'Constitutional adjudication and constitutional justice in Africa's uncertain transition: Mapping the way forward' in Fombad (n 11) 363.

3.2 Lack of clear constitutional foundation(s)

Legal and ideological problems surrounding constitutional interpretation are compounded by the lack of clear constitutional foundations for such interpretation across many African constitutions. Do constitutions instruct judges and other interpreters on how to construe their meaning, which methods to use when interpreting general constitutional provisions or those related to human rights, how to balance competing rights, freedoms, and values,[80] or which interpretive resources and materials to rely on? The answer remains complex.

Contrary to the Constitution of Angola, French civil law constitutions in Africa hardly contain provisions on the interpretation of the constitution unlike article 146 of the Constitution of Tunisia or of fundamental rights, thereby leaving constitutional judges to fend for themselves, especially when they are reluctant to learn from other jurisdictions or believe that constitutional interpretation is akin to interpreting other legal texts and that it suffices to extract the framers' intent to determine its meaning. By contrast, article 26 of the Constitution of Angola promotes an interpretation of human rights that is consistent with the UDHR, the African Charter and relevant human rights treaties the state has ratified while ensuring human rights treaties are applied by interpreters even when not invoked. Some common law constitutions do include interpretive provisions, which have been instrumental in ensuring that constitutional interpretation is not reduced to a mere technical exercise aimed at extracting and applying the literal meaning of a constitutional clause. The 1993 Interim Constitution of South Africa and the 1996 Final Constitution provide interpretive guidance that has influenced other African common law constitutions.[81] These provisions may be grouped into three main categories: guidance on the interpretation of human rights provisions;[82]

80 See for example, R Dworkin *Justice for hedgehogs* (2011) 6-10; 339.

81 Sec 46 of the 2013 Constitution of Zimbabwe; sec 259 of the 2010 Constitution of Kenya.

82 Sec 39 reads: '(1) When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or

the interpretation of conflicts between national and provincial laws; [83] and the requirement to interpret laws in accordance with international law norms.[84] These interpretive 'prompts' are further complemented by provisions on the limitation of rights,[85] the status of the Bill of Rights,[86] founding provisions,[87] and the preamble, all of which are critical for judges interpreting fundamental rights and freedoms.

However, both civil law and common law constitutions in Africa generally do not specify the constitutional methods judges should use or prefer, nor do they explain how to balance competing rights and values in interpretation. This normative lacuna has prompted judges to develop their own theories and methods suitable for interpreting the constitution and fundamental rights, drawing on various micro- and macro-level dynamics.[88] Compared to their civil law counterparts, common law constitutional judges tend to clarify in their judgments, through separate or dissenting opinions, or in personal memoirs, how best to interpret the constitution and which methods are most suitable for advancing a culture of constitutionalism and respect for human rights, thus filling the gap left by constitutional drafters.[89]

Civil law constitutional judges rarely articulate such methods or approaches, although the Constitutional Court of the Democratic Republic of the Congo (DRC) has, over the past five years, cautiously begun to craft its own methodological approach to interpreting the constitution, fundamental rights, and the balancing of competing legal

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conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

83 Sec 150 reads: 'When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.'

84 Sec 233 reads: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

85 Sec 36 of the 1996 Constitution of South Africa.

86 Sec 7 of the 1996 Constitution of South Africa.

87 Secs 1-6 of the 1996 Constitution of South Africa.

88 On these concepts, see P Dann, M Riegner & M Bönneman 'The Southern turn in comparative constitutional law: An introduction' in P Dann, M Riegner & M Bönneman (eds) *The global south and comparative constitutional law* (2020) 3; 14.

89 See generally D Moseneke *My own liberator: A memoir* (2016); E Cameron *Justice: A personal account* (2014); A Sachs *The strange alchemy of life and law* (2011); A Sachs *We, the people: Insights of an activist judge* (2016).

provisions.[90] This remains an exception among civil law courts. Whether judges should be creative enough to develop interpretive approaches and chart a methodological path for constitutional interpretation appears to depend largely on the legal tradition and judicial culture in which they operate. In some judicial environments, judges may be discouraged from expressing their views in separate opinions, even when they are legally empowered to do so.[91]

Unlike their common law counterparts, civil law constitutional courts tend to promote a unified vision of constitutional interpretation, making it difficult to discern the internal debates and deliberations that take place, or to appreciate the efforts judges may make to address the normative lacuna related to the absence of constitutionally prescribed interpretive methods. The importance of a clear constitutional foundation cannot be overstated. At a time when constitutional judges are accused of various transgressions, ranging from 'judicial adventurism' and excessive judicial activism to dangerous government of judges or, conversely, of failing to transform political, economic, and social practices that hinder constitutionalism and radical transformation, a sound and unequivocal legal basis would allow observers to assess more clearly whether judges have done too little or too much, relative to what is expected of them.

3.3 Meaning, nature and purpose

Constitutional interpretation is the process by which individuals and entities empowered to interpret the constitution construe the meaning of constitutional provisions and principles or values in order to apply them to the constitutional questions and issues they encounter. It encompasses the theories and methods used to understand, explain, clarify, and persuade others about the meaning of the constitution. The constitutional interpretation of bills of rights thus involves construing the meaning of human rights provisions to address questions or issues submitted to the (constitutional) judge, in order to resolve or clarify them and to advance or promote a culture of human rights within a given society.

90 Judgment R.Const. 1800 of 22 July 2022.

91 PP Kumakinga 'La promotion de la démocratie dans la fonction juridictionnelle de la Cour constitutionnelle: À propos de la pratique des opinions dissidentes et individuelles par les juges constitutionnels de la République démocratique du Congo' (2018) 3 *Annuaire congolais de justice constitutionnelle* 10-15.

Scholars generally distinguish between two notions of interpretation: interpretation as an 'act of will,' in which judges exercise discretion[92] in selecting interpretive methods and materials,[93] being seen as creators of meaning; and interpretation as an 'act of knowledge,' in which judicial interpretation is viewed as a cognitive process aimed at discovering, rather than deciding, the meaning of legal or constitutional provisions.[94] In the latter conception, the object of constitutional interpretation is restrictively seen as being limited to the constitutional text itself, which is assumed to be decipherable through proper analysis.[95]

The interpretation of the constitution is unique, primarily because of the nature of the text to be interpreted, its status within the normative hierarchy, its normative content and purpose within a country's socio-political landscape, and the nature and scope of judicial and institutional guarantees established to ensure its supremacy. It is the combination, not the isolated consideration, of these elements that distinguishes constitutional norms and their interpretation, since other legal norms may share one or more of these attributes without exhibiting the same singularity.

First, constitutional norms, rules, and principles are often vague, ambiguous, and indeterminate in nature. A purely formalistic interpretive approach may therefore fail to yield outcomes aligned with the ideals of constitutionalism. As the Supreme Court of Kenya observed: 'The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional

92 Discretion can be understood 'as the legally conferred power (competence, authorization) or as the de facto liberty, for a judge, of choosing between alternative courses of action (in the broadest sense of "courses of action") bearing on the decision of a case (controversy, lawsuit) at hand'. See P Chiassoni & B Spaić (eds) *Judges and adjudication in constitutional democracies: A view from legal realism* (2021) 38.

93 As above.

94 M Troper 'A causal view of judicial interpretation' in Chiassoni & Spaić (n 92) 112; M Troper, J-L Gardies & C Grzegorczyk 'Statutory interpretation in France' in DN MacCormick & RS Summers (eds) *Interpreting statutes: A comparative study* (1991) 155-156. See generally SB Traoré *L'interprétation des résolutions du Conseil de sécurité des Nations Unies: Contribution à la théorie de l'interprétation dans la société internationale* (2020) 114-118.

95 Troper (n 94) 155-156. On the difficulty to identify the object of constitutional interpretation, see SD Smith 'What does constitutional interpretation interpret?' in G Huscroft (ed) *Expounding the Constitution: Essays in constitutional theory* (2008) 36.

moments, fertilise vagueness in phraseology and draftsmanship.'[96] It also means the interpreter might at time be required to choose a reasonable and acceptable interpretation which resolve the issue while enhancing constitutionalism rather than to find the correct interpretation.[97]

Second, constitutional norms distinguish themselves both formally and substantively.[98] Formally, they differ from other legal norms because they determine the conditions for the validity of other norms within the legal system. They also regulate the procedures for the production of inferior norms, sit atop the normative hierarchy, and are adopted, amended, or revised through rigorous and often unique procedures. Their violation is subject to sanction by a judicial or quasi-judicial authority whose powers, composition, and functioning are explicitly defined in the Constitution, often differing from other courts, particularly in civil law constitutional traditions.[99] The constitution is a foundational legal instrument; it contains fundamental norms that are stringently protected against any form of violation.

Substantively, the fundamentality of the Constitution lies in the fact that its norms govern the organisation and functioning of the state and its institutions, set out the modalities of cooperation between the branches of government (executive, legislature, and judiciary) and between national and subnational units, and guarantee the protection and promotion of fundamental rights and freedoms.[100] These norms form the bedrock of social peace and cohesion, encapsulating the compromise among various national groups to form a unified nation and share collective aspirations.[101] Any transgression of these norms risks unravelling the delicate balance that holds the nation together,

96 *David Ndii* (n 74) para 416.

97 D Grimm 'Legal reasoning matters: Judicial review contested' in M Khosla & VC Jackson (eds) *Redefining comparative constitutional law: Essays for Mark Tushnet* (2024) 209. See broadly GP Fletcher 'Comparative law as a subversive discipline' (1998) 46 *American Journal of Comparative Law* 699.

98 See generally, F Hamon & M Troper *Droit constitutionnel* (2014) 25-30.

99 CM Fombad 'An overview of contemporary models of constitutional review in Africa' in Fombad (n 11) 17-50.

100 L Favoreu and others *Droit constitutionnel* (2019) 83-86.

101 As two scholars put it '[a]t the core of the Constitution is the "soul" of the [nation], the overarching principles, the guiding philosophy, the values of the nation – *the soul of the African Constitution*'; N Kabira & R Kibugi 'Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19' (2020) 20 *African Human Rights Law Journal* 440. See generally H Ebrahim *The soul of a nation: Constitution-making in South-Africa* 1998.

especially in divided or post-conflict societies where constitutional arrangements are often designed to accommodate group-specific needs and identities.[102] Although global values are increasingly embedded in constitutions,[103] particularly through the constitutionalisation of international (human rights) law on the African continent, such values remain complementary to the national pact. They enter the constitutional sphere through a voluntary process in which 'We the People' accept and confer constitutional status upon them.

Third, to underline the importance of constitutional norms, modern constitutions have established specialised constitutional jurisdictions tasked with guaranteeing constitutional supremacy through constitutional review, adjudicating fundamental rights and freedoms, and interpreting constitutional norms at the request of designated political actors. Moreover, independent institutions have been created to protect the constitutional order and democratic values embodied in the Constitution.[104] Some of these institutions have played a vital role in promoting social transformation, through strategic litigation and constructive engagement with key state organs responsible for implementing constitutional provisions, thus reinforcing the transformative value and distinctiveness of constitutional norms.[105]

In light of this, the *sui generis* nature of the Constitution implies that it cannot be interpreted in the same way as ordinary legal texts, whether legislative or international. Interpreters must treat it as a living instrument, capable of adapting to evolving socio-political realities rather than remaining fixed in the logic of the past.[106] Interpretations that advance the values and aspirations of constitutionalism, particularly through a consequentialist approach focused on human rights and democratic principles, should be preferred, even where they diverge

102 YT Fessha *Ethnic diversity and federalism: Constitution-making in South Africa and Ethiopia* (2016).

103 R Albert 'Global values in national constitutions' in Khosla & Jackson (n 97) 147-148.

104 See C Fombad 'The diffusion of South African-style institutions? A study in comparative constitutionalism' in R Dixon & T Roux (eds) *Constitutional triumphs, constitutional disappointments: A critical assessment of the 1996 South African Constitution's local and international influence* (2018) 359-385.

105 D Brand 'Socio-economic rights in South Africa: The "Christof Heyns clause"' in F Viljoen and others (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 460-467.

106 AM Samaha 'Dead hand arguments and constitutional interpretation' (2008) 108 *Columbia Law Review* 607.

from the original intent of the framers.[107] In this context, extra-legal materials and interpretive resources are essential to understanding the specific environment in which the Constitution emerged and continues to operate.

Constitutional interpretation is both an *instrumental process*, intended, among other things, to ensure that infra-constitutional and legislative norms are consistent with the constitution, uphold its supremacy and democratic character, protect fundamental rights and freedoms, and limit executive authoritarianism, and a *methodological approach* through which judges and constitutional bodies determine the meaning of constitutional provisions by selecting and applying specific doctrines and methods. Both conceptions are essential and mutually reinforcing.

While its immediate technical aim is to ascribe or discover the meaning of a legal provision in order to resolve a constitutional question through judicial processes, constitutional interpretation may also serve broader instrumental purposes in a democratic society. It can act as a transformative tool through which judges promote a culture of accountability, justification, and respect for human and socio-economic rights, while helping to prevent the return of entrenched authoritarian practices. This view assumes that the role of judges goes beyond the mere technical exposition of the law and positions them as agents of transformation within political communities, an idea closely linked to the project of transformative constitutionalism.

Transformative constitutionalism places 'obligations' on the legal profession and judges to use the bill of rights in a progressive manner,

107 *S v Mhlungu and others* CCT25/94; 1995 (3) SA 867 (CC). See debates and controversies in Z Motala 'The Constitution is not anything the Court wants it to be: The *Mhlungu* decision and the need for disciplining rules' (1998) 115 *South African Law Journal* 141-142; DM Davis 'The need for disciplining rules: A reply to Ziyad Motala' (1999) 116 *South African Law Journal* 157; E Fagan 'The longest erratum note in history: *S v Mhlungu and others* CCT25/94; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC)' (1996) 79 *South African Journal on Human Rights* 79; A Fagan 'In defence of the obvious – Ordinary meaning and the identification of constitutional rules' (1995) 11 *South African Journal on Human Rights* 545; E Fagan 'The ordinary meaning of language – A response to Professor Davis replies' (1997) 13 *South African Journal on Human Rights* 174; D Davis 'The twist of language and the two Fagans: Please sir may I have some more literalism!' (1996) 12 *South African Journal on Human Rights* 504; N Smith 'The purposes behind the words – *S v Mhlungu and Others*' (1996) 12 *South African Journal on Human Rights* 90.

especially when they operate in middling and reactionary democracies.[108] Klare defines 'transformative constitutionalism' as

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[109]

Moseneke,[110] Langa,[111] and Hoexter, writing from a South African perspective, have argued that achieving the transformative project, of which interpretation is an important element, requires that judges undo the 'formalistic and authoritarian legal tradition which the country inherited from apartheid'.[112]

Transformative constitutional interpretation entails that 'any constitutional interpretation by a court or tribunal should be linked to or informed by one or more' of the values on which the bill of rights and perhaps the constitution rest.[113] Transformative interpretation requires that judges, Langa noted, do not 'rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions'.[114] According to him, 'judges bear the ultimate responsibility to justify their decisions not only by reference to authority but by reference to ideas and values'.[115]

Transformative interpretation of the constitution requires judicial creativity and 'self-reflection about legal method, analysis and reasoning'.[116] For this to happen, judges and the legal profession primarily must be committed to both the *constitution* – 'legal and other rules

108 A middling democracy is one where political leaders and citizens are in favour of a *status quo* that is neither progressive nor reactionary while a reactionary democracy is where political leaders and citizens converge towards legislation that restricts freedom, aiming to ensure that only selected groups benefit from it. See generally B Leiter 'The role of judges in democracies: a realistic view' in Chiassoni & Spaić (n 92) 10.
109 Klare (n 73).
110 D Moseneke 'The fourth Bram Fischer Memorial lecture: Transformative adjudication' (2002) 18 *South African Journal of Human Rights* 316.
111 JP Langa 'Transformative constitutionalism' (2006) *Stellenbosch Law Review* 353.
112 C Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *South African Journal of Human Rights* 287.
113 M Mhango 'Transformation and the judiciary' in C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 79.
114 Langa (n 111) 353.
115 As above.
116 Moseneke (n 110) 318.

regulating the foundations of political and social life in a society' – and *constitutionalism* – ideas, attitudes, and rules as patterns of behaviour, *limiting* political powers and all other authorities in a society by means of so-called basic laws'.[117]

As the democratic transition afforded apex courts' judges 'a bit more scope for interpretive creativity and innovation',[118] the way they will select and apply methods of constitutional interpretation will be crucial in assessing how better they are protecting the bill of rights across various legal traditions.

3.4 Beyond positivism in interpreting fundamental rights

In what follows I present the problem positivism as an interpretive lens brings to constitutional interpretation (3.4.1) before I can demonstrate how, based on the continent's specific political and legal contexts, positivistic constitutional interpretation of fundamental rights is inadequate (3.4.2).

3.4.1 The problem

Positivism requires strict observance of the text of the constitution and the separation of pure legal considerations from values and morality.[119] It is portrayed as a 'descriptive theory' of law, one that does not tell judges how they 'should decide hard cases or when civil disobedience is justified'.[120] According to scholars, the positive law approach has the following three characteristics:

(1) the only legitimate authority for law making is the sovereign legislature;
(2) law is a closed system of logically arranged and internally coherent rules;
(3) the judiciary, as an independent authority is to interpret and apply the written law only by reference to the existing body of such rules while solving disputes and in strict accordance with legislature's will.[121]

117 J Hasanbegović 'On the (un)changing Judge icons and their creators: On Deborah, Coke and Montesquieu, Posner and Barak, and some others' in Chiassoni & Spaić (n 92) 85.
118 Klare (n 73) 171.
119 R Alexy *The argument from injustice: A reply to legal positivism* (2002) 3.
120 M Arshakyan 'The impact of legal systems on constitutional interpretation: A comparative analysis: The US Supreme Court and the German Federal Constitutional Court' (2013) 14 *German Law Journal* 1320.
121 Arshakyan (n 120) 1321. See also L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2018) 45.

The function of the judiciary is to apply legal rules irrespective of whether they advance justice in society or are fair.[122] A positive law approach does not consider the moral implications of rights.[123] It views rights simply as the manifestation of positive rules and as amenable to interpretation using the ordinary canons of legal interpretation. Constitutional positivism perhaps describes better a positivistic approach to constitutional adjudication. According to Dyzenhaus,

> constitutional positivism refers to a family of positions in legal and political theory, many of which are influential in contemporary debates. Members of this family include critics of judicial activism and academics who advocate an enhanced role for legislatures in constitutional interpretation and a diminished role for judges. They tend to see originalism, the idea that there is some original, factually determinable meaning of the constitution that it is the judicial duty to transmit to legal subjects, as a way of disciplining judges in order to confine their activism and diminish their role in legal order.[124]

From the above, one can already discern the distinguishing features of the positivistic approach to the judicial role and constitutional adjudication. First, it places an emphasis on a technical and formalistic approach to legal rules under the assumption that judges do not need to be creative to find the meaning of legal or constitutional provisions. At the core of this positivistic approach is the fundamental belief among positivist legal philosophers that legal interpretation is an act of knowledge – judicial interpretation as a cognitive science – intended to discover, and not to decide, what the meaning of the legal or constitutional provision is.[125] The object of constitutional interpretation is the 'text' of the constitution and can be deciphered easily.[126]

Secondly, the positivistic approach rests on a formal, as opposed to substantive, conception of democracy where judges ought to be

122 L Green & T Adams 'Legal positivism' in EN Zalta (ed) *The Stanford encyclopedia of philosophy* (2019); D Kleyn & others *Beginner's guide for law students* (2018) 15.

123 Hennebel & Tigroudja (n 121) 45; R Kolb *Theory of international law* (2016) 104-107.

124 D Dyzenhaus 'The incoherence of constitutional positivism' in G Huscroft (ed) *Expounding the Constitution: Essays in constitutional theory* (2008) 138.

125 M Troper 'A causal view of judicial interpretation' in Chiassoni & Spaić (n 92) 112; Troper, Gardies & Grzegorczyk (n 94) 155-156. See generally Traoré (n 94) 114-118.

126 Troper (n 125); Troper, Gardies & Grzegorczyk (n 94) 155-156. On the difficulty to identify the object of constitutional interpretation, see SD Smith 'What does constitutional interpretation interpret?' in G Huscroft (ed) *Expounding the Constitution: Essays in constitutional theory* (2008) 36.

deferential to the legislature as the representative of the general will of the people and the sole democratic organ accountable to voters. The counter-majoritarian difficulty is thus seen as abhorrent to the very foundation of representative democracy since the judiciary lacks democratic legitimacy[127] and may lead to what Schmit labelled as the 'juridification of politics' and the 'politicization of the judiciary'.[128]

Thirdly, influenced extensively by Kelsen's *Pure Theory of Law* and normativism, a positivistic approach excludes the resort to non-legal materials during interpretation, particularly those with moral, political, social, ethical and psychological origins, as they are external to the 'science of the law'.[129]

3.4.2 The inadequacy of positivistic interpretation in the African context

There is historical and empirical evidence that a positivistic approach to judicial role, constitutional adjudication and constitutional interpretation may impede the dynamic furtherance of substantive constitutionalism and human rights in Africa.[130] Firstly, a formalistic approach to constitutional interpretation cannot enable apex constitutional jurisdictions to infuse a human rights culture into countries where post-independence and Cold War authoritarianism had enabled founding fathers to enact legislation tailored to suit their whims.[131] A number of constitutions are worded in formalistic terms and provide little guidance to interpreters about the substantive approach they can take.[132] Much legislation which is bill-

127 Currie & de Waal (n 71) 9; Traoré (n 94) 114-115.

128 Grimm (n 97) 214.

129 H Kelsen *Pure theory of law* (2005) 1 (Translation from the second (revised and enlarged) German edition by Max Knight; M Freeman *Lloyds introduction to jurisprudence* (2014) 253; Johnson, Pete & Du Plessis (n 37) 132-133.

130 NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa focus: Twenty years after the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 57.

131 M Wetsh'Okonda Koso Senga *La protection des droits de l'homme par le juge constitutionnel congolais: Analyse critique et jurisprudence* (2016) 83-84.

132 B Kanté 'Préface: L'Etat et la crise postcoloniale en Afrique' in JB Akilimali & TM Makunya (eds) *L'Etat africain et la crise postcoloniale: Repenser 60 ans d'alternance institutionnelle et idéologique sans alternative socioéconomique* (2021) 14; 'Penser la Constitution à partir de ses approches extra-juridiques – Le droit de la Fontaine' https://www.ledroitdelafontaine.fr/penser-la-constitution-a-partir-de-ses-approches-extra-juridiques/ (accessed 23 February 2021).

of-rights unfriendly and which was adopted in the pre-democratisation era is still in force; legislatures are reluctant to repeal it or bring it into alignment with the substantive values of constitutionalism.[133] The adoption of some of this legislation by legislatures controlled by a ruling coalition or appointees of the party-state suggests that without a progressive approach to constitutional interpretation, it is unrealistic to expect the legal regime to reflect constitutional normative values.[134]

Secondly, post-1990 bills of rights and constitutions contain substantive values that need to be honed by a judicial approach that goes beyond a formalistic purview if they (the values) are to take root and grow into a culture of constitutionalism.[135] As is endlessly reiterated, the 'constitutions without constitutionalism'[136] phenomenon has been the hallmark of 'postcolonial statehood in Africa',[137] and so unless the judicial mindset is changed to allow for substantive and creative approaches to adjudication, bills of rights will not be worth the paper they are written on.

Thirdly, as scholars have noted, there is a significant gap between constitutional promises and lived realities in Africa,[138] which means there is need for an approach that empowers the judiciary to begin ensuring that the constitution can keep its socio-political promises. Chanock goes further to suggest that while African constitutions provide for remarkable institutions and rights, these have 'floated meaninglessly above the societies for which they have been designated, until the bubble bursts in outbreaks of violence'.[139]

A study on the implementation of modern-African constitutions supports the case for giving an active role to constitutional jurisdictions. It concludes that most African constitutions, even the most transformative ones, such as the 2010 Kenya and 2013 Zimbabwe constitutions,

133 B Kahombo 'Les modalités d'exercice du recours individuel en inconstitutionnalité en droit positif congolais entre ambiguïté et nécessité de réforme juridiques' (2017) 20 *Recht in Africa – Law in Africa – Droit en Afrique* 143.

134 Wetsh'Okonda Koso Senga (n 131) 85.

135 Kibet & Fombad (n 73) 353.

136 Okoth-Ogendo (n 68); Ghai (n 68) 150.

137 P Dann, M Riegner & M Bönnemann 'The Southern turn in comparative constitutional law' in P Dann, M Riegner & M Bönnemann (eds) *The global south and comparative constitutional law* (2020) 25.

138 M Killander 'The effects of international law norms on constitutional adjudication in Africa' in Fombad (n 11) 222.

139 H Klug 'Transformative constitutionalism as a model for Africa?' in Dann, Riegner & Bönneman (n 137) 150.

encounter serious implementation challenges, with citizens being 'unaware of which of their constitutional rights and obligations remain unfulfilled'.[140] According to the study, the reasons for the lack of implementation include 'ignorance, carelessness and indifference [...] bad faith, mischief or deliberate inaction'.[141] Thus, constitutional jurisdictions cannot remain accomplices to such constitutional regression through passive constitutional interpretation. The need to explicate the ins and outs of constitutions and engage seriously with stakeholders to increase understanding of bills of rights and the obligations they entail, and thereby advance constitutionalism, is more urgent than ever.[142]

Fourth, despite professing to be democracies, African states are often engaged in engineering and re-engineering illiberal practices such as excluding minority parties from decision-making,[143] or 'making, unmaking and remaking'[144] constitutions to suit leaders' personal whims, for example by repealing presidential term limits[145] and tightening electoral laws to exclude competitors.[146] One may also note the persistence of male-domination in politics[147] and the continual shrinking of civic space. Most apex courts adopt formalistic approaches that let them turn a blind eye to constitutional amendments that enable

140 CM Fombad 'Constitutional implementation in perspective: Developing a sustainable normative constitutional implementation framework' in CM Fombad (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016) 221.

141 Fombad (n 140) 218.

142 BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 21-22.

143 *Noudehouenou v Benin* (merits) (2020) 4 AfCLR 749.

144 DF Meledje 'The making, unmaking and remaking of the constitution of Côte d'Ivoire: An example of chronic instability' in CM Fombad & C Murray (eds) *Fostering constitutionalism in Africa (*2010) 119.

145 JR Mangala (ed) *The politics of challenging presidential term limits in Africa* (2020) 28;227.

146 SL Mbaya 'Actualité sur les règles de jeu électoral en République démocratique du Congo: Que savoir de la loi électorale révisée du 24 décembre 2017?' (2019) 2(1) *Revue congolaise d'analyse des politiques et pratiques électorales* 61.

147 J Kamwendo & G Kamwendo 'When exploitation is camouflaged as women empowerment: The case of Joyce Banda as presidential running mate and vice president in Malawi' (2015) 20 *Feminist Africa* 77; V-A Touché 'La situation des femmes en République démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 15-22.

incumbents to maintain their grip on power and reverse gains made in securing the alternation of powers in Africa.[148]

There is thus the necessity to break the chains of 'symbolic constitutionalism' in Africa.[149] Contrary to what Waldron[150] and Grim[151] note, while countries with advanced accountability institutions and a culture of respect for constitutional values among citizens and political leaders may find it appealing to maintain a positivistic approach, the conditions hardly apply in most African countries. For example, the marginalisation of black South Africans through valid laws that enabled the white minority to control the country's political economy and means of productions[152] indicates that a formalistic approach to bill-of-rights interpretation can maintain the *status quo* and impede social justice.[153] Also, 'with hardly any exceptions, African politicians have over the last six decades proven that, if left unconstrained by clear constitutional rules and an effective system of constitutional review, their authoritarian instincts and impulses easily take control of them'.[154]

In view of all this, positivism, alone and in a rigid form, is not suitable for the interpretation of constitutional rights in Africa and the promotion of a culture of rights.

3.5 Canons of constitutional interpretation

In this section, I examine four canons of constitutional interpretation through which judges construe the meaning of constitutional rights provisions, resolve disputes brought before them, and contribute to the development of a culture that promotes human rights. These are

148 Constitutional Court of DRC (2018) Constitutional Court of Burundi (2015) Supreme Court of Uganda (2019) Constitutional Council of Senegal (2012) Constitutional Court of Guinea (2020) Supreme Court of Rwanda (2015). See generally Adjolohoun (n 91) 270-281.

149 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.

150 J Waldron 'The core of the case against judicial review essay' (2005) 115 *Yale Law Journal* 1360.

151 Grimm (n 97) 215.

152 T Mfete 'Neo-liberalism and inequality in post-apartheid South Africa' (2020) 14 *Pretoria Student Law Review* 412; JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300.

153 Klare (n 73).

154 Fombad (n 140) 358.

the textual (3.5.1), contextual (3.5.2), purposive (3.5.3), and generous (3.5.4).

3.5.1 Textual interpretation

The text of the provision to interpret is the starting-point of statutory and constitutional interpretation. It is based on the literal meaning of words.[155] Words can have ordinary or technical meaning.[156] Textual interpretation presupposes that ordinary or technical words have an objective meaning[157] that judges can extract, using grammatical or legal vocabulary independently of judge's 'own ideology and politics'.[158] Judges who apply this method may use the dictionary to determine the meaning of words. A 'positivistic, formalistic and statute-centred' legal system conceives of law as an assemblage of concepts and holds that a dominant ideology should not alter, or be preferred at the expense of, the meaning of constitutional rules.[159] Thus, textual interpretation of the constitution does not take account of the outcome and the practical implications of the interpretation.[160]

It assumes that the role of the court is not to revise or refine constitutional provisions.[161] Judges must follow what the law says, and not what they think the law should say.[162] Most of the time, according to Troper, Grzegorczyk and Gardies, courts resort to textual interpretation to avoid controversy or unnecessary justifications.[163] Some scholars believe that 'the [c]onstitution provides a complex framework for the exercise of state power, a framework with both procedural and

155 M Fromont *Justice constitutionnelle comparée* (2013) 266.
156 RS Summers, M Taruffo & C Grzegorczyk 'Interpretation and comparative analysis' in DN MacCormick & RS Summers *Interpreting statutes: A comparative study* (1991) 469.
157 Summers & Taruffo (n 156) 466; T Campbell 'Grounding theories of legal interpretation' in J Goldsworthy & T Campbell (eds) *Legal interpretation in democratic states* (2002) 31.
158 BJ Murrill 'Modes of constitutional interpretation' (2018) *Congressional Research Service* 6 https://fas.org/sgp/crs/misc/R45129.pdf (accessed 30 May 2019). See also J Goldsworthy 'Legislative intentions, legislative supremacy, and legal positivism' in Goldsworthy & Campbell (n 157) 47-48.
159 Fromont (n 155) 267; Troper, Gardies & Grzegorczyk (n 94) 182.
160 Christie (n 7) 81.
161 JL Hiebert 'Governing like judges?' in T Campbell and others (eds) *The legal protection of human rights: Sceptical essays* (2011) 48.
162 Campbell (n 157) 31.
163 Troper, Gardies & Grzegorczyk (n 94) 182.

substantive elements', and that its formulation is generally abstract and open-ended.[164]

Critics of textual interpretation argue that the method does not explain how competing values or rights should be construed or how to solve linguistic or textual ambiguities.[165] Bill-of-rights provisions may have axiological meaning that cannot be extracted merely by searching for the ordinary or technical meaning of terms such as 'dignity', 'equality' and 'freedom'. If judges are willing to give effect to rights, they might thus consider linking the text of the provision with its context.

3.5.2 Contextual interpretation

To cure some shortcomings of the textual approach and achieve a sound interpretation, Driedger suggests, '[the] legislative text, the words to be interpreted must be read in their entire context'.[166] This includes the immediate but also the larger context (the legal instrument as a whole, other legislation, the legal system and social, economic and political conditions in which the provision and the instrument to be interpreted operate).

Two types of contexts should be distinguished: the internal legal context and the external social, political, economic, cultural and ideological context. They all contribute to concretising the meaning of constitutional provisions. The notion of internal legal context assumes that the constitution is a well-structured system wherein provisions are in harmony among themselves and with constitutional values and principles.[167] This context may include legal rules external to the constitution but recognised as part of municipal law, such as international human rights law.[168] A bill-of-rights provision should be construed on the basis of its position within the system and with due regard to other rights in the system.[169] Constitutional provisions are interdependent, as are human rights.[170] The one cannot be construed in isolation from the

164 Currie & de Waal (n 71) 135-136.
165 Murrill (n 158) 6.
166 R Sullivan *Statutory Interpretation* (2007) 128.
167 Troper, Gardies & Grzegorczyk (n 94) 182.
168 Sullivan (n 166) 130.
169 Fromont (n 155) 267; Troper, Gardies & Grzegorczyk (n 94) 182.
170 Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

other.[171] Interpreters who apply this method may consider constitutional values and principles.

The internal legal context can help the interpreter determine the scope and extent of relevant state and state organs' obligations regarding the realisation of a right.[172] For example, some countries establish national electoral commissions to organise elections and vest in governments and parliaments the duty to finance their operations and adopt enabling legislation. The failure of the government or parliament to do so may affect the ability of the electoral commission to organise elections and lead to the violation of the right to vote. Understanding the structure of the state and the scope of duties of each institution may allow the judge to decide who among the electoral commission, government or parliament, as state organs, violated the bill of rights.[173] Fromont points out that this approach, along with purposive interpretation, enables judges to construe broadly the meaning of the constitutional provision by allowing its purport and spirit to trump its letters.[174]

Due regard must also be given to the external legal context, which pertains to the 'original setting' or the 'operational context'.[175] The former helps interpreters understand the context within which the constitution, the constitutional provision and the right to be interpreted were adopted, while the latter obligates the interpreter to consider the social, political, economic, cultural and ideological contexts in which the constitutional and the bill of rights operate.[176] In fair-trial- and due-process-related proceedings where an individual is prosecuted for specific crimes, for example rape or murder, the reasons for which such

171 Fromont (n 155) 267.
172 See generally C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 230.
173 For example, Sachs J in *Arnold Keith August and Another v The Electoral Commission and Others* 1999 (3) SA 363 (CC) para 33 argued that '[p]arliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require either the Commission or this Court to decide which categories of prisoners, if any, should be deprived of the vote and which should not. The [Electoral] Commission's duty is to manage the elections, not to determine the electorate; it must decide the how of voting, not the who. Similarly, the task of this Court is to ensure that fundamental rights and democratic processes are protected'.
174 Fromont (n 155) 269.
175 Sullivan (n 166) 130.
176 As above.

crimes were penalised and the sanctions attached to them may be used as contextual elements for the purpose of interpretation.

Ultimately, history will be an important material to resort to in order to bridge the gap between the present and the past. Its open-endedness, however, means that 'history' must be approached carefully to ensure that we do not make it say what it does not and that it is not used to maintain the *status quo ante*, that is, in a manner that prevents the constitution and the bill of rights from adjusting to present conditions as a 'living document'.[177]

3.5.3 Teleological or purposive interpretation

Each right has its purpose or function within a constitutional system. Purposive constitutional interpretation requires interpreters to determine and give effect to such a purpose. According to Barak, the purpose of the law is 'to ensure the normal social life of the community on the one hand, and human rights, equality, and justice on the other'.[178] Barak argues that 'if a statute is a tool for realizing a social objective, the interpretation of the statute must be done in a way that realises this social objective'.[179]

However, identifying the purpose may be as difficult as finding the meaning of a right. The purpose of a constitutional provision may be subjective, meaning it is that which drafters of the constitution sought the right should achieve. The intent of the framer must then guide the interpreter when seeking to retrieve subjective purpose. Another type of purpose commonly preferred in constitutional interpretation is one which is objective and can be construed without due regard to the framers' intent.[180] Objective purpose suggests that drafters of the constitution sought to achieve social change through constitutional means.[181]

The tools which the interpreter can use to ascertain the purpose encompass the 'language chosen to articulate the specific right or

177 P de Vos 'A bridge too far – History as context in the interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.
178 A Barak 'Constitutional interpretation' in F Melin-Soucramanien (ed) *L'interprétation constitutionnelle* (2005) 401.
179 As above.
180 Currie & de Waal (n 71) 137; Troper, Gardies & Grzegorczyk (n 94) 183.
181 Summers, Taruffo & Grzegorczyk (n 156) 469.

freedom, [...] the historical origins of the concept enshrined, and, where applicable, [...] the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Bill of Rights'.[182] Purposive interpretation involves value judgment and, as Mahomed CJ argues, interpreters should look into 'norms, aspirations, expectations and sensitivities of the [...] people'[183] to objectively identify the required value.

3.5.4 Generous interpretation

In this method, judges construe the meaning of the right to accord broad protection to individuals. The method stands at odds with a literal, legalistic and narrow construction of the right. Courts seldom resort to generous interpretation because it may entail that the meaning of the text is disregarded. Judges that face the dilemma of competing values and purposes of rights might find the generous interpretation useful because it allows them to adopt the value which protects individuals the most.[184] This method is recommended in instances where the effect of the choice of other values or purposes would be to deny the benefit of the right to individuals.[185]

As discussed in chapter 6, these canons of constitutional interpretation are mobilised by constitutional jurisdictions across legal traditions, either individually or in combination with other interpretive canons. Their use therefore varies depending on the context within which a court operates, the nature and significance of the case under adjudication, the scope and framing of the arguments advanced by the parties, and the judges' particular judicial philosophies. Differences between legal traditions constitute only one among several explanatory factors. That said, the extent to which a given canon of constitutional interpretation is employed may vary considerably from one court to another. The South African Constitutional Court, for instance, has relied on a wide range of interpretive materials to support purposive and contextual interpretation, while the use of similar canons by the Constitutional

182 N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2017) 123. See also Fromont (n 155) 280. *R v Big M Drug Mart Ltd*, Supreme Court of Canada (1986) LRC (Const) 332 at 364.
183 Currie & de Waal (n 71) 137.
184 As above.
185 Currie & de Waal (n 71) 139.

Courts of the DRC and Benin has generally not required recourse to an equally extensive body of non-legal materials.

4 Contribution of the book

This book addresses an important yet often overlooked aspect of constitutional adjudication of fundamental rights and freedoms in Africa: the interpretation of human rights by constitutional courts operating within different legal traditions, and their capacity to foster a culture that promotes human rights through interpretation. Despite growing academic interest in comparative constitutional studies in Africa,[186] constitutional adjudication[187] including analyses of specific constitutional courts such as those of the DRC,[188] Benin,[189] and South

186 R Dixon, T Ginsburg & AK Abebe (eds) *Comparative constitutional law in Africa* (2022); C O'Regan 'The political paradox of African constitutionalism revisited: Kenya's BBI case' in Khosla & Jackson (n 97) 224-241; Fombad (n 66); CM Fombad & N Steytler (eds) *Decentralisation and constitutionalism in Africa* (2019); CM Fombad & N Steytler (eds) *Corruption and constitutionalism in Africa* (2020); CM Fombad & N Steytler (eds) *Constitutionalism and the economy in Africa* (2022); CM Fombad & N Steytler (eds) *Constitutional identity and constitutionalism in Africa* (2024); CM Fombad & N Steytler (eds) *Constitutional change and constitutionalism in Africa* (2025).

187 Fombad (n 11); Roux (n 69) 104; R Gargarella, P Domingo & T Roux *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) FJ Aïvo, J du Bois de Gaudusson & J Maïla (eds) *L'amphithéâtre et le prétoire au service des droits de l'homme et de la démocratie* (2020); Aïvo (n 62); Wetsh'Okonda Koso Senga (n 131); Fowkes (n 69); MS Kende *Constitutional rights in two worlds: South Africa and the United States* (2009); Kibet & Fombad (n 73) 340. See generally W Sadurski *Rights before Courts: A study of constitutional courts in Postcommunist states of Central and Eastern Europe* (2014) 145-165; Klug (n 139) 150; SH Adjolohoun 'Made in courts' democracies? Constitutional adjudication and politics in African constitutionalism' in Fombad (n 11) 281-284.

188 JPM Mvumbi-di-Ngoma *La justice constitutionnelle en République démocratique du Congo: Aperçu sur la compétence de la Cour constitutionnelle et la procédure devant cette haute cour* (2017); B Kahombo 'L'originalité de la Cour Constitutionnelle congolaise: Son organisation et ses compétences' (2011) 6 *Librairie d'Etudes Juridiques Africaines* 5; Kahombo (n 133) 118; Wetsh'Okonda Koso Senga (n 131); DK Dibwa 'Le constitutionnalisme congolais: de la démocratie électorale à la démocratie constitutionnelle' (2011) http://www.la-constitution-en-afrique.org/article-de-la-democratie-electorale-a-la-democratie-constitutionnelle-54494472.html (accessed 12 May 2018); M Wetsh'Okonda Koso Senga 'La protection des droits de l'homme par le juge congolais: Essai d'analyse critique de la juridiction et de sa jurisprudence (2003-2013)' (2015) unpublished LLM dissertation prepared at the Université de Kinshasa (on file with the author); D Pollet-Panoussis 'La Constitution congolaise de 2006: Petite sœur africaine de la constitution française' (2008) 75 *Revue francaise de droit constitutionnel* 465; BO Tongomo 'Le contrôle

Africa,[190] constitutional interpretation,[191] as well as in legal traditions and

juridictionnel de l'administration et l'état de droit en République démocratique du Congo' (2012) 277, unpublished doctoral thesis at the Université de Kinshasa and Universté de Liege (on file with the author); AN Mulagano 'Les modes alternatifs de règlement des conflits: À la recherche d'une clé d'accès à la justice administrative' (2014) unpublished doctoral thesis at the Université catholique de Louvain (on file with the author); PGN Nkoy-ea-Loongya 'Le contrôle de constitutionnalité en République démocratique du Congo: Étude critique d'un système de justice constitutionnelle dans un État à forte tradition autocratique' (2008) unpublished doctoral thesis at the Université catholique de Louvain (on file with the author).

189 AL Sidi 'La présidence de la mandature Pognon ou les origines du pragmatisme du juge constitutionnel dans la protection des droits fondamentaux' in ID Salami (ed) *Les fondations de la justice constitutionnelle: Études en l'honneur de Madame Elisabeth K. Pognon et de la première mandature (1993-1998)* (2021) 191-216; FJ Aïvo, J du Bois de Gaudusson & J Maïla *L'amphithéâtre et le prétoire au service des droits de l'homme et de la démocratie* (2020); Aïvo (n 188); Adjolohoun (n 2); SH Adjolohoun 'Centralised model of constitutional adjudication: The Constitutional Court of Benin' in Fombad (n 11) 51-68; T Holo 'Handling of petitions by the Constitutional Court of Benin' in Fombad (n 11) 317; D Degboe 'Les vicissitudes de la protection des droits et libertés par la Cour constitutionnelle du Bénin' (2016) 10 *Les annales de droit* 119.

190 D Moseneke *All rise: A judicial memoir* (2020) 61-265; Moseneke (n 89); Cameron (n 89) 7-10; L Ackerman *Human dignity: Lodestar for equality in South Africa* (2012); Currie & de Waal (n 71) 133-149; Mbazira (n 172) 8-10; M Cosser and others 'Introduction' in M Cosser and others (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 1-25; N Bohler-Muller and others 'Breaking the chains of discrimination and forging new bonds: The extraordinary journey of Justice Yvonne Mokgoro' in M Cosser and others (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 103-125; N Ndlovu & M Omino 'The functional constitutionalism of Justice Thembile Skweyiya' in M Cosser and others (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 185-205; C Rautenbach 'Exploring the contribution of Ubuntu in constitutional adjudication – Towards the indeginisation of constitutionalism in South Africa?' in Fombad (n 11) 293-312; JZM Yacoob 'Reflections of a retired judge' in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 607-614; Langa (n 111) 351-356; E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31-48; A Klaasen 'Constitutional interpretation in the so called 'hard cases': Revisiting *S v Makwanyane*' (2017) 50(1) *De Jure* 10; Sachs (n 89) 47-269; W le Roux 'Descriptive overview of the South African Constitution and Constitutional Court' in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 135-175; S Ellmann *Arthur Chaskalson: A life dedicated to justice for all* (2019) 614-679.

191 GC Christie *Philosopher Kings? The adjudication of conflicting human rights and social values* (2011); L Alexander and Emily Sherwin *Demystifying legal reasoning* (2008); C Gearty *Principles of human rights adjudication* (2004) 33-36; A Scalia *A matter of interpretation* (1997); Kibet & Fombad (n 87) 341; EK Quansah & CM Fombad 'Judicial activism in Africa: Possible defence against authoritarian resurgence' (2007) https://ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf (accessed 27 October 2021); IG Shivji 'Contradictory developments in the teaching and practice of human rights law in

their colonial legacies,[192] much of the existing literature does not engage with the central focus of this book, nor does it adopt similar comparative methodologies. Current scholarship rarely compares the interpretive methods applied to bills of rights across common law and civil law traditions, nor does it draw conclusions from such comparisons about the advancement of a human rights culture. This is the primary focus and key contribution of the present study to comparative constitutional law: it not only engages substantively with the constitutional interpretation of fundamental rights by three African constitutional courts but also addresses the methodological dimensions of comparative constitutional law in Africa, offering lessons for promoting a human rights culture.

In doing so, the book transcends what might be termed 'monological' comparative constitutional analyses,[193] those that limit comparisons to constitutional objects within a single legal tradition. Instead, it offers dialogical, cross-tradition insights that help scholars, practitioners,

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Tanzania' (1992) 18 *Commonwealth Law Bulletin* 1151 & 1158; NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracy' (2005) 6 *African Human Rights Law Journal* 51; C McCrudden 'Using comparative reasoning in human rights adjudication: The Court of Justice of the European Union and the European Court of Human Rights compared' (2013) 15 *Cambridge Yearbook of European Legal Studies* 383-415.

192 CM Fombad *The Botswana legal system* (2013) 21; 196 & 200; M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in Killander (n 130) 4-11; CM Fombad 'An overview of contemporary models of constitutional review in Africa' in Fombad (n 11) 18-47; CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25(2) *Boston College Third World Law Journal* 302-338; J Fowkes & CM Fombad 'Introduction' in CM Fombad (ed) *The separation of powers in African constitutionalism* (2016) 1-9; G Jessup 'Symbiotic relations: Clinical methodology – Fostering new paradigms in African legal education' (2002) 8 *Clinical Law Review* 382-387; K Quashigah 'Justice in the traditional African society within the modern constitutional set-up' (2016) 7(1) *Jurisprudence: An International Journal of Legal and Political Thought* 99; M Böckenforde 'Introduction' in M Böckenforde and others *Les juridictions constitutionnelles en Afrique de l'Ouest: Analyse comparée* (2016) 19; Fombad (n 66) 13-52; B Kanté & HK Prempeh 'Les autres attributions des juridictions compétentes en matière de contrôle de constitutionnalité' in M Böckenforde and others *Les juridictions constitutionnelles en Afrique de l'Ouest: Analyse comparée* (2016) 112-121; SM Mitchell and others 'Domestic legal traditions and states' human rights practices' (2013) 50(2) *Journal of Peace Research* 190-192; LC Keith & A Ogundele 'Legal systems and constitutionalism in sub-Saharan Africa: An empirical examination of colonial influences on human rights (2007) 29 *Human Rights Quarterly* 1069-1071.

193 See, for an illustration, H Corder 'Regulating the exercise of public power through law: a first glance at comparative administrative law/justice in Africa' in Dixon, Ginsburg & Abebe (n 186) 216-242. For an exploration of concepts of 'monological' and 'dialogical' comparison in Africa, see Makunya (n 78).

judges, and regional and international human rights bodies understand how and why similar human rights provisions may be interpreted differently, why some constitutional courts succeed or fail in their role of regulating or humanising politics, and what theoretical and practical justifications exist for sustained intra-African engagement aimed at enhancing the quality of human rights protection beyond inherited legal traditions. Since human rights ideals, values, and norms constitute key benchmarks for assessing African states' commitment to Pan-Africanism and regional integration, understanding how constitutional courts contribute to fulfilling these aspirations is essential. This book seeks to do just that.

5 Key concepts

This section clarifies the meaning of 'constitutional culture' and 'human rights culture', (5.1) on the one hand, and 'legal culture', (5.2) 'legal tradition and legal family' (5.3) and 'legal system', (5.4) on the other. These concepts are invoked frequently in this book.

5.1 Constitutional culture and human rights culture

In modern constitutionalism, constitutional and human rights culture are interrelated given the foundational place of human rights in constitutionalism today. Constitutional culture 'refers to a people's legal knowledge of the constitutional text governing their country'.[194] According to Harutyunyan, constitutional culture is 'a historically formed sustainable value system of convictions, perceptions, and legal awareness, enriched by the experience of generations, which constitutes the basis for the social community in the process of establishing and guaranteeing, through public accord, of the fundamental rules of democratic and lawful behavior'.[195] It is 'an expression of the attitude of the members of the public towards law, statute, the authorities, the state and to legal norms and constitutional principles'.[196]

194 HM Rafsandjani 'La culture constitutionnelle dans les États d'Afrique francophone: Le paradoxe du peuple constituant' (2020) 123 *Revue francaise de droit constitutionnel* 614.

195 G Harutyunyan *Constitutional culture: The lessons of history and the challenges of time* (2009) 36; 29.

196 Harutyunyan (n 195) 29.

The concept of a 'culture of rights' or 'human rights culture' refers to collective and individual attitudes, bahaviours and actions aimed to ensure respect of basic entitlements accrued to individuals by virtue of being human and to defend them through institutional and extra-institutional means. Eduardo Caceres argues that

> a culture of rights promotes the construction of societies in which the intrinsic dignity of human beings is recognised, along with a notion of justice that tolerates neither impunity nor the extremes of inequality and exclusion [...]. In this way, a culture of rights perspective confronts authoritarian conceptions of the state and society, as well as perspectives that reduce society to the market and interpersonal relations to contracts meant only to guarantee private benefit.[197]

According to Nash,

> a human rights culture is one in which values of both solidarity and diversity are shared, in which individual freedom, and therefore minority rights, are respected, but in which democratic decisions arrived at by majority voting and taken with such considerations in mind are accepted as binding and legitimate. A human rights culture should bring elites and people together in a celebration of common values such that it is rarely necessary to subject democratic decisions to damaging judicial review, nor for citizens to take public authorities to court, because the basics of human rights are what guide public policy-making and legislation.[198]

For some scholars, the mere recognition and protection of fundamental rights and freedoms through an enforceable bill of rights may entail the existence of a human rights culture.[199] In *State v Makwanyane*, Langa J defines a culture of rights as the ability of individuals 'to respect rights not only of the weakest, but also of the worst among us',[200] as well as to respect 'human life and dignity based on values reflected in the constitution'.[201]

Due regard must be given to the substantive nature of human rights (substantive equality and substantive justice) in order to transcend the formalism and technicalities often invoked by those who wield powers and judges and which hinder in effect the protection of rights. In

197 E Caceres 'Building a culture of rights' 25 September 2007 https://nacla.org/article/building-culture-rights (accessed 20 April 2021).
198 K Nash 'Human rights culture: Solidarity, diversity and the right to be different' (2005) 9 *Citizenship Studies* 337.
199 J Sarkin 'The development of a human rights culture in South Africa' (1998) 20 *Human Rights Quarterly* 634.
200 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 229.
201 *Makwanyane* (n 200) para 222.

addition, to borrow from Mureinik, the shift from a 'culture of authority' to a 'culture of justification', which demands that constitutionalism shields individual citizens from arbitrariness and tyranny, is an integral part of a human rights culture.[202] The burden of advancing this culture lies, among others, on the judiciary and constitutional jurisdictions as well as the legal community and citizens affected by unfriendly human rights actions and omissions.

5.2 Legal culture

Church and his colleagues define legal culture as a body of 'attitudes and ideas held by some part of the public and which are affected by events and situations in the society as a whole and which in turn lead to actions that have an impact on the legal system itself'.[203] Legal culture can be viewed as a sub-category of culture, which itself means 'the way of life of people' but it is better defined by considering the behaviour and awareness of people.[204] For Friedman, legal culture includes elements of legal reasoning (internal legal culture) and the expectations of persons with regard to what the law is or might provide (external legal culture).[205] Nelken suggests that legal culture encompasses both culture generally, including the way people behave and express their attitudes in regard to the law, and the institutional patterns pertaining to the role of lawyers and judges, their appointment procedures, and legal 'values, aspirations and mentalities'.[206] There may exist different legal cultures in one country (from town to town), a temporal legal culture from a certain period to another period,[207] and different legal cultures from one legal domain (constitutional law, economic law, mercantile law, etc.) to another.

From the foregoing, legal culture encompasses legal institutions as well as moral, philosophical, social and political behaviours and attitudes toward the law. It includes elements of the legal tradition and legal system. Legal tradition focuses on rules and historical events that have

202 Mureinik (n 190) 32; Dyzenhaus (n 124) 13.
203 J Church, C Schulze & H Strydom *Human rights from a comparative and international law perspective* (2007) 26-27.
204 Church, Schulze & Strydom (n 203) 26.
205 D Nelken 'Disclosing/invoking legal culture: An introduction' (1995) 4 *Social and Legal Studies* 437.
206 D Nelken 'Using the concept of legal culture' (2004) 29 *Australian Journal of Legal Philosophy* 1.
207 Klare (n 73) 167.

shaped the formation of legal systems. Both the legal tradition and legal system can be influenced by legal culture. Similarly, legal tradition and the legal system can influence the formation of a particular legal culture.

5.3 Legal tradition and legal family

Merryman defines legal tradition as a

> set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of the law in the society and the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.[208]

The following observations can be made. First, a legal system is part of both legal tradition and legal culture. Different countries (legal systems) may share similar legal traditions. For example, the legal systems of Benin, Côte d'Ivoire and Senegal belong to the civil law legal tradition, while those of Ghana, Kenya, The Gambia and Malawi belong to the common law legal tradition. Secondly, there is little difference between legal tradition and legal family. The particularity of a family of law, as Church and his colleagues demonstrate, resides in the fact that legal systems share a communal ancestry.[209] Thus, countries that are generally classified as part of the common law legal family have their ancestral roots in the English legal system, while those of the civil law family have theirs in Roman Law.[210]

Legal traditions 'ascribe authority to particular texts and have both long-established rules of interpretation and an authoritative community of interpretation'.[211] In fact, 'their sources of law [...] their characteristic mode of thought in legal matters, their distinctive legal institutions (and judicial, executive and legislative structures) and their fundamental legal ideology'[212] are elements one may look at to distinguish legal traditions. For the purposes of this book, 'legal family' and 'legal tradition' are used interchangeably.

208 Merryman (n 16) 2.
209 Church, Schulze & Strydom (n 203) 27.
210 As above.
211 G Mousourakis *Roman law and the origins of the civil law tradition* (2014) 134.
212 PD Cruz *Comparative law in a changing world* (1999) 43.

5.4 Legal system

The legal system is an 'operating set of legal institutions, procedures and rules' at the national level.[213] These institutions, procedures and rules may be influenced both by the legal traditions to which national legal systems belong and by local historical, socio-political and economic conditions. For example, while the 1960 DRC Constitution established a constitutional court, a model it borrowed from Belgium, local conditions did not allow for its effective establishment.[214] The Court was later incorporated into the Supreme Court of Justice as one of the three chambers for financial and human resource deficits.

Legal procedures and rules may also vary from legal system to legal system. Whilst the Benin and DRC Constitutional Courts can be approached by individual petitioners,[215] the latter are not allowed to approach the Constitutional Councils of Senegal[216] and Côte d'Ivoire[217] directly. Similarly, although the Constitutions of South Africa,[218] Kenya[219] and Zimbabwe[220] contain a bill-of-rights interpretive clause, the constitutions of Nigeria, Ghana and The Gambia do not. These few examples highlight the efforts that the drafters of constitutions can make to ensure that their legal systems are adjusted to local conditions and respond to specific problems. Merryman observes that in 'a world organised into sovereign states and organisations of states, there are as many legal systems as there are such states and organisations'.[221]

213 Merryman (n 16) 1.
214 The 1960 Constitution of DRC established a constitutional court, but the Belgian Council of State was empowered to perform its functions temporarily. The 1964 Constitution conferred these powers on the Court of Appeal of Kinshasa. The Constitutional Amendment Act 74-020 of 15 August 1974 transferred definitively constitutional powers to the Supreme Court of Justice in a shift from an autonomous constitutional jurisdiction staffed with its special judges to a chamber within the Supreme Court of Justice.
215 Arts 3(3) & 122 of the 1990 Constitution of Benin and art 162(2) of the 2006 Constitution of DRC.
216 See arts 89-94 of the 2001 Constitution of Senegal.
217 Art 135 of the 2016 Constitution of Côte d'Ivoire.
218 Sec 39 of the 1996 Constitution of South Africa.
219 Sec 20(4) of the 2010 Constitution of Kenya.
220 Sec 46 of the 2013 Constitution of Zimbabwe.
221 Merryman (n 16) 1.

6 Comparative constitutional law approaches

In this section, I start by clarifying methodological approaches this book uses (6.1) before explaining the rationale behind the choice of the Constitutional Courts of Benin, the DRC and South Africa as case studies (6.2) and the selection of the three rights for comparative purposes (6.3).

6.1 Three courts, one purpose: Justifying the case studies

This book is essentially comparative. It uses the historical, functional, structural, analytical and contextual methods of comparative law.[222] The object of analysis of the five methods (rules, effects of rules, environment of the law and legal institutions) is consistent with the aim, purpose and the questions this book addresses.

222 See generally E Lambert 'Conception générale, definition, méthode et histoire du droit comparé: Le droit comparé et l'enseignement du droit' (1905) *Excerpt of minutes and documents of the 1990 Congress on Comparative Law published by the Librairie générale de droit et de jurisprudence* (LGDJ) 47-48 http://idcel.univlyon3.fr/fileadmin/medias/Documents_IDCEL/Fonds_numerise/Ecrits_d_Edouard_Lambert/1905_conception_generale__def__methode_droit_compare.pdf (accessed 1 May 2018); B Jaluzot 'Méthodologie du droit comparé: Bilan et prospective' (2005) 57(1) *Révue internationale de droit comparé* 36; EJ Eberle 'The method and role of comparative law' (2009) 8(3) *Washington University Global Studies Law Review* 456-457; K Zweigert & H Kötz *An introduction to comparative law* (1998) 3; G Samuel *An introduction to comparative law theory and method* (2014) 30; J Hage 'Comparative law as method and the method of comparative law' in M Adams & D Heirbaut (eds) *The method and culture of comparative law: Essays in honour of Mark Van Hoecke* (2014) 44; S Rozmaryn 'Etude comparative des cas administratifs concrets' (1967) 19(2) *Revue internationale de droit comparé* 422; B Markesinis 'Unité ou divergence: À la recherche des ressemblances dans le droit européen contemporain' (2001) 53(4) *Révue internationale de droit comparé* 810-813; R Michaels 'The functional method of comparative law' in *The Oxford handbook of comparative law* (2006) 345; M van Hoecke 'Methodology of comparative legal research' (2011) https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001 (accessed 19 May 2018); PI Bhat 'Comparative method of legal research: Nature, process and potentiality' (2015) 57(2) *Journal of the Indian Law Institute* 146; B Markesinis & J Fedtke *Engaging with foreign law* (2009) 7-15; R David & C Jauffret-Spinosi *Les grands systèmes juridiques contemporains* (1992) 12 quoted in B Jaluzot 'Méthodologie du droit comparé: Bilan et prospective' (2005) 57(1) *Révue internationale de droit comparé* 39; CN Okeke 'Methodological approaches to comparative legal studies in Africa' in S Mancuso & CM Fombad (eds) *Comparative law in Africa: Methodologies and concepts* (2015) 46; S Mancuso 'Comparative law in the African context' in S Mancuso & CM Fombad (eds) *Comparative law in Africa: Methodologies and concepts* (2015) 21-23; VG Curran 'Cultural immersion, difference and categories in US comparative law' (1998) 46 *American Journal of Comparative Law* 51.

These methods are mobilised harmoniously in this study. The historical method is used to understand the historical formation and development of legal traditions in Africa and the historical, political and economic factors that influenced the formation of constitutional courts, approaches to bills of rights and constitutional interpretation of bills of rights in Benin, the DRC and South Africa. In turn, the contextual method is used to place the recognition and protection of human rights, the establishment of constitutional courts and methods of constitutional interpretation used by the courts in their legal, political, economic, social and cultural context. The functional method is used to understand, at the micro level, the effects or impact of the chosen methods of constitutional interpretation on the promotion of a human rights culture in Benin, the DRC and South Africa. The structural or systemic method is used to understand approaches to bills of rights (meaning, nature and scope of rights) and the obligations of state and non-state actors *vis-à-vis* individual rights. The analytical method in this book focuses on the arrangement of rights in bills of rights to understand whether their formulation and interconnection with others provide sufficient protection and ground for the courts to conduct its interpretation properly and promote a culture of human rights.

The research conducts the comparison both at the macro level (legal traditions, legal systems and legal *mentalités*) and the micro level (constitutional courts and constitutional interpretation of bills of rights) to uncover relevant influences on the nature, meaning and scope of constitutional adjudication of fundamental rights, the interpretation of human rights and the extent to which courts attempt to enhance a culture promotive of human rights within the mandate conferred on them.

In addition to the comparative approach, this book combines doctrinal (positivistic or black-letter law) and non-doctrinal (socio-legal) approaches.[223] These approaches are chosen based on their ability to provide a comprehensive understanding of legal traditions in Africa, legal systems under study, constitutional courts and bills of rights. The doctrinal approach is used to primarily analyse the content and scope of constitutional rules organising the powers and competences of

223 See for the discussion K Mohamed 'Combining methods in legal research' (2016) 11(21) *Social Sciences* 5191-5198; O Corten *Méthodologie du droit international public* (2024) 23-31.

constitutional courts covered in this book and of the legislative rules governing procedures before them.[224] It also makes it possible to assess the content, nature and scope of provisions of bills of rights as well as the provisions of legislative acts adopted to implement or give effect to constitutional rights. It is worth mentioning that provisions of international human rights treaties duly ratified by Benin, the DRC and South Africa are also analysed.

The doctrinal approach is also used in the analysis of the meaning, scope and significance of judgments and decisions rendered by the Constitutional Courts of Benin, the DRC and South Africa as well as in deciphering the normative content of judgments and decisions of regional human rights bodies such as the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights.

The non-doctrinal (socio-legal) approach is used to place legal traditions, legal systems, constitutional courts, bills of rights, constitutional rights litigation and judgments of various constitutional courts in their social, historical, political and cultural context.[225] In other words, this method is used to place doctrinal materials in the context within which they operate in order to move beyond formalism, connect constitutonal rights to lived realities across African countries, and to explain the implications of various interpretive approaches on the promotion of human rights culture.[226]

From a doctrinal point of view, the legal materials cited above are used as primary data while articles published in academic journals, case commentaries, books, encyclopaedias and law reports are used as secondary data. From the socio-legal approach, this book relies mainly on secondary data consisting of, among others, reports from state entities and non-governmental organisations, online news paper and blogs.

224 H Bouillon *La technique juridique: Essai* (2016) 29; B Barraud *La recherche juridique: Sciences et pensées du droit* (2016) 70-71.

225 Barraud (n 224) 111-113.

226 I have been particularly influenced by legal realism and critical legal studies, among other socio-legal schools of thought.

6.2 Benin, the DRC and South Africa as case studies

This book uses Benin, the DRC and South Africa as case studies.[227] The three countries present similarities and differences. South Africa and Benin have two of the most longstanding and generally acclaimed constitutional courts in Africa,[228] both of which were established after a protracted period of authoritarianism. Although they operate in different legal and political contexts, the two courts started to function in the early 1990s based on constitutions that break with a culture of authority. These constitutions contain enforceable bills of rights that constitutional courts have used to prevent, in South Africa, the return of the ghost of three centuries of colonialism, racial segregation and apartheid, and, in Benin, to ensure that the country is not plunged back into its 30 years of dictatorship and instability.[229]

The DRC Constitutional Court is relatively younger than these two 'baobabs'. However, its establishment is part of the general political and global context that led to the creation of constitutional courts in Africa.[230] Whilst the establishment of a constitutional court in the DRC was envisaged in the independence Constitution of 1960, a constitutional court was established in effect only under the 2006 DRC Constitution. Like the Constitutional Courts of Benin and the South Africa, the DRC Constitutional Court operates under a 'revolutionary' constitution.[231] It forms part of the judiciary, to which the 2006 DRC Constitution confers the mandate to protect fundamental rights.[232] This Constitutional Court has been operational since only 20 years compared to the Constitutional Courts of Benin and South Africa which have been active for over 30 years now. The comparison is, however, based on the merit or substance

227 See generally R Hirschl *Comparative matters: The renaissance of comparative constitutional law* (2014) 256-260; R Hirschl 'The question of case selection in comparative constitutional law' (2005) 53(125) *American Journal of Comparative Law* 142.

228 AM Mbata 'Constitutionalisme, constitutions et limitation des pouvoirs et des mandats présidentiels en Afrique' in Aïvo (n 62) 735.

229 T Holo 'Preface' in G Badet *Les attributions originales de la Cour constitutionnelle du Benin* (2013) 9-10.

230 B Kante 'Models of constitutional jurisdiction in Francophone West Africa' (2008) 3 *Journal of Comparative Law* 158-160.

231 G Bakandeja wa Mpungu 'The new Constitution of the Democratic Republic of Congo: Sources and innovations' in CM Fombad and C Murray (eds) *Fostering Constitutionalism in Africa* (2010) 154-155.

232 Art 150(1) of the 2006 Constitution of DRC. See also Judgment R.Const. 469 of 26 May 2017.

of judgments delivered by each of the three Constitutional Courts. The comparison of the structure of each court, judges' interpretive approaches, their (judges) ability to explain the content and scope of constitutional rights, and the comparison of the meaning, nature and scope of the bills of rights are not necessarily influenced by the longevity of a constitutional court.[233]

The Benin, DRC and South Africa's Constitutional Courts have produced a wealth of jurisprudence interpreting the nature, the scope of rights as well as the guarantees that constitutions offer against unconstitutional practices.[234] Owing to the fact that the jurisprudence produced by the Benin and the South African Constitutional Courts is generally acclaimed in constitutional literature, understanding how courts operating within different legal traditions enhance the quality of human rights protection is important.

The Benin and South African Bills of Rights provide an additional basis for comparison. The Benin Constitution, unlike other civil law constitutions, explicitly provides that the rights contained in the African Charter on Human and Peoples' Rights form part of it.[235] The Benin Constitutional Court uses both the Bill of Rights and the African Charter to ascertain the violation of rights.[236] An analysis of decisions by the Benin Constitutional Court would shed light on how the African Charter contributes to the protection of human rights in Benin. As for the South African Bill of Rights, it contains several features that require detailed analysis to gauge whether they enable the Constitutional Court to protect individual rights effectively. These include the explicit indication of its horizontal and vertical application, an explicit status of the Bill of Rights as a 'cornerstone of democracy', the existence of limitation and interpretive clauses, and the possibility for individuals to approach the Constitutional Court for public interest litigation.[237]

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233 Despite the longevity of the United States Supreme Court, many scholars have compared its jurisprudence with that of the South African Constitutional Court which is younger. See for example Kende (n 187) 8-10. Also, see various chapters in A Jakab, A Dyevre & G Itzcovich *Comparing constitutional reasoning* (2017) comparing various courts of different ages.

234 See the discussion in chapter 4, 5 & 6.

235 Art 7 of the 1990 Constitution of Benin. See generally TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in Viljoen and others (n 105) 468.

236 A Tanoh & H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in Killander (n 193) 118.

237 Secs 7, 8, 36, 38 & 39 of the 1996 Constitution of South Africa.

The design of the DRC Constitutional Court is also unique among civil law constitutional jurisdictions in Africa. An office of the Prosecutor General operates operates alongside the Court,[238] while the Act regulating the Constitutional Court empowers Constitutional Court judges to write separate dissenting or concurring opinions.[239] These two features make the DRC Constitutional Court unique among its African civil law counterparts. Selecting the DRC from among the variety of civil law constitutional jurisdictions that exist could thus show whether constitutional courts with prosecutor systems interpret and protect the bill of rights differently and whether the possibility for dissenting and concurring makes any difference.

From the perspective of legal traditions, the Benin and the DRC Constitutional Courts operate in a civil law legal tradition, while South Africa's Constitutional Court operates in a mixed legal system with a predominantly common-law-oriented judicial system, judicial reasoning, and public and constitutional law. A study comparing the legal reasoning of some apex courts in the world finds that the reasoning and practices of the South African Constitutional Court are similar to those of other common law apex courts.[240] Also, since South African public law and constitutional law are mainly derived from English common law,[241] the South African Constitutional Court serves in this book as an exemplar of a common law constitutional jurisdiction.

An effort to adopt a uniform structure for the case studies proved challenging in practice, given the need to accommodate differences in the historical development of the courts and their respective jurisprudence. For instance, the formative stage of constitutional rights jurisprudence in the DRC is marked by cases in which the DRC Constitutional Court was required to clarify the scope of its jurisdiction and admissibility criteria, at times applying inconsistent evaluative standards. These inconsistencies needed to be highlighted in order to make sense of the Court's evolving approach and its underlying pursuit of substantive justice. This situation is compounded by the absence of an explicit human

238 Art 12 of the Organic Law 13/026 of 15 October 2013 Governing the Organisation and Functioning of the Constitutional Court.

239 Art 92(5) of the Organic Law 13/026 of 15 October 2013 Governing the Organisation and Functioning of the Constitutional Court.

240 A Jakab, A Dyevre & G Itzcovich 'Conclusion' in A Jakab, A Dyevre & G Itzcovich (eds) *Comparative constitutional reasoning* (2017) 769 & 779.

241 Palmer (n 13) 9-10.

rights mandate which, unlike in Benin and South Africa, compels the DRC Constitutional Court to assert its jurisdiction over human rights petitions through purposive interpretation. Furthermore, the litigation culture in South Africa, largely unparalleled elsewhere on the continent, necessitates closer scrutiny of the dynamics of pressure, competition, and complementarity that shape the adjudication and interpretation of the Bill of Rights, in order to identify explanatory factors of convergence or divergence, as the case may be.

Notwithstanding these formal differences, each case study retains a common substantive core and a set of comparable elements on which the analysis relies to conduct meaningful comparison.

6.3 The rationale and importance of focusing on (three) fundamental rights

This comparative study uses 'human rights' or 'bills of rights' as *tertium comparationis*. The Constitutional Courts of Benin, the DRC and South Africa have it in common that they protect human rights through procedures established under constitutions and procedural legislation.[242] They perform similar functions in their respective legal traditions despite *micro* differences that can emerge between them. Three rights have been selected – equality and non-discrimination, fair trial and due process of law, and political rights. The Constitutions of the three countries covered in this book recognise these rights, and the three Constitutional Courts have had an opportunity to interpret them. The global and continental human rights treaties that bind Benin, the DRC and South Africa also recognise the same rights.[243]

Equality, fair trial and political rights have normative powers in liberal democratic regimes in that they allow individuals to exercise freely several other rights, participate in the management of public affairs and to balance powers of the state and its organs. Whilst other civil and political rights not included in this book are no less important, it is hoped that the findings derived from the analysis of the interpretation of the three rights can be applied to them *mutatis mutandis*.

The book does not include an analysis of constitutional interpretation of socio-economic rights for methodological reasons. Although these

242 See the discussion in sec 4 (ch 2).
243 The ICCPR (arts 3, 14 & 25) and the African Charter (arts 3, 7 & 13).

rights have received considerable attention in the comparative literature on South African constitutionalism and have been extensively litigated before South African constitutional jurisdictions,[244] there is a paucity of comparable case law and scholarly literature in African civil law jurisdictions, including Benin and the DRC.

As will become clear in chapter 2, socio-economic rights in South Africa are conceived as being both abstract legal entitlements accruing to individuals and emancipatory instruments aimed at addressing the historical marginalisation of poor communities, predominantly black South Africans, and at ensuring that the State fulfils its social and transformative functions.[245] Over time, these rights have become a central site of contestation. They have been mobilised by individuals and groups representing marginalised communities to improve their material living conditions, while also being invoked by historically privileged groups to preserve the *status quo ante* and protect entrenched advantages.

This state of affairs is inherent in the nature and historical trajectory of the South African state, which has racialised many of its core institutional, social, and legal structures in a manner unmatched by any other African country.

7 Summary of the book

This book is divided into three parts. Part I introduces the framework for the constitutional comparison undertaken. Chapter 1 provides an overview of the background of this book, the problem it addresses, the questions it answers, its objectives and methodology, and reviews the key scholarly works in the field. It also provides a brief clarification of key concepts and the scope and limitations of the study. Chapter 2 examines approaches that the Benin, DRC and South African Constitutions take in the recognition and protection of fundamental rights and freedoms and the organisation of constitutional courts. The chapter begins with some preliminary discussion of the historical and political background of Benin, the DRC and South Africa to elucidate the context within which bills of rights emerge and operate. The discussion then moves

244 M Langford and others (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014).

245 S Liebenberg 'Reparative justice in South Africa's socio-economic rights jurisprudence' (2025) 15(1) *Constitutional Court Review* 1-50.

to the consideration of how human rights are concretely recognised in the three bills of rights, noting the main convergences and divergences between common law and civil law bills of rights. The final discussion relates to the constitutional courts' human rights protection mandate. The chapter conducts a detailed review of the powers of the three constitutional courts, issues of access and possible checks against the arbitrary removal of judges. Its conclusion grounds the discussion in the next three chapters that make up part II.

Part II puts together the three case studies by examining the interpretation of the three selected rights by the Benin, DRC and South African constitutional courts. The successive three chapters analyse concrete decisions made by the three constitutional courts in equality and non-discrimination, fair trial and due process rights and political rights petitions. The chapters analyse the interpretations to understand the general methods used by courts, the types of teleological arguments invoked, and the extent to which constitutional courts use contextual aids to interpretation such as international law, precedents and African indigenous values. In looking at the cases, each chapter provides an overview of the cases discussed, the way courts choose and apply methods of constitutional interpretation, and the possible implications for the promotion of a human rights culture. The chapters consider the way courts interpret limitations to fundamental rights and freedoms. The discussion in these chapters lays the foundation for a comparative overview of trends, developments and lessons for comparative constitutional law.

Part III provides comparative trends and lessons. Chapter 6 begins with a comparative overview of trends and developments in constitutional interpretation of bills of rights in the selected countries. It discusses four trends in particular: the use of similar methods of constitutional interpretation; the level of the categorisation and explanation of the meaning and content of constitutional rights; the quality of the protection of rights; and the use of aids to constitutional interpretation and their impact. The chapter moves on to explain the factors that influence the choice and application of methods of constitutional interpretation. Two sets of factors, those related to legal traditions and the scope and content of bills of rights, are discussed. Chapter 7 looks at ways to enhance a culture of human rights in Africa beyond legal traditions.