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Fundamental rights and constitutional courts in the Benin, Democratic Republic of Congo and South African Constitutions: Background and approaches

1 Introduction

Following the 1990 wave of democratisation, Benin, the Democratic Republic of Congo (DRC)[1] and South Africa enacted constitutions and established institutions to constrain the power of political authorities and enable citizens to participate in public affairs.[2] These constitutions recognise and protect individuals' fundamental rights and freedoms (bills of rights or human rights) as the manifestation of liberal ideals on which most modern states rest.[3] The norms and institutions in the three countries have some similarities with each other. They result from national consensus preceded by a protracted period of authoritarianism.[4] They

1 Whilst Benin and South Africa adopted their post-1990 constitutions in 1990 and 1993/1996, respectively, the DRC's final Constitution was promulgated in 2006; see GB wa Mpungu 'The new constitution of the Democratic Republic of Congo: Sources and innovations' in CM Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) 149. Following constitutions preceded it right after 1990: Act 93-001 of 2 April 1993 Harmonised Constitutional Act of the Transitional Period, Constitution of the Transition of 9 April 1994, Executive-Decree 003 of 27 May 1997 Governing the Exercise of Power in the Democratic Republic of Congo, Constitution of the Transition of 4 April 2003. See generally M Wetsh'Okonda Koso Senga *Les textes constitutionnels congolais annotés* (2012) 6. In the DRC context, reference to the post-1990 constitution is aimed specifically at the Constitution of 18 February 2006. For a similar trends in Francophone African countries, see A Gadji 'L'économie dans les nouvelles constitutions des États d'Afrique francophone' 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) 760.

2 For Benin, see BG Gbago *Le Benin et les droits de l'homme* (2001) 27; for South Africa, I Currie & J de Waal (eds) *The bill of rights handbook* (2016) 7-8.

3 A Soma 'Le statut du juge constitutionnel africain' in Aïvo (n 1) 454-455.

4 AM Mangu 'The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo' (2002) unpublished doctoral thesis, University of South Africa 430-434.

entrench bills of rights,[5] empower (constitutional) courts to ensure that these rights are respected by states, their organs and private individuals[6] and grant direct and indirect access to these courts by individuals.[7]

These features make the post-1990 African constitutional dispensation unique.[8] They have ushered the three countries' legal systems into what Lasser terms 'the rights revolution'[9] where human rights form part of the supreme norms of the land, such that inconsistent state conduct or laws may be declared unconstitutional.[10] According to Lasser, the rights revolution transforms 'procedural, doctrinal, institutional and conceptual structures' within an existing legal system to enable it protect efficiently fundamental rights and freedoms.[11] In fact, in Benin, the DRC and South Africa, the post-1990 era led to some structural judicial

5 Sec 3 below discusses the recognition and protection of human rights in the three countries covered in this book. For the celebrated Benin Constitutional Court human rights jurisprudence, see various publications in *Annuaire béninois de justice constitutionnel: Dossier special 21 ans de jurisprudence de la Cour constitutionnelle du Bénin (1991-2012)* (2013) 430-623.

6 CM Fombad 'The role of emerging hybrid institutions of accountability in the separation of powers scheme in Africa' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 330.

7 G Aïvo 'Les recours individuels devant le judge constitutionnel béninois' in Aïvo (n 1) 535-538.

8 B Kanté 'Leçon inaugurale: La justice constitutionnelle face à l'épreuve de la transition démocratique en Afrique' in O Narey (ed) *La justice constitutionnelle: Actes du colloque international de l'ANDC* (2016) 31-37; 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) 134-139.

9 See M Lasser *Judicial transformations: The rights revolution in the courts of Europe* (2009) 29-31.

10 See also AB Fall 'Le juge constitutionnel béninois, avant-garde du constitutionnalisme africain?' in Aïvo (n 1) 718.

11 Lasser (n 9) 1; M Lasser *Judicial deliberations: A comparative analysis of judicial transparency and legitimacy* (2005) 8-9; M Lasser 'Transforming deliberations' in N Huls, M Adams & J Bomhoff (eds) *The legitimacy of highest courts' rulings: Judicial deliberations and beyond* (2009) 38-42.

transformation.[12] Lourens du Plessis,[13] and Pius Langa[14] in the context of South Africa, seem unanimous that the entrenchment of bills of rights necessitates that (constitutional) interpreters transform their interpretive practices.[15] The same applies to the DRC and Benin. As the Constitutional Court of the DRC affirmed, the new constitutional order entrusts constitutional jurisdictions with the authority to safeguard fundamental constitutional values against encroachment by any constituted organ, including the judiciary.[16] Without such oversight, the Constitution would be rendered devoid of normative force and reduced to a mere symbolic document.[17]

However, the 'rights revolution' did not occur in African countries at the same time and was not shaped by similar 'micro-dynamics'.[18] These heterogenous 'micro-dynamics' must thus be understood to comprehend how far each country, fundamental rights and freedoms and constitutional court can go in protecting fundamental rights and

12 The 1990 Benin Constitution established the Constitutional Court, the Supreme Court of Justice (SCJ) and the High Court of Justice (HCJ) to adjudicate various matters. The first deals with constitutional matters including the adjudication of the Bill of Rights. The SCJ is the country apex courts in administrative and civil matters. It may deal with some aspects of commercial matters when they do not fall under the jurisdiction of the Common Court of Justice and Arbitration established under the guise of the Organisation for the Harmonisation of Business Law in Africa (OHADA). The HCJ is the criminal jurisdiction before which the President of the Republic and cabinet ministers may be tried. The 2006 DRC Constitution established three apex courts. The Constitutional Court adjudicates constitutional matters and the Bill of Rights. The Council of State is the apex court in administrative matters. The Court of Cassation is the apex court in judicial, criminal and business-related petitions not covered by the OHADA. The establishment, although not yet effective, of special Administrative Courts at the provincial levels in the DRC confirms this constant judicial transformation. The model of three (supreme) apex courts that the DRC adopted has been adopted by a number of other Francophone countries post-1990. See some comments in J Djogbénou 'L'ambiguité statutaire du pouvoir judiciare dans les constitutions des États africains de tradition juridique française' in Aïvo (n 1) 485.

13 L du Plessis 'A background to drafting the chapter on fundamental rights' in B de Villiers (ed) *Birth of a Constitution* (1994) 100.

14 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 356-359; KE Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human rights* 168.

15 N Bohler-Muller, M Cosser & G Pienaar 'Introduction' in N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 7-8.

16 Judgment R.Const. 1800 of 22 July 2022, 6.

17 As above.

18 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.

promoting a culture promotive of human rights. In this chapter, I consider the background and approaches to the recognition and protection of fundamental rights and the extent to which constitutional jurisdictions are equipped to protect bills of rights. In the next section, I examine the extent to which the different types of human rights violations in the three countries covered in this book laid the foundation for post-1990 bills of rights.

2 Historical and political background of the three countries

The guarantee of fundamental rights and freedoms in Benin, the DRC and South Africa are the result of the three countries' tumultuous past and their willingness to ensure that the powers of those who wield the monopoly of violence are constrained. I discuss two issues in this section: the authoritarianism and violation of human rights that preceded the new constitutional order, and how the judiciaries did not sufficiently protect these rights. The different types of human rights violations had an effect on the way new constitutions recognise and protect human rights. I now turn to the nature and extent of these violations.

2.1 Authoritarianism and the violation of fundamental rights and freedoms

Historically and politically, the three countries share a past characterised by authoritarianism, much of which started during colonisation and extended to the postcolonial period. Institutions served to entrench a culture for human rights violations.[19] In Benin and the DRC particularly, post-independent African leaders learnt quickly that they could use the violence the colonial state institutionalised and its means (laws and institutions) to consolidate their powers. Violence in South Africa differed in its nature and rationale to that in Benin and the DRC in various dimensions. The distinguishing factor was the ideological substructure of violence in South Africa, namely white racial supremacy

19 U Baxi 'The colonialist heritage' in P Legrand & R Munday (eds) *Comparative legal studies: Traditions and transitions* (2003) 48; U Baxi *The future of human rights* (2002) 7; U Baxi 'Preliminary notes on transformative constitutionalism' in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 31-33; AL Conklin 'Colonialism and human rights, a contradiction in terms? The case of France in West Africa, 1895-1914' (1998) 103(2) *American Historical Review* 422.

over blacks and institutionalised racism that lasted for more than three decades.[20]

The arrival of Dutch settlers in the Cape of Good Hope in 1652 and the agreements and ties they forged with the British were the beginning of the marginalisation of the natives in modern day South Africa.[21] Four colonies were formed subsequently: The Cape Colony, Natal, Transvaal and Orange Free State. The exploitation of agricultural land and mines by the Dutch and the British for their own benefit resulted in the gradual dispossession of indigenous land, spatial segregation and the dehumanisation of Africans. Since Africans were considered unfit for intellectual and skilled labour,[22] they were reduced to cheap labour in the service of the capitalist interests of new settlers.

Despite growing internal demands by some black South Africans to reverse the debilitating effects of the colonial and segregationist system, colonialism did not stop.[23] Britain decided, for example, not to get involved in the suspension of the 1913 Natives Land Act despite negotiations undertaken by the South African Native National Congress (SANNC), the predecessor of the African National Congress (ANC) in February 1914.[24] The political participation of the African majority was gradually revoked.[25]

The Natives Land Act, the Population Registration Act and the Group Areas Act crystallised inequality between whites and Africans, the economic dependence of the latter on the former, and the underdevelopment of the native settlements and slums to which more

20 S Terreblanche *A history of inequality in South Africa 1652-2002* (2002) 25-26; C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013) 35-2; M Oosthuizen 'Why South Africa can't deliver on the social contract set out in its constitution' *The Conversation*, 21 November 2016 http://theconversation.com/why-south-africa-cant-deliver-on-the-social-contract-set-out-in-its-constitution-69119 (accessed 16 November 2020).

21 Terreblanche (n 20) 153;179.

22 'South Africa Yearbook 2017/18: History' (2018) 5 https://www.gcis.gov.za/sites/default/ files/docs/resourcecentre/yearbook/2-History2018.pdf (accessed 16 November 2020).

23 'The Natives Land Act of 1913 | South African History Online' (27 August 2019) https://www.sahistory.org.za/article/natives-land-act-1913 (accessed 5 November 2020).

24 As above.

25 As above.

than 3.5 million Africans were relegated.[26] This instituted an exceptional regime of permission to enter white cities, thus limiting the movement of African populations into the land of their ancestors.[27] Moreover, the successive states that were established – first the four colonies, then the Union of South Africa (1910) and finally the Republic of South Africa (1961) – were inherently built on an ideology of white epistemic and racial superiority over the natives. This resulted in the relegation of Africans to the background in terms of service delivery (education, housing, health care, labour, social security).

Whilst the racial discrimination and inequality instituted by the National Party government[28] rested on various laws, the 1950 Population Registration Act was the 'cornerstone of apartheid'.[29] It differentiated 'whites' from 'non-whites'.[30] The colour of the skin was not enough to prove people's whiteness. Through interrogations and investigations into people's lives, the Director of Census was empowered to declassify those who thought they were whites even when in 'appearance obviously' they were.[31] Once declassified, individuals could be subjected to discrimination as was every non-white person. The ANC, the Pan-Africanist Congress and the National Party were declared unlawful in 1960 and many of their activists faced political trials on grounds such as the breach of security laws or defamation.[32] On the basis of the Terrorism Act and Internal Security Act, political dissidents could be detained for longer periods without trial.[33] Negotiations between the apartheid government and opposition parties, notably the ANC, started officially in May 1990[34]

26 S Jensen & O Zenker 'Homelands as frontiers: Apartheid's loose ends – An introduction' (2015) 41 *Journal of Southern African Studies* 941.
27 'The Homelands | South African History Online' (24 January 2019) https://www.sahistory.org. za/article/homelands (accessed 5 November 2020).
28 J Dugard *Human rights and the South African legal order* (1978) 53.
29 Dugard (n 28) 60.
30 1950 Population Registration Act sec 1(xv).
31 Dugard (n 28) 62.
32 'Suppression of communism Act, No. 44 of 1950 approved in parliament' 26 September 2016 in *South African History Online* https://www.sahistory.org.za/dated-event/suppression-communism-act-no-44-1950-approved-parliament (accessed 2 August 2019).
33 J Dugard 'Human rights in South Africa – retrospect and prospect' (1979) *Acta Juridica* 263.
34 W de Klerk 'The process of political negotiation: 1990-1993' in De Villiers (n 13) 6.

and ended up with the adoption of an interim Constitution in 1993[35] and final Constitution promulgated in 1996.

Human rights violations were also committed in Benin and the DRC before 1990, but unlike South Africa, most of these were not guided by racial-supremacist ideology. Demographically, Benin and the DRC are inhabited by a largely monoracial population, while South Africa is one of the densely populated multiracial countries in Africa.

The then Republic of Dahomey (Benin) went through a long period of political instability due to military coups.[36] The *coup d'état* that Mathieu Kérekou staged in 1972 took away the power of the Presidential Council. The Presidential Council was a system of government established to enable the three parts of the country – the North, the Centre and the South of Benin – to alternate in ruling the country to foster cohesion.[37] Three main political figures represented the three alternating parts: Maga, Ahomadegbé and Apithy.[38]

In 1974, Benin became a Marxist-Leninist country, and political leaders claimed that priority would be given to social and economic development and social and economic rights at the expense of civil liberties and political rights. This ideological split between liberalism and socialism had a toll on the exercise of fundamental civil and political rights and freedoms.[39] Rotman noted that 'hundreds of cases of torture

35 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 33-48.

36 HS Adjolohoun 'Benin' http://www.icla.up.ac.za/images/country_reports/benin_country_report.pdf (accessed 2 August 2019).

37 RM Tossou 'Multipartisme, ethnicité et pouvoir politique au Bénin: 1951-2006' (2010) unpublished doctoral thesis, University of Abomey-Calavi 184.

38 HS Adjolohoun 'Between presidentialism and a human rights approach to constitutionalism: Twenty years of practice and dilemma of revising the 1990 Constitution of Benin' in MK Mbondenyi & T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from sub-Saharan Africa* (2013) 248; Tossou (n 37) 184.

39 FJ Aïvo *Le juge constitutionnel et l'Etat de droit en Afrique* (2006) 31. See also United Nations Human Rights Committee 'Consideration of reports submitted by states parties under Art 40 of the Covenant: International Covenant on Civil and Political Rights: Benin' (3 February 2004) para 1 https://digitallibrary.un.org/record/527598?ln=en (accessed 26 June 2021); Republique du Bénin 'Rapport périodique 1993-1994 sur la mise en application des droits et libertés reconnus et garantis dans la Charte africaine des droits de l'homme et des peuples' (6 November 2000) para 2.

and other human rights abuses [were] perpetrated [between 1972 and 1991] by government officials' but went unheard and unpunished.[40]

The respective governments did little to promote women's rights especially in the political sphere, where women were generally used by politicians to achieve their political ambitions.[41] The government's weak commitment to women's rights could perhaps be illustrated by the fact that although Benin signed the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1981, it formally became party to it only 10 years later.[42] In the meantime, the promised economic development was not achieved and the economic system started to crumble in the late 1980s, leading to mass protests and strikes.[43] These internal pressures, coupled with external demands for democratisation, led to the organisation of the National Sovereign Conference, ushering the country into a new era of democracy through the adoption of the 11 December 1990 Constitution.[44]

The DRC's situation was peculiar to its post-independence context and the different stances political leaders adopted towards fundamental rights and democratic principles. The two major periods of authoritarianism (1965–1997; 1997– 2001) and the two periods of political stalemate (1960–1965; 2001–2005) set the tone for the country's democratic and human rights projects.[45] The first political stalemate arose from a seeming misinterpretation of constitutional powers between the President of the Republic and the Prime Minister, with each wanting to exercise full executive power. Amid a parliamentary system of government, the two executive figures dismissed each other, plunging the country in an institutional instability. This instability gave the army an excuse to stage a military coup in 1965 that brought Mobutu Seseko to power.

40 A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 282.

41 M-O Attanasso *Femmes et pouvoirs politiques au Bénin: Des origines dahoméennes à nos jours* (2012) 61; 69-70.

42 United Nations Treaty Body Database 'Ratification status for Benin' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=19andLang=EN (accessed 5 April 2021).

43 Aïvo (n 39) 35.

44 K Ahadzi-Nonou 'Constitution, démocratie et pouvoir en Afrique: Leçon inaugurale' in Aïvo (n 1) 63-69.

45 JOM Yahisule *Élections et changement politique en République démocratique du Congo: Six décennies perdues pour le développement* (2021) 30.

Between 1965 and 1997, President Mobutu presided over a regime based on corruption and the violation of civil and political rights.[46] The communications which Birindwa and Tshisekedi lodged with the United Nations Human Rights Committee (UNHRC) in 1987, among many others,[47] illustrate some of the human rights violations perpetrated against political activists. Both Birindwa and Tshisekedi were banned from moving freely, and were tortured and subjected to inhuman treatment as well as deprived of fair trial.[48] Laws that were in place were ineffective enough to prevent the perpetration of human rights violations. The 24 June 1967 Constitution of Zaire (DRC) contained a Bill of Rights[49] made up of 14 provisions.[50] There existed laws and institutions to protect individual rights. They included Ordinance 86/268 of 31 October 1986 instituting the Ministry of Citizen's Rights and Freedoms, and Ordinance 90/151 of 18 August 1990 instituting the National Intelligence and Protection Service (SNIP). Luzolo and Bameya noted that these institutions became instruments of tyranny and repression in Mobutu's Zaire.[51]

The State Security Court was empowered to enforce state legislation that authorised arbitrary detentions.[52] Its jurisdiction covered attempts to state security, offences against the President of the Republic and any offences whatsoever that could be linked with state or head of state's

46 Mangu (n 4) 430-434.

47 See for example 25/89, 47/90, 56/91, 100/93 (joined) *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les témoins de Jehovah v Zaire* (African Commission on Human and Peoples' Rights) on allegations of torture, arbitrary arrests, detention without trial, extrajudicial executions, persecution of Jehovah's witnesses where the Commission found against Zaire. For a detailed account, see L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' (2005) unpublished doctoral thesis, University of Pretoria 66;83-107; VO Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states' (2018) unpublished doctoral thesis, University of Pretoria 62-63.

48 *Birindwa and Tshisekedi v Zaire*, Communication 241/1987 and 242/1987, UN Doc. CCPR/C/37/D/242/1987 (1989). For Benin, see Rotman (n 40) 282.

49 EJL Bambi & AN Bayona Ba Meya *Manuel de procédure pénale* (2011) 30-31.

50 See title II 'Fundamental rights' of the 24 June 1967 Constitution of Zaire (DRC); art 5 to art 18 in Wetsh'Okonda Koso Senga (n 1) 137-140.

51 Bambi & Bayona Ba Meya (n 49) 31.

52 In Benin, the *Cour Criminelle d'Exception* played this role. See Republique du Bénin 'Rapport périodique 1993-1994 sur la mise en application des droits et libertés reconnus et garantis dans la Charte africaine des droits de l'homme et des peuples' (6 November 2000) 10.

security.[53] The National Sovereign Conference, established in 1991 to deal with anti-democracy and human rights practices by the Mobutu regime and pave the way for democratisation, soon became ineffective and was disbanded as its Commission on Assassinations and Human Rights violations revealed the perpetration of several crimes and human rights violations by the state.[54]

It is also recorded that during Mobutu's reign, just as in Benin, the government did not make sufficient efforts to enhance women's rights, particularly their ability to participate in political affairs. President Mobutu Seseko was quoted as saying that 'it remains to be understood, with all due consideration, that there will always be a boss in every household'.[55] According to him, 'until proof to the contrary, the boss in our land is the one who wears the pants. Our female citizens should also understand this, accept it with a smile, and with revolutionary submissiveness'.[56] In the political sphere, Catherine Nzunzi wa Mbombo suggested that women generally served as instruments for mass mobilisation and a stepping stone to achieve the goals of male politicians.[57] They were hardly considered as equal political partners.

Mobutu saw his demise in 1997, but was to be replaced by a regime which accorded a weak status to fundamental rights and freedoms in the constitution. President Laurent-Désiré Kabila signed a Constitutional Decree on May 1997 which was anything but a constitution in its modern sense. Out of its 15 provisions, only one provision broadly recognised 'the exercise of individual and collective rights and freedoms subject to the observance of the law, public orders and good morals'.[58] In 2001, the Ministry of Human Rights adopted a Congolese Charter

53 Art 96 of Ordinance-Law 82-020 of 31 March 1982 governing the Organisation and Compétence of Courts and Tribunal in the DRC. The Ordinance was abrogated in 2013 by a new law.

54 SP Tunamsifu 'Transitional justice processes in Africa: The case of the Democratic Republic of the Congo' (2018) 4 https://www.csvr.org.za/project-reports/DRC-Case-Philippe-Tunamsifu.pdf (accessed 6 April 2021).

55 C Coquery-Vidrovitch *African women: A modern history* (1994) 185-186.

56 Coquery-Vidrovitch (n 55) 185-186; JR Oppong & T Woodruff *Democratic Republic of Congo* (2007) 48-50.

57 C Nzuzi wa Mbombo 'Le role de la femme politique en République Démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femme et engagement politique en République Démocratique du Congo* (2014) 68; PM Mantuba-Ngoma *Les élections dans l'histoire politique de la République démocratique du Congo (1957-2011)* (2013) 41.

58 Art 2 of the 1997 Decree on the Organisation and Exercise of Power in the DRC in Wetsh'Okonda Koso Senga (n 1) 351.

on Human and Peoples' Rights that laid a solid foundation for the protection of rights[59] and might have influenced bills of rights under the 2003 interim and 2006 final Constitutions. In 2006, a new Constitution was promulgated after a long period of transition (between 1990-2006) following negotiations and peace talks among warring factions.

In all three countries in this period, their judiciaries were ineffective in checking authoritarianism and failed to protect individual rights and freedoms. In other words, between 1960 and 1990, most judges remained passive towards human rights violations. Most African leaders utilised the judiciary and existing legal norms to establish hegemonic power.[60]

2.2 The failure of judiciaries to check authoritarianism

Three explanations are usually given to elucidate why judges were ineffective in protecting individual rights. First, the appointment of judges was controlled by the executive. It ensured that judges appointed to superior courts were beholden to political authorities and could be removed if they threatened the interests of the government.[61] In the DRC, judges took the following oath: 'I hereby swear that I will be loyal to the President of the Popular Movement of the Revolution (*Mouvement populaire de la Révolution*), President of the Republic, obedience to the Constitution and the laws of the Republic of Zaire.'[62] In South Africa, Dugard suggests that the majority of judges appointed to the South African Supreme Court by 1978 supported the National Party programmes.[63] Secondly, Hoexter and Forsyth point out that in South Africa, the ability of the legislature to oust the jurisdiction of courts to adjudicate specific matters, as was the case with the Reservation of Separate Amenities Act of 1953, disempowered judges.[64] Thirdly, judges did not want to challenge political authorities and make decisions that

59 Adopted in Kinshasa (30 June 2001).
60 BK Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 1; E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.
61 PGN Nkoy-ea-Loongya 'Le contrôle de constitutionnalité en République démocratique du Congo: Etude critique d'un système de justice constitutionnelle dans un Etat à forte tradition autocratique' (2008) unpublished doctoral thesis, Université catholique de Louvain 98.
62 Nkoy-ea-Loongya (n 61) 93.
63 Dugard (n 28) 11.
64 C Hoexter 'Just and administrative action' in Currie & De Waal (n 2) 644.

had no prospect being complied with.[65] Citizens likewise feared reprisal if they challenged the government.[66]

There could be a fourth explanation. Benin and the DRC established constitutional courts but these did not operate properly and lacked powers to adjudicate direct complaints lodged by individuals.[67] The DRC Supreme Court of Justice had criminal, civil, administrative and constitutional jurisdictions vested in three different sections.[68] Only the Attorney-General at his own initiative or at the behest of a number of political authorities[69] could lodge complaints with the constitutional section.[70] The 1960 Benin Constitution established the Supreme Court. The 1965 Act on the Supreme Court envisaged a constitutional chamber,

65 Kibet & Fombad (n 60) 348.

66 SH Adjolohoun 'Centralised model of constitutional adjudication: The Constitutional Court of Benin' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 55. The courage Jehovah Witnesses demonstrated by petitioning the presidential ordinance of Mobutu in Zaïre (DRC) suggests that the absence of enabling legislation in Benin, coupled with a centralised form of constitutional review established under civil law systems, could justify the absence of petitions against human rights violations.

67 For the first time, the 1960 DRC Constitution 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, shifting from an autonomous constitutional jurisdiction staffed with its special judges to a chamber within the Supreme Court of Justice.

68 The section of legislation dealt primarily with administrative matters, while the section of judicial matters dealt with criminal and civil petitions. The third section was the combination of the two existing sections (legislation and judicial matters) and was tasked with, among others, reviewing the constitutionality of acts of parliament, regulations and any such act which could be considered as law.

69 Art 131 of Ordinance-Law 82-017 of 31 March 1982 relating to the Procedure before the Supreme Court of Justice provides for the following authorities: President of the Republic, Bureau of parliament and courts and tribunals when exceptions of unconstitutionality were raised before them.

70 Ordinance-Law 82-017 of 31 March 1982 relating to the Procedure before the Supreme Court of Justice, art 131. In the landmark *Jehovah's Witnesses* case, the Supreme Court of Justice of Zaire overturned a 1986 presidential decree banning the non-governmental organisation Jehovah's Witnesses on the grounds that the order did not provide sufficient reasons as required by law and violated individual rights. However, the decision drew criticism. For example, Mabanga argued that the administrative division had illegally ruled on constitutional claims over which only the third chamber of the Supreme Court had jurisdiction. According to Ngondankoy, this exceptional decision was made possible partly because the decisions challenged were administrative and not legislative, and partly because of the wave of democratization that began to sweep through the country at the time of the Sovereign National Conference.

which did not operate in practice. The law organising the procedure before the constitutional chamber in Benin was never adopted.[71]

The South African legal system faced three major problems. Judges appointed to the bench were only white South Africans. The principle of legislative supremacy was applied unquestionably by judges to give effect to acts of parliament depriving citizens of their individual liberty.[72] The law was considered to be the general expression of the people, save that the people concerned were only 4 300 000 whites.[73] In Dugard's opinion, this should have convinced judges that the law was no longer the expression of people and prompted them to adopt interpretive theories that gave effect to fundamental values underpinning the South African legal system.[74] It was suggested that the common law had rights that could be enforced by courts to protect individuals but that the judges' legal education dominated by positivism had not enabled them to change their approach to interpretation,[75] which was characterised mostly by 'legalistic textualism'.[76]

The measures that post-1990 constitutional framers established sought to remove the ghost of authoritarianism in Benin, the DRC and South Africa. Also, constitutional framers intended them to be effective. This chapter identifies and discusses two sets of measures and mechanisms: the guarantee of fundamental rights and freedoms, as well as the effective establishment of constitutional jurisdictions empowered to decide over human rights violations. Section three below deals with the bill of rights, while section four deals with constitutional courts.

71 Adjolohoun (n 66) 55.
72 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 183-184.
73 By the time Dugard published his book in 1978, he noted that South Africa was populated by 26 million people: 18 600 000 Africans, 4 300 000 whites, 2 400 000 coloureds, and 746 000 Asians.
74 Dugard (n 28) 199-200.
75 As above.
76 W le Roux 'Descriptive overview of the South African Constitution and Constitutional Court' in Vilhena, Baxi & Viljoen (n 19) 140; Du Plessis (n 13) 100.

3 Recognition and protection of fundamental rights and freedoms

The nomenclature used for human rights in African constitutions differs. For example, some refer to this as bill of rights;[77] fundamental rights and duties;[78] human rights, fundamental freedoms and duties of a citizen and the state;[79] and protection of fundamental rights and freedoms of the individual.[80] Most African bills of rights use 'rights' and 'freedom' interchangeably, although they are theoretically different.[81] This book follows this trend by using the two concepts interchangeably. For comparative purposes, in this section, I adopt a three-pronged comparative and analytical framework.[82] First, I analyse the scope of rights in the bill of rights, secondly, the constitutional status of the bill of rights, and thirdly, their relationship with international law. This framework provides an understanding of the normative and transformative ability of bills of rights across legal traditions.

3.1 Scope of rights in bills of rights

The effectiveness of rights depends, in part, on the way they are guaranteed in the constitution. In this section, I analyse three basic characteristics and the types of rights that bills of rights cover. I look at the number of rights recognised, the breadth and length of human right provisions, and the language in which they are couched;[83] their scope of application; and finally, the extent to which restrictions and derogations are permitted and the conditions they have to meet.

77 Chapter 2 of the 1996 Constitution of South Africa and the chapter 4 of the 2010 Constitution of Kenya.

78 Title II of the 2010 Constitution of Angola and Title I of the 1990 Constitution of Burkina Faso. Title II of the 2018 Constitution of Chad is entitled of freedom, of fundamental rights and of duties.

79 2006 DRC Constitution, Title II.

80 Chapter II of the 1966 Constitution of Botswana.

81 K Quashigah 'A critical analysis of the concept of rights and freedoms under chapter five of the 1992 Constitution of Ghana' (2005/2007) 23 *University of Ghana Law Journal* 170; L Favoreu and others *Droit constitutionnel* (2019) 931-934.

82 P Alston 'A framework for the comparative analysis of bills of rights' in P Alston (ed) *Promoting human rights through bills of rights: Comparative perspectives* (1999) 11.

83 CM Fombad 'African bills of rights in comparative perspective' (2011) 17(1) *Fundamina* 36.

3.1.1 The recognition and protection of fundamental rights and freedoms

There is no catalogue of substantive rights, neither at the domestic nor international level, that a bill of rights must recognise, nor a delineation of the proper procedure to recognise them.[84] The Benin, DRC and South African constitutions recognise the three generations of rights: civil and political rights,[85] economic, social and cultural rights,[86] and collective

84 Office of the United Nations High Commissioner for Human Rights *Human rights and constitution making* (2018) 21-22.

85 The 1990 Constitution of Benin recognises the following civil and political rights: Right to dignity (para 3, Preamble), right to political participation (art 1), right to vote (art 4), right to life (art 8), right to personal development and blossoming (art 9), right to culture (art 10), right to be prosecuted based on *a posteriori* law (art 16), fair trial and due process rights (presumption of innocence, right to defence, public hearing, non-retroactivity of crimes, application of a more lenient criminal law, art 17), prohibition of torture and other cruel, inhuman and degrading treatment; right of the accused to be treated by a medical doctor of their choice, legality of the detention (art 18); right and duty not to enforce an order to torture (art 19); inviolability of domicile (art 20); secrecy of correspondence and communications (art 21), right to freedom of thought, conscious, religion, cult, opinion and expression (art 23), right to freedom of the press (art 24), right to freedom of movement and choice of residence, right to association, meeting, cortege and demonstration; right to equality before the law, non-discrimination (art 25), right to equality between men and women (art 26).
The following civil and political rights are recognised under the 2006 Constitution of DRC: Right to vote and political participation (art 5), right to political pluralism (art 6), right to citizenship (art 10), right to equality, freedom and dignity (art 11), right to equality before the law and to equal protection by laws (art 12), prohibition of discriminatory measures (art 13), right of women not to be discriminated (art 14), prohibition of sexual violence (art 15), the sacred nature of human person, prohibition of slavery, cruel and inhuman or degrading treatment, and prohibition of forced or compulsory labour (art 16), right to individual freedom (art 17), rights of arrested persons (art 18), right to a fair trial and publicity of hearings (art 19 & 20), right to appeal against judicial decisions (art 21), right to freedom of thought, conscious and religion (art 22), right to freedom of expression (art 23), right to information (art 24), right to peaceful assembly (art 25), right to freedom of demonstration (art 26), right to petition (art 27), right not to enforce a manifestly illegal order (art 28), right to the inviolability of one's own domicile (art 29), right to freedom of movement and residence (art 30), right to privacy (art 31), right to seek and receive asylum (art 33).
The 1996 Constitution of South Africa protects the following civil and political rights: Right to equality and equal protection (sec 9), right to human dignity (sec 10), right to life (sec 11), right to freedom and security of person (sec 12), prohibition of slavery, servitude and forced labour (sec 13), right to privacy (sec 14), right to freedom of religion, belief and opinion (sec 15), right to freedom of expression (sec 16), right to freedom of assembly, demonstration, picket and petition (sec 17), right to freedom of association (sec 18), political rights (sec 19), right to citizenship (sec 20), freedom of movement and residence (sec 21), right

rights.[87] The Benin and DRC bills of rights also provide for duties.[88]

to access to information (sec 32), right to a just and administrative action (sec 33), right to access to courts (sec 34), rights of arrested, detained and accused persons (sec 35).

86 The 1990 Constitution of Benin recognises and protects the following economic, social and cultural rights in addition to those directly provided under the African Charter: Right to education for children (art 12), right to education for youth (art 13), right of communities to use their language (art 11), right to property (art 22), right to a healthy environment (art 27, 28 & 29), right to work (art 30), right to strike (art 31).
The following economic, social and cultural rights are recognised under the 1996 Constitution of South Africa: Right to freedom of trade, occupation and profession (sec 22), right to labour relations (sec 23), right to environment (sec 24), right to property (sec 25), right to housing (sec 26), right to healthcare, food, water and social security (sec 27), right to education (sec 29), right to language and culture (sec 30), rights of cultural, religious and linguistic communities (sec 31).
The following economic, social and cultural rights are recognised under the 2006 DRC Constitution: Right to private property (art 34), right to private initiative (art 35), right to work (art 36), right to freedom of association (art 37), right to form and be part of union (art 38), right to strike (art 39), right to freedom of marriage and to family (art 40), right of minors to know their parents' names (art 41), right to education (art 43), right to establish educational institutions (art 45), right to culture and freedom of intellectual and artistic creation (art 46), right to health and human security (art 47), right to decent housing (art 48), and the right to a healthy environment (arts 53, 54 & 55).

87 The 1990 Constitution of Benin protects the following collective rights: Peoples' rights to popular sovereignty (art 3), right of Beninese living abroad and their wealth to be protected (art 38), right of foreign nationals to enjoy equal rights (art 39). The following group rights are recognised under the 1996 Constitution of South Africa: Cultural, religious and linguistic communities' rights. The following collective rights are recognised under the 2006 DRC Constitution: Peoples' right to popular sovereignty (art 5), the rights of Congolese leaving abroad and their wealth to be protected (art 50), right to peaceful and harmonious coexistence and the right of vulnerable groups and minorities (art 51), Right to peace and security (art 52), right to have national wealth protected (art 56 & 57), right to enjoy of natural resources (art 58), and the right to enjoy the common heritage of mankind (art 59).

88 The 1990 Constitution of Benin recognise the following duties: Duty to defend the nation and national territory (art 32), duty to work for the general interest (art 33), duty to respect the constitution, constitutional order and laws of the Republic (art 34), duty of civil servant to act with probity (art 35), duty to respect others without discrimination (art 36), and duties of religious institutions to contribute to the education of the youth (art 15).
The 2006 DRC Constitution provides for the following duties: Duty to work (art 36), duty of parents to take care of their children and children to assist parents (art 40), duty of state to protect the youth (art 42), duty to eradicate illiteracy (art 44), state duty to ensure peaceful and harmonious coexistence (art 51), state duty to protect and promote rights of vulnerable groups and all minorities (art 51(2), and the duty to resist against an unconstitutional take over or exercise of power (art 64).

The analysis of the three bills of rights reveals two trends. First, the number of human rights provisions differ across the three bills of rights. The DRC Bill of Rights stand out with 24 provisions on civil and political rights, 14 provisions on social, economic and cultural rights[89] and six provisions on group rights, ranging from the protection of persons with disabilities and older persons to the right to enjoy the common heritage of mankind. Some scholars have rightly suggested that the DRC Bill of Rights contains more rights than many African bills of rights.[90] It provides for duties of citizens and the state. The Benin Bill of Rights has 16 provisions on civil and political rights, nine provisions on social, economic and cultural rights and three on solidarity rights. It also provides for the duties of citizens. The Benin Bill of Rights constitutionalises rights guaranteed under the African Charter. Article 7 of the Benin Constitution reads: '[t]he rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on 20 January 1986 shall be an integral part of the present Constitution and of Beninese law'.[91]

The status of the African Charter in the Benin Constitution has a number of legal implications.[92] The Benin Constitutional Court relies on provisions of the Constitution and the African Charter simultaneously to find a violation of rights.[93] Rights not expressly provided for under the Constitution but contained in the African Charter may thus be invoked by litigants before it.[94] Further, rights provided for under the African

89 Just like Benin, the DRC Bill of rights also contains three provisions related to the right to a healthy environment.

90 C Heyns & W Kaguongo 'Current developments' (2006) 22 *South African Journal on Human Rights* 716.

91 See generally H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: Le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peoples* (2011) 22.

92 For an assessment, TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen and others (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 468.

93 See for example Decision DCC 06-037 of 4 April 2006 where the Benin Constitutional Court found the violation of the right to equality before the law based on art 26 of the Constitution and 3(1) of the African Charter.

94 In Decision DCC 01-082 of 17 August 2001, the Benin Constitutional Court ruled that Mathieu Okpeitcha violated art 29(1)(1) of the African Charter on Human and Peoples' Rights for he had failed to abide by the duty of care towards the family, a duty not contained in the Constitution.

Charter form part of norms of reference (*le bloc de constitutionalité*),[95] and any inferior norms, including legislation, regulations and administrative decisions, must conform to them.[96] In addition, where entitlements under the Benin Bill of Rights are poorly defined, for example the right to life, the African Charter, and the jurisprudence, interpretive guidelines and general comments of the African Commission on Human and Peoples' Rights[97] may, in theory, supplement the understanding of the nature and the scope of such right at the domestic level.[98] The South African Bill of Rights contains 17 provisions on civil and political rights, nine provisions on social, economic and cultural rights and one group rights. The Bill of Rights seems to have no clearly defined duty imposed on citizens.[99]

Secondly, the breadth and the length of rights in the three bills of rights vary from right to right.[100] The South African Bill of Rights has many detailed and specific rights. The DRC Bill of Rights similarly has several detailed and long human rights provisions, as compared to its

95 J Bell, S Boyron & S Whittaker *Principles of French Law* (2008) 16.

96 In Decision DCC 18-117 of 22 May 2018, the Benin Constitutional Court noted that a regulation suspending activities of the 'égoun-goun' group in the Litoral Division was not contrary to art 23 of the Constitution because both the Constitution and art 27(2) of the African provide those rights must be exercised in a manner compliant with the rights of others, collective security, moral and communal interests.

97 Based on art 45(1)(b) of the African Charter, the African Commission has the mandate 'to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations'.

98 A perfect example of this is General Comment 3 of the African Commission on art 4 of the African Charter on the Right to Life. The General Comment clarifies, among others, the nature of the right and obligations which it imposes on states. In Decision DCC 12-153 of 4 August 2012, the Benin Constitutional Court confirmed the unconstitutional nature of the death penalty, and in Decision DCC 16-020 of 21 January 2016, it reiterated the same ruling, adding that, through a combined reading of art 8 and 15 of the Constitution and art 4 of the African Charter, life remained sacred and the state had the 'absolute obligation to respect and protect it'.

99 The only duty which appears to be imposed on citizens is to respect the rights provided for in the Bill of Rights. Sec 9(4) imposes on individuals the duty not to unfairly discriminate directly or indirectly against other persons on grounds that are clearly stated. The Benin and DRC bills of rights also impose these duties to individuals and state organs, in addition to other duties.

100 One may observe, however, that most rights which are long enough in the South African bill of rights seem to be those that were problematic during the apartheid era, such as the rights of arrested, detained and accused persons and the regulation of states of emergency, or those which aimed to preserve the rights that the white minority acquired during apartheid, such as the right to property. See generally C Forsyth 'The judiciary under apartheid' in C Hoexter& M Olivier (eds) *The judiciary in South Africa* (2014) 38-49.

Benin civil law counterpart. In the bills of rights of Benin, DRC and South Africa, however, there are shorter provisions that enumerate or identify rights poorly, making it difficult to understand their exact scope.[101] Rights couched in specific language and detailed enough enable the right-holder and the duty-bearer to understand their scope and obligations.[102] In fact, 'the clarity and specificity of the constitutional contract may be helpful in providing incentive for, and facilitating, enforcement'.[103] Permitting organic legislation to define core modalities of the exercise of certain rights and the extent to which they can be limited may have one practical adverse effect: they may be adopted with significant delay or not adopted at all.[104] For instance, the law intended to determine modalities for the exercise of the freedom of the press was enacted in 2023,[105] 17 years after the entry into force of the DRC Constitution while those on access to information and the freedom of demonstration have not been enacted.[106]

One notes that, in general, many African common law bills of rights tend to be detailed, as compared to their civil law counterparts.

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101 For example, while the South African and the Benin bills of rights simply guarantee the freedom of association without indicating how it should be given effect, the DRC bill of rights enjoins 'public authorities [to] cooperate with the associations which contribute to the social, economic, intellectual, moral and spiritual development of the population and to the education of its citizens', and indicates that the state may grant subsidies to education institutions. See sec 18 of the 1996 Constitution of South Africa; art 25 of the Benin Constitution and art 37 of the DRC Constitution.

102 M Kordela 'The principle of legal certainty as a fundamental element of the formal concept of the rule of law' (2008) 110(2) *La Revue du notariat* 603-604.

103 Z Elkins, T Ginsburg & J Melton *The endurance of national constitutions* (2009) 84. They cite Dick Howard who critiqued the Brazilian Constitution arguing that a high degree of detail and length in constitutional provisions may lead to recurrent amendment and render the text obsolete.

104 CM Fombad 'Problematising the issue of constitutional implementation in Africa' in CM Fombad (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016) 13.

105 *Ordonnance-Loi 23/009 du 13 mars 2023 fixant les modalités d'exercice de la liberté de la presse, la liberté d'information et d'émission par la radio et la télévision, la presse écrite ou tout autre moyen de communication en République démocratique du Congo.*

106 The freedom of the press is currently regulated under Act 96-002 of 22 June 1996 Governing the Modalities of the Exercise of the Freedom of the Press. This Act has been critiqued, and rightly so, given that it was adopted under the autocratic regime of President Mobutu to undermine the very freedom of the press it ironically thought to regulate. It contains provisions that are inconsistent with the values of constitutionalism encapsulated under the current constitution. The same can be said of the Decree-Law 196 Regulating Demonstrations and Public Assemblies which remains in force despite some provisions which make the exercise of the constitutional right to freedom of assembly and demonstration illusory.

A comparison between the manner in which rights are couched in the common law constitutions of Ghana,[107] Kenya,[108] Uganda,[109] Namibia,[110] Nigeria[111] and civil law constitutions of Burkina Faso,[112] Côte d'Ivoire,[113]

107 Chapter five of the 1992 Constitution of Ghana is entitled 'Fundamental rights and freedoms'. Sec 14 on the right to personal liberty is detailed, nearly a page long in the Constitution, and caters for the rights of detained and accused persons. It sets out in its seven sub-sections legitimate reasons that may justify its infringement. Equally, sec 17 on fair trial is scattered over almost two pages and covers, in 21 sub-sections, a vast array of rights of the defendant. Protection from deprivation of property (sec 20) educational rights (sec 25) and children's rights (sec 28) are detailed.

108 Chapter four of the 2010 Constitution of Kenya is entitled 'Bill of Rights'. It contains both long (sec 34, freedom of the media; sec 40, protection of the right to property) and shorter (sec 28, human dignity; slavery, servitude and forced labour) provisions, which are couched in a language similar to other common law bills of rights. Sec 49 (rights of arrested persons) sec 50 (fair hearing) and sec 51 (rights of persons detained, held in custody or imprisoned) are long and detailed, as in other common law African constitutions.

109 Chapter four of the 1995 Constitution of Uganda is entitled 'Protection of fundamental and other human rights and freedoms'. Like sec 12 of the 1992 Ghana Constitution, worded similarly, sec 20 of the Constitution sets out conditions of application of rights and freedoms. Its long provisions include sec 23 (protection of personal liberty) sec 25 (protection from slavery, servitude and forced labour) sec 28 (right to a fair hearing). This Constitution and the 1996 Constitution of Ghana have similar headings.

110 Chapter three of the 1990 Constitution of Namibia is entitled 'Fundamental human rights and freedoms'. Like many other common law African constitutions, provisions which define the rights of arrested and detained persons (art 11) or fair trial (art 12) are as well detailed.

111 Chapter four of the 1999 Constitution of the Federal Republic of Nigeria is entitled 'Fundamental rights'. Sec 33 which provides for the right to life, is virtually identical word-for-word with sec 13 of the 1992 Ghana Constitution. It is also similar to sec 18 of the Gambian Constitution (Protection of the right to life). Its long and detailed provisions include sec 34 on the right to dignity, sec 35 (right to personal liberty) sec 36 (fair hearing).

112 Title one of the 1991 Constitution of Burkina Faso is entitled 'Fundamental rights and duties'. Art 3, which guarantees the right to personal liberty, is short and has two paragraphs of one sentence each. Most rights and freedoms are not clearly defined (art 9 on freedom of movement or art 4 on equality and equal protection).

113 Title one of the 2016 Constitution of Côte d'Ivoire is entitled 'rights, freedoms and duties'. Although art 7 guarantees the rights of arrested individuals, the provision seems not to be as detailed as common law provisions on similar matters. The four paragraphs seem to mix fair hearings, arrested persons' rights and related due process rights.

Rwanda,[114] Tunisia[115] and Gabon[116] not only reveals the similarity in the formulation of rights among constitutions sharing similar legal traditions, but confirms the detailed nature of most rights in many African common law bills of rights.

Of course, the presence of the three generations of rights in most African constitutions is an influence of the International Bill of Rights and the African Charter. However, the way they are formulated seems to go beyond the mere influence of the International Bill of Rights. The similarity in wording is perhaps also not a coincidence. This raises an important question: Is there an inherent feature in the common law tradition that makes most of its bills of rights provisions detailed, or in the civil law tradition that makes most of its bills of rights less detailed?

One possible explanation could be that, during its formation, the common law legal tradition developed defendant rights in criminal proceedings through various writs such as the writ of *habeas corpus* or the writ of *mandamus* one does not find in the civil law tradition.[117] This in part may explain why provisions related to personal liberty and security, rights of detained, accused or persons in custody and fair trial and due process rights are detailed in many African common law constitutions. Merryman observes that civil law countries have increasingly taken consideration of defendant rights.[118] The examples of African civil law constitutions cited above suggest that they have not detailed their human rights provisions as sufficiently as their common law counterparts, except

114 Chapter four of the 2003 Constitution of Rwanda is entitled 'Human rights and freedoms'. Under art 12, the right to life is defined in similar equivocal words as under art 3 of the constitution of Cote d'Ivoire. art 24 defines the right to liberty and security of person without defining instances in which they may be deprived and how, in such instances, the core rights of individuals may still be observed.

115 Chapter two of the 2014 of the Constitution of Tunisia – 'Rights and freedoms' – is not much different from Chapter4 of the Constitution of Rwanda in terms of the brevity and ambiguity of rights such as the right to life (art 22) human dignity (art 23) and right of the defendant (art 27).

116 In the 1991 Constitution of Gabon, human rights are grouped in a 'preliminary title' entitled 'Of fundamental principles and rights'. All the rights are provided for under art 1 which contains 23 sub-articles. Rights of defendants (art 1(4)) freedom of movement (art 1(3)) or freedom of conscience, thought, expression, communication, religion are as ambiguous as rights contained in the preamble of the Cameroon Constitution.

117 D Shelton *Remedies in international human rights law* (2000) 79-80; SE van der Merwe 'A basic introduction to criminal procedure' in JJ Joubert (ed) *Criminal procedure handbook* (2017) 27-28.

118 JH Merryman *The loneliness of the comparative lawyer and other essays in foreign and comparative law* (1999) 21.

perhaps for the DRC's Bill of Rights. The common law versus civil law divide might be one explanation, but is not the only one.

There might be some context-specific justifications. In regard to South Africa, Lourens du Plessis argues that the interests of different segment of population during the negotiation of the interim Constitution[119] and the large participation of various groups can explain the length of some bills of rights provisions. For instance, the participation of women's groups ensured that the rights of children are effectively constitutionalised.[120] The participation of labour groups played in favour of the recognition of labour rights,[121] and politicians who participated in the constitutional negotiations ensured that right to political participations is appropriately catered for.[122] The interests of participating social groups influenced the drafting of the property clause.

Be that as it may, some post-1990s African constitutional framers understood that these rights might remain unrealised if their scope of application did not cover violations by states, their organs and private individuals.

119 Most of its provisions in relation to the Bill of Rights were maintained in the final Constitution with slight modifications.

120 Sec 28 of the 1996 Constitution of South Africa.

121 Sec 23 of the 1996 Constitution of South Africa.

122 Sec 19 of the 1996 Constitution of South Africa. See Du Plessis (n 13) 97-98. This has prompted some scholars to suggest that there must be a shift from formalistic and positivistic interpretation of constitutional rights to open and participatory deliberations. Justice Langa, for instance, suggested that 'The provisions of our Bill of Rights are expressed in a manner that calls explicitly for judicial application of open-textured political values such as dignity, equality and freedom. They call implicitly for judicial choice from amongst a variety of possible solutions various deep problems of governance and social interaction.' See Bohler-Muller, Cosser & Pienaar (n 15) 7. In his minority judgment in *State v Mhlungu*, Kentridge AJ stated the following: 'I might add that I regard the question of interpretation to be one to which there can never be an absolute and definitive answer and that, in particular, the search of where to locate ourselves on the literal/purposive continuum or how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this court, then between our court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large', para 129. See also S Woolman & M Bishop 'Introduction: Law's autonomy' in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 7.

3.1.2 Effective protection of rights through vertical and horizontal applications of bills of rights

A bill of rights can properly serve its purpose, 'to introduce contemporary norms and standards of human rights protection into the governance of a country',[123] when, among others, it applies vertically and horizontally.[124] Vertical application of the bill of rights ensures that individuals are protected against abuses by states and their organs (executive, legislature and judiciary) at all levels of government. States are powerful as compared to individuals as they have the monopoly of legitimate violence, and the authority of command to enforce laws and regulations, thus inequality may occur during the exercise of such powers.[125] The horizontal application of a bill of rights is its ability to protect individuals against violations and abuses perpetrated by other individuals. Corporations and private individuals play an increasing role in regulating economic and other activities in which individuals have a stake.[126] The horizontal application of fundamental rights and freedoms may be seen as a shift from the traditional 'natural rights theory' – which limits rights to the public arena – to demands for a free, open and democratic society.[127] The South African and DRC bills of rights explicitly provide for their vertical and horizontal application. In Benin's Bill of Rights, this much is implied.

The vertical and horizontal application of the South African Bill of Rights has three implications. First, the 'executive, legislature, the judiciary and all organs of state' must ensure that their actions and omissions do not infringe the Bill of Rights. The legislature encompasses the South African parliament (National Assembly and National Council of Provinces), the provincial legislatures and municipal councils.[128] Legislation they adopt and non-legislative measures they adopt must conform to the Bill of Rights.[129] The executive is composed of political

123 N Jayawickarama *The judicial application of human rights law: National, regional and international jurisprudence* (2017) 85.
124 DM Chirwa *Human rights under the Malawian Constitution* (2011) 19.
125 Currie & de Waal (n 2) 31.
126 CM Fombad 'Botswana: Introductory notes' 14 http://www.icla.up.ac.za/images/country_ reports/botswana_country_report.pdf (accessed 28 June 2021).
127 DM Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 *Law, Democracy and Development* 21.
128 Sec 43 of the 1996 Constitution of South Africa.
129 Currie & de Waal (n 2) 42.

authorities at the national level (the President of the Republic and their deputy and cabinet ministers) and provincial level. Members of the judiciary are equally bound by the bill of rights in the exercise of their functions. All organs of state such as national, provincial or local state departments are also bound by the bill of rights. Secondly, the bill of rights applies in the relationship between private individuals and they might be prosecuted should they violate it.[130] Thirdly, the bill of rights can be applied directly to the executive, legislature, judiciary and state organs when they have infringed individual rights, or applied indirectly to them when courts bring their actions and legislation in conformity with the 'spirit and the purport' of the bill of rights. It can also be applied to relationships among private individuals *directly* when one violates another persons' right, or *indirectly* when litigants that approach courts rely on common law provisions, such as defamation. The first case scenario is termed direct or indirect vertical application, while the second relates to direct or indirect horizontal application.[131]

Unlike the South African Bill of Rights, Benin's does not have an explicit provision on its vertical and horizontal application. However, vertical application is implied by some constitutional provisions. Article 74 prescribes that the President of the Republic is liable for high treason if they are an accomplice to or perpetrator of grave human rights violations. Article 19(2) provides that '[a]ny individual or any agent of the state shall be absolved of the duty of obedience when the order received shall constitute a serious and manifest infringement with respect to human rights and public liberties'.[132]

Benin's Constitutional Court jurisprudence confirms the vertical and horizontal application of the country's Bill of Rights. In Decision DCC 09-087 of 13 August 2009, the Constitutional Court ruled that it could review 'legal instrument, actions, behaviour of any nature and from whoever: citizen, civil service, government, courts including the

130 The horizontal application of the South African Bill of Rights was put to test during the operation of the South African 1993 interim Constitution in a matter referred to the Constitutional Court by the Transvaal Provincial Division of the Supreme Court (current High Court of South Africa, Gauteng Division). The latter questioned whether the Bill of Rights could be applied to 'legal relationships between private parties', to wit, an action of defamation. The Court applied indirect horizontal application. Under the 1996 Constitution, the provision was first put in application in *Khumalo v Holomisa* before the Constitutional Court.

131 Currie & de Waal (n 2) 44-50.

132 Art 119 of the 1990 Constitution of Benin.

Supreme Court and the High Court of Justice'.[133] Further, in Decision DCC 01-082 of 17 August 2001, it found that Mr Okpeitcha violated article 29(1)(1) of the African Charter in failing to abide by the duty of care to the family.[134] Finally, under Decision DCC 02-014 of 19 February 2002, the Constitutional Court ruled that a local chief that arrests, detains and imposes inhuman treatment on individuals violates the Constitution.[135]

Article 60 of the 2006 DRC Constitution provides for vertical and horizontal application of the Bill of Rights. According to it, 'public authorities (*pouvoirs publics*) and every person are bound to respect human rights and fundamental freedoms enshrined in this Constitution'.[136] Public authorities comprise the state and state organs, including the judiciary,[137] since other provisions, such as articles 14, 15, 37, 40(2) and (3), 41(3) and (5), 42, 45(2), impose on them specific obligations related to fundamental rights. However, the concept of 'person' is not defined under the Constitution or in the Family Code on the law of persons. Thus, it is difficult to tell whether it includes natural and legal persons. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa defines a person as both a natural and legal person.[138] In 2010, the Supreme Court of Justice (interim Constitutional Court) quashed a regulation of the Governor of the Central Bank as it had infringed the right to equality before the law and equal protection and freedom of association of a private company.[139] If the latter, as a juristic person, could enjoy rights provided for under the Bill of Rights, there is no doubt that it also has the duty to respect them.

The foregoing demonstrates that the three Bills of Rights are designed to constrain the capacity of both state and non-state actors to infringe upon human rights, to embed a culture that actively promotes human

133 Decision DCC 09-087 of 13 August 2009.
134 Decision DCC 01-082 of 17 August 2001.
135 Decision DCC 02-014 of 19 February 2002.
136 Art 60 of the 2006 DRC Constitution.
137 Decision R.Const 1830 du 18 novembre 2022 in Cour constitutionnelle *Bulletin des arrêts: Contentieux de constitutionnalité 2022-2023* (2024) 184.
138 Art 1(16) of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. DRC ratified the Convention on 15 September 1994 and deposited ratification instruments on 13 April 1995. See also A Clapham *Human rights obligations of non-state actors* (2006) 31.
139 Judgment R.Const. 113 of 26 March 2010 cited in Wetsh'Okonda (n 1) 426.

rights within their respective spheres of operation, and to ensure the protection of individuals against violations, regardless of the source. This normative alignment underscores the principle that the protection and promotion of human rights is a shared responsibility. It imposes a duty on all actors, whether public or private, to respect, protect, and fulfil fundamental rights. Vertical and horizontal application are perfect tools to induce a culture of rights even when they are limited or derogated under conditions provided for by constitutions. The analysis now turns to derogations and limitations of constitutional rights.

3.1.3 Conditions for derogations and limitations of human rights

International[140] and domestic laws envisage situations where human rights may be restricted or limited and suspended or derogated upon.[141] This depends on the nature of the right and the circumstance which the country faces.[142] Derogations and limitations of human rights are different. Derogations are a temporary suspension of the enjoyment of some rights to ensure that the state's interests are preserved during exceptional circumstances. Limitations or restrictions of a right occur where the exercise of that right is curtailed or regulated through legal measures adopted by public authorities, including legislation enacted by Parliament or executive acts.

Unlike derogations, limitations do not require a special circumstance. They are meant to reconcile three competing interests: interests of individuals (rights-holders), interests of community members, and state

140 UDHR, art 29(2): 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.

141 I Maja 'Limitation of human rights in international law and the Zimbabwean Constitution' (2018) 1 *University of Zimbabwe Law Journal* 117-135.

142 Art 4 of the 1966/1976 International Covenant on Civil and Political Rights (2200A (XXI)).

interests.[143] Individuals enjoy their rights and freedoms with due regard to the rights of others and state interests.[144]

How bills of rights balance competing individual interests and ensure that state interests are proportionately defined so as not to impede the enjoyment of rights is the central question this section addresses.[145] It first assesses the extent to which the three bills of rights covered in this book allow for limitations, and, secondly, derogations. It also looks at conditions which they impose in order to constrain the discretion of states when declaring states of emergencies.

The three bills of rights impose different conditions for limitations and derogations of rights. The South African Bill of Rights is one of the few African common law bills of rights that contains a general limitation clause.[146] In addition, other provisions have internal limitation clauses.[147] The general limitation clause imposes stringent conditions for the validity of limitations, thus constituting an important shield against arbitrary limitations of rights. A number of provisions in the bills of rights of Benin and the DRC contain internal limitations. Benin's Bill of Rights has less rights with internal limitations than the DRC. In Benin, human rights provisions that contain internal limitation clause include the right to freedom of thought, conscience, religion, cult, opinion and expression. They must be exercised with due regard to public order 'as defined by the law and regulations'.[148]

143 See the review in M Malila 'The place of individuals' duties in international human rights law: Perspectives from the African human rights system' (2017) unpublished doctoral thesis, University of Pretoria 18-43; Quashigah (n 81) 162; WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1914) 23 *Yale Law Journal* 42-54.

144 S Peers 'Taking rights away? Limitations and derogations' in S Peers & A Ward (eds) *The European Union Charter of fundamental rights* (2004) 142.

145 See also JA Neto *Borrowing justification for proportionality: On the influence of the Principles Theory in Brazil* (2018) 234.

146 Sec 36 of the South African Bill of Rights, reads: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsec (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bills of Rights.'

147 For example, sec 25 explains instances where the right to property may be limited.

148 Arts 9 and 23 of the 1990 Constitution of Benin.

In *Media Rights Agenda v Nigeria,* the African Commission on Human and Peoples' Rights ruled that the concept 'by the law' meant 'in accordance with International Human Rights Law'.[149] Thus, a limitation must be provided for by the law, serve a legitimate aim, be necessary to achieve such aim, and be proportionate to the gain sought by the state. Article 27(2) of the African Charter establishes limitations to rights and is applicable to Benin.[150] The Benin Constitutional Court relied on it in some cases.[151] It ruled that an Act of Parliament or a regulation could not be used to derogate rights. The legislature was empowered to regulate the exercise of a right when the Constitution provides for such possibility.[152] The Court ruled that the power to regulate did not empower public authority to add conditions not contemplated by the constitution for individuals to exercise their rights.[153]

Regarding derogations, the state of emergency and the state of siege are two situations that can justify derogations.[154] The state of emergency lacks clear definition.[155] It is generally accepted that an emergency presupposes the existence of a public threat that endangers the survival of the nation. It could be a political crisis (internal commotion or external attack), natural catastrophe, pandemic, disaster or economic crisis.[156] It must be temporary. The threat must be actual or imminent, its magnitude must affect the entire population, and the very existence of the nation must be threatened.[157] The declaration must be a measure of last resort.

149 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200, para 66-70 in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 303.

150 Art 27(2) reads: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' Heyns & Kaguongo suggests that this provision may be regarded as the general limitation clause of rights provided for under the African Charter.

151 The exercise by Gilda Ahissou and his colleagues of their right to freedom of demonstration had violated the Constitution because they had prevented other students, administrative staff and professors from working. See Decision DCC 14-129 of 8 July 2014.

152 Decision DCC 18-117 of 22 May 2018; Decision DCC 33-94 of 24 November 1994.

153 Decision DCC 18-117 of 22 May 2018.

154 RB Lillich 'The Paris Minimum Standards of Human Rights Norms in a state of emergency' (1985) 79(4) *American Journal of International Law* 1074-1081.

155 J Oraa *Human rights in states of emergency in international law* (1992) 11.

156 As above..

157 As above.

With the benefit of hindsight over the way African states reacted legally and constitutionally to the coronavirus (COVID-19) pandemic as a public health emergency, it is possible to make some comments on how well the bills of rights of Benin, the DRC and South Africa protect human rights during emergencies. It is important first to describe how the constitutions of the three countries regulate emergency situations.

Benin's Constitution fails to define a state of emergency,[158] but it establishes conditions for its validity. Procedurally, there must be a prior declaration, and the President of the Republic must consult with the President of the National Assembly and the President of the Constitutional Court.[159] The nation must be informed.[160] The resort to article 68 powers is discretionary.[161] Article 98(15) of the Constitution provides in addition that 'the state of siege and the state of emergency' must be declared by a law.[162] Substantively, there must be a grave and immediate threat and it must lead to the interruption of the functioning of public and constitutional powers.[163] The Benin Constitutional Court ruled that measures established to address the emergency must respect constitutional rights.[164] In addition, they must be adopted in the council of ministers and be temporary.

On its part, the DRC Constitution establishes two alternative criteria for the validity of the declaration of emergency, namely when

158 EN Youmbi *La justice constitutionnelle au Bénin: Logiques politique et sociale* (2016) 556.

159 As one can see, the National Assembly as a Plenary is not to be consulted, only its President. The same applies to the Constitutional Court whose President must be consulted.

160 Youmbi (n 158) 557-558; Fondation Konrad Adenauer *Commentaire de la Constitution béninoise du 11 décembre 1990* (2009) 96-100.

161 Decision DCC 27-94 of 24 August 1994.

162 A controversial decision by the Minister of Security prohibiting public demonstrations was found consistent with the Constitution because it was not adopted under art 68 powers. Decision DCC 10-005 of 21 January 2010. In *Commission Nationale des Droits de l'Hommes et des Libertés v Chad* (2000) AHRLR 66 (ACPHR 1995) para 21, the African Commission noted that the African Charter does not allow derogations of rights in emergency situations. For critical perspective, see OB Bahoze 'Le système africain des droits de l'homme face à l'état d'urgence sanitaire due à la Covid-19' (2020) 4 *Annuaire africain des droits de l'homme* 60-82; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 434; R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 127. A logical deduction perhaps is that Benin cannot derogate African Charter rights even in states of emergency.

163 Youmbi (n 158) 559; Adenauer (n 160) 96-100.

164 As above.

'grave circumstances constitute a present threat to the independence or the integrity of the national territory', or 'when they provoke the disruption of the proper functioning of institutions'.[165] Constitutional rights are protected in two ways during the state of emergency. First, article 61 enumerates seven rights that cannot be derogated. They include the right to life, the prohibition of torture and cruel and inhuman or degrading treatment or punishments, the prohibition of slavery, and fair trials and due-process rights.[166] Secondly, article 145(2) empowers the Constitutional Court to review the constitutionality of Presidential Ordinances instituting the state of emergency and the state of siege.[167] Citizens are also empowered, by virtue of article 162(2), to challenge emergency measures adopted in a separate legal act from one which declares the state of emergency, particularly when the measures are likely to violate fundamental rights. The same is provided for in South Africa.

The South African Bill of Rights sets two cumulative criteria, namely when 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency' and when 'the declaration is necessary to restore peace and order'.[168] The state of emergency is declared through an Act of Parliament.[169] South African courts are empowered to control the validity of either the Act that declares the state of emergency or the Act that prolongs it. The nature of some rights does not allow any derogation even when a state of emergency is declared.[170] Detentions without trials, as argued in section two, characterised the apartheid regime and have now been carefully

165 Art 85 of the 2006 Constitution of DRC. See generally Judgment R.Const. 150 of 6 May 2021.

166 In the *Mukonkole* case, the Constitutional Chamber of the Supreme Court of Justice held that, with respect to the right to defence as a non-derogable right, only remedies properly defined by the implementing legislation should not be derogated from, not general remedies. Westhokonda noted that the court's reading of the Constitution was inappropriate, as the issue was whether legislation had the power to abrogate a constitutionally protected right of defence, even in an emergency; See M Westhokonda 'Le contentieux constitutionnel congolais des droits de l'homme du 18 février 2006 au 18 février 2011: Essai de bilan et perspectives d'avenir' (2011) http://www.la-constitution-en-afrique.org/article-les-droits-de-l-homme-selon-le-juge-constitutionnel-79507577.html (accessed 2 August 2019).

167 B Kahombo 'The origin of the Congolese Constitutional Court: Organisation and jurisdiction' https://www.hamann-legal.de/upload/6Balingene.pdf (accessed 2 August 2019).

168 Sec 37 of the 1996 Constitution of South Africa.

169 Sec 37(1) of the 1996 Constitution of South Africa.

170 Art 61 of the 2006 DRC Constitution.

protected under section 37(6) to cater for the rights of individuals.[171] Thus, the three bills of rights regulate the exercise of limitation and derogation powers. Parliaments must be involved; derogations must be temporary; and citizens may challenge limitations and derogations before courts.

Despite such strong constitutional protection of human rights during emergencies, the DRC and South African responses to COVID-19 invariably affected fundamental rights and freedoms. Whilst the DRC President declared a state of emergency, the ordinance declaring it was not promptly submitted to the Constitutional Court for review.[172] When it finally reached the Court, the latter examined the extent to which the ordinance respected procedural requirements for declaring the state of emergency. It did not assess how the measures adopted substantially affected fundamental rights, including the non-derogable rights under article 61 of the Constitution.[173] The Court reaffirmed this position in Judgment R.Const. 1550 of 6 May 2021, going so far as to assert that the state of siege could, in accordance with the Constitution, 'suspend' the rule of law. In doing so, it deferred to the executive branch, which it considered best positioned to assess whether the substantive conditions justifying the declaration of a state of siege were met. Judgment R.Const. 1200 of 13 April 2020 and Judgment 1550 of 6 May 2021 exercise a minimalistic control as opposed to a detailed review of human rights protection. The South African authorities avoided declaring a state of emergency as this would have subjected them to rigorous parliamentary and constitutional scrutiny.[174] Instead, they declared a state of disaster through the Disaster Management Act. Human rights violations were committed during this period, but unlike in the DRC, some people who

171 Sec 37(6) of the Constitution of South Africa.

172 TM Makunya 'DRC's Constitutional Court: Broken shield in overseeing the executive in emergencies?' (*ConstitutionNet*, 27 May 2020) http://constitutionnet.org/news/drcs-constitutional-court-broken-shield-overseeing-executive-emergencies (accessed 1 July 2020).

173 AM Ndjalandjoko & TL Kidimba 'La suspension des cultes en RD Congo pour cause de la COVID-19: Critique de l'arrêt de conformité rendu par la Cour constitutionnelle' (2020) 546 *Congo Afrique* 732. See also Judgment R.Const. 150 of 6 May 2021 7-9.

174 CM Fombad & LA Abdulrauf 'Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa' (2020) 20 *African Human Rights Law Journal* 407-408.

went to court to protect their rights or to hold perpetrators of human rights violations accountable were successful.[175]

A practical lesson from the responses to COVID-19 is that individuals should not expect political authorities to respond to emergencies in a human rights-sensitive manner simply because constitutions require them to do so.[176] The existence of non-derogable rights in the constitution does not suffice on its own to ensure respect for human rights during exceptional circumstances.

3.2 The ability of bills of rights to check arbitrary amendments

The three bills of rights are constitutionalised and, as such, any pre-existing and subsequent inconsistent legislation is invalid. This derives from the nature of the constitution itself as the supreme law of the land and the obligation that inferior norms be consistent with its provisions. The South African Constitution guarantees rights under chapter 2. Benin and DRC alike constitutionalise their bills of rights and thereby bind state as well as non-state actors. In addition, Benin's Bill of Rights constitutionalises the African Charter's rights. Because the bill of rights is explicitly provided in the Constitution, its amendment must satisfy conditions that the Constitution lays down for the validity of constitutional amendments.[177] Thus, one needs to assess the extent to which bills of rights may check against arbitrary amendments.

Article 220 of the DRC Constitution prohibits constitutional amendments that seek to reduce individual rights and freedoms. Article 219 proscribes constitutional amendments during the state of war, the state of emergency and the state of siege.[178] Further conditions imposed for the validity of constitutional amendment may enable the Bill of Rights to prevent arbitrary amendments. First, the National Assembly and the Senate must approve the constitutional amendment.[179] Secondly, the

175 M van Staden 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa' (2020) 20 *African Human Rights Law Journal* 484.

176 CM Fombad & TM Makunya 'The struggle for constitutional identity in Francophone Africa' in CM Fombad & N Steytler (eds) *Constitutional identity and constitutionalism in Africa* (2024) 100-101.

177 DA Schmeiser 'The entrenchment of a bill of rights' (1981) 19 *Alberta Law Review* 376-377.

178 A similar provision can be art 70 of the 2010 Constitution of Angola.

179 Under art 218, the President of the Republic, the Cabinet after a deliberation by the Council of Ministers, half of members of the National Assembly or the Senate and 100 000 citizens.

proposal must be approved by referendum unless parliament approves it by a three-fifths majority of members, that is, affirmative votes of 366 out of 610 Members of Parliament. Thirdly, the amendment bill must be promulgated into law by the President and gazetted.

The amendment process, however, suffers from two weaknesses, one legal and the other practical, that may affect the Bill of Rights. First, the absence of constitutional review of constitutional amendments means that the Constitutional Court is not empowered to review the extent to which constitutional amendments comply with procedural and substantive guarantees the Constitution establishes.[180] Secondly, if Members of Parliament all come from the ruling party or coalition, it is doubtful whether they can ensure the Constitution is not amended to serve the interests of their party, coalition or the President of the Republic.[181] The Benin Constitution tries to reduce these risks.

The Benin Bill of Rights has three-fold protection against arbitrary amendments. The first is linked with the procedure for the validity of constitutional amendments. The amendment bill must be approved by a three-fourths majority of MPs. It also must be approved by referendum unless Members of Parliament approve it by a four-fifths majority. Furthermore, the Constitutional Court can review constitutional amendments although it has, recently, adopted a minimalist approach which limits it to simply conduct a procedural review of amendments. Yet, in some cases, it has annulled constitutional amendments[182] on the basis that they were contrary to 'constitutional valued-principles'.[183] National consensus, a remnant of the way decisions were reached during the 1990 National Sovereign Conference, forms part of those principles, and entails that the process of constitutional amendment should be 'public and open'.[184] Closely linked to the second possibility, the third

180 In 2011, a Member of Parliament approached the then interim Constitutional Court to declare the amendments to the Constitution unconstitutional. To this day, the Court has never issued a ruling in this case.

181 See generally B Kahombo 'Les fondements de la revision de la Constitution du 18 Février 2006' (2014) 1 *KAS African Law Study Library – Librairie Africaine d'Etudes Juridiques* 428.

182 Adjolohoun (n 91) 28-29. See Decision DCC 05-139 of 17 November 2005 and Decision DCC 05-145 of 1 December 2005.

183 Les principes à valeur constitutionnelle.

184 Adjolohoun (n 91) 28-29. See also African Court on Human and Peoples' Rights *Houngoue Eric Noudehouenou v Benin*, Application 003/2020 (4 December 2020). The principle of 'national consensus' and the current Benin Constitutional Court's position towards it are fully discussed in sec 2.2 (ch 3).

derives from the ability of individuals to challenge the constitutional validity of 'any law, regulation and administrative act' by virtue of article 3 and 121 of the Benin Constitution.

The South African Bill of Rights combines a rigorous constitutional amendment process with the review of constitutional amendment laws. Section 74(2) of the Constitution provides that a bill amending the Bill of Rights must be supported by a minimum of two-thirds of members of the National Assembly and the affirmative vote of at least six provinces within the National Council of Provinces. Bills amending the Constitution, including those amending the Bill of Rights, must be assented to by the President of the Republic and, as such, two protective reviews are offered. The President may refer such a bill to the Constitutional Court for an *a priori* review of constitutionality and, after promulgation, the bill may be subjected to concrete review of constitutionality.

3.3 The relationship between bills of rights and international law

The International Bill of Rights and the African Charter continue to influence domestic adjudication of constitutional rights in Africa.[185] The examples of Benin, the DRC and South Africa show, however, that the degree to which bills of rights relate to international (human rights) law differ even within countries that share the same legal tradition.[186] International human rights law as used in this book refers to conventional norms[187] and customary international law,[188] including *jus cogens* norms.[189] The discussion in this section relates to the status of international law in the three domestic legal systems.

185 M Killander 'The effects of international law norms on constitutional adjudication in Africa' in Fombad (n 66) 216.

186 TS Bulto 'The monist-dualist divide and the supremacy clause: Revisiting the status of human rights treaties in Ethiopia' (2009) 23 *Journal of Ethiopian Law* 134-137.

187 JS Gibson 'International human rights law: Progression of sources, agencies, and law' (1990) 14 *Suffolk Transnational Law Journal* 47-50; J Crawford *Brownlie's principles of public international law* (2012) 31-33.

188 B Stephens 'Litigating customary international human rights norms' (1995) 25 *Georgia Journal of International and Comparative Law* 191; RB Lillich 'The growing importance of customary international human rights law' (1995) 25 *Georgia Journal of International and Comparative Law* 3-5.

189 I Diaconu '*Jus cogens* – development in international law' (2016) 16 *Romanian Journal of International Law* 36-42.

African civil law constitutions adopt, in general, a monist approach to international law;[190] thus, this section discusses together the approaches taken by the DRC and Benin. Most constitutions that adopt the monist approach, particularly Francophone ones, have their origins in article 55 of the 1958 French Constitution, which reads: 'Treaties or agreements duly ratified or approved possess, from the moment of their publication, a superior authority to those of laws under the condition, for each treaty and agreement, of its application by the other party.'[191] The content of this provision is similar to article 215 of the DRC Constitution and 147 of the Benin Constitution. Whilst the former provides that '[l]awfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject for each treaty and agreement to the application by the other party', the latter stipulates that '[t]reaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party'. Although the formulations seem different to some extent,[192] the core procedural and substantive requirements for the validity and the application of international law norms at the domestic level are almost the same.

First, a treaty or an agreement must be 'duly ratified' 'concluded' or 'approved'. Secondly, it should be published. Thirdly, it should be applied reciprocally by other parties,[193] though this last condition does not apply to human rights treaties.[194] The ratification is 'duly' performed, when its process has respected the substantive and procedural conditions laid down under the constitution and relevant legislation.[195] Such conditions

190 JK Mpiana 'La position du droit international dans l'ordre juridique congolais et l'application de ses normes' (2012) doctoral thesis, *Sapienza Universita Di Roma* 93-94.

191 J Plötner 'Report on France' in A-M Slaughter, AS Sweet & JHH Weiler (eds) *The European Court and National Courts – doctrine and jurisprudence: Legal change in its social context* (1998) 42.

192 The 1958 Constitution of France contains the following formulation – a treaty 'ratified or approved' while the 2006 DRC Constitution uses a treaty 'concluded' and Benin merely indicates a treaty simply 'ratified'.

193 On recent changes in the application of monism, M Killander & H Adjolohoun 'International law and domestic human rights in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5-11; MA Waters 'Creeping monism: The judicial trend toward interpretive incorporation of human rights treaties' (2007) 107 *Columbia Law Review* 654.

194 Broader interpretation of art 60(5) of the 1969 of the Vienna Convention on the Law of Treaties.

195 B Asso & F Monera *Contentieux administratif* (2006) 138.

are: they should be ratified by the President of the Republic or their delegates; that parliament should approve in advance the ratification of certain treaties; and that they must not contain provisions inconsistent with the constitution.[196]

The Benin and the DRC constitutions are silent on the status of customary international law in the domestic system.[197] Some human rights violations could be perpetrated by foreign nationals that claim jurisdictional immunity or functional immunity, and a national court would have to determine whether such a rule as developed under customary international law applies to it directly or needs to be provided for under a binding instrument.[198] However, under Decision DCC 02-052 of 31 May 2002, the Benin Constitutional Court directly applied a customary international law norm without a positive law basis. This suggests that, in some instances, courts may avoid a rigid approach to customary international law and adopt a pragmatic one. The application of customary international law should nonetheless be made clear, and some African common law constitutions, starting with the South African Constitution, may be used as source of inspiration. Many common law constitutions adopt a dualist approach to international law.

Dualism is intimately linked to the doctrine of parliamentary supremacy. It empowered the House of Commons to validate international commitments made by the Crown before they could be applicable in the English legal system.[199] Three main features of South African legal system's relationship with international law are worth discussing.

First, the South African Constitution follows the principle of dualism in regard to international treaty law. According to section 231(4), '[a]ny international agreement becomes law in the Republic when it is

196 BM Métou 'Le moyen de droit international devant les juridictions internes en Afrique: Quelques exemples d'Afrique noire francophone' (2009) 22(1) *Révue québecoise de droit international* 143.

197 However, some domestic laws in the DRC refer to customary international law. See generally JK Mpiana 'La position du droit international dans l'ordre juridique congolais et l'application de ses normes' (2012) doctoral thesis, *Sapienza Universita Di Roma* 267-269.

198 See the discussion in J Hamster 'Customary international law' in A Nollkaemper & A Reinisch (eds) *International law in domestic courts: A casebook* (2018) 266-277.

199 JO Ambani 'Navigating past the 'dualist doctrine': The case for progressive jurisprudence on the application of international human rights norms in Kenya' in Killander (n 193) 28.

enacted into law by national legislation'. However, provisions of a treaty or agreement 'approved by Parliament' and which are 'self-executing', capable of being directly applied by national courts without the need for further legislative action, form part of the law of South Africa, if they remain consistent with the Constitution and legislation.

Knowing which provisions of ratified treaties are 'self-executing' has been a matter of scholarly and jurisprudential controversy. According to Dugard, one might recognise a self-executing provision when 'the language of the treaty so indicates and existing municipal law, either common law or statute, is adequate in the sense that it fails to place any obstacle in the way of treaty application'.[200] Agpalo argues that a self-executing provision is 'one which is complete by itself without the aid of supplementary or enabling legislation, or which supplies sufficient rule by means of which the rights it grants may be enjoyed or protected'.[201] Both scholars emphasise the need for clarity in the formulation of the provision and for lack of domestic impediment to its application.

This means its normative content must be specific. In *Claassen v Minister of Justice and Constitutional Development*, the Western Cape High Court ruled that the ICCPR was not a self-executing instrument and that its article 9(5) could not serve as the basis of a legal remedy, while the South African Constitutional Court in *Zealand v Minister of Justice and Constitutional Development* coined a right to compensation by reasoning that 'South Africa also bears an international obligation in this regard in terms of article 9(5) of the ICCPR'.[202]

Secondly, the South African Constitution recognises the direct applicability of customary international law. Section 232 of the Constitution provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. Because an Act of Parliament may override a customary international law norm,[203] its status in the domestic system seems weak.

200 J Dugard *International law: A South African perspective* (2016) 57.
201 See RE Agpalo *Statutory construction* (2003) 467.
202 The High Court distinguished *Claassen* from *Zealand* on the ground that in the former, the magistrate acting outside the authority of the law and leading to the unlawful detention of an individual had 'judicial immunity'. See the discussion in M Killander 'Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)' (2010) 26 *South African Journal of Human Rights* 387-394. See also Killander & Adjolohoun (n 193) 13.
203 The Kenyan Constitution is specific in this regard.

Some suggest that the Act of Parliament in question is an Act which 'can be reconciled with' fundamental rights and freedoms provided for under the Constitution. Thus, an amendment to an existing customary international law must seek to increase the protection of right, not undermine it.[204]

Thirdly, the Constitution provides clear indication that courts should rely on international law during interpretation. It distinguishes between a bill-of-rights interpretation where a 'court, tribunal or forum' 'must consider international law'[205] and the interpretation of legislation.[206] For the latter, when a court faces divergent interpretations, preference should be given to the interpretation that accords with international law.

Despite the elevated status accorded to international (human rights) norms within the three Bills of Rights, the constitutions, particularly those of the DRC and Benin, remain largely silent on the methodological modalities governing the use of such norms in constitutional adjudication. They do not clarify under what circumstances, to what extent, and which specific international human rights instruments may be invoked. This lack of methodological guidance is especially significant given the growing fragmentation of the international legal order and the reality that constitutional judges may lack sufficient familiarity with, or may be reluctant to engage with, international legal standards.

While the South African Constitution contains provisions, most notably Sections 39(1) and 233, that can be purposively interpreted to encourage a dialogical engagement between constitutional and international norms, the actual application of these provisions remains at the discretion of the judiciary. Judges retain significant latitude in determining when, and to what extent, international human rights law will be referenced in domestic adjudication.

In the case of the DRC, article 153(4) of the Constitution provides a potential avenue for strengthening human rights protection, as it explicitly stipulates that courts and tribunals apply international treaties.

204 J Kweitel and others 'The role and impact of international and foreign law on adjudication in the apex courts of Brazil, India and South Africa' in Vilhena, Baxi & Viljoen (n 19) 184. Sec 232 of the 1996 Constitution of South Africa reads: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

205 Sec 39 of the 1996 Constitution of South Africa.

206 Sec 233 of the 1996 Constitution of South Africa.

However, even within such frameworks that are formally receptive to international law, the practical efficacy of international human rights norms in domestic litigation ultimately hinges on judicial willingness to invoke them and to engage with the interpretive jurisprudence developed by international human rights bodies and courts.[207]

4 Constitutional courts' human rights protection mandate

The effective establishment of constitutional courts is a significant feature of post-1990s constitutionalism in Africa. In this section, I compare the type of powers constitutional courts have been given in dealing with human-rights-related matters, the ability of individuals to approach courts, and the extent to which constitutions establish checks against the arbitrary removal of constitutional court judges. In Benin and the DRC, constitutional courts were not established immediately after the promulgation of the constitutions. In South Africa, the constitutional court operated under two constitutions. In the next section, I consider first how the issue of constitutional decisions adopted before effective functioning of constitutional courts in Benin and DRC was resolved.

4.1 The status of human rights jurisprudence by interim constitutional courts or under interim constitutions

The Benin, DRC and South African constitutions establish constitutional courts to deal with constitutional matters. Whatever name it may bear, a constitutional court is generally described as 'the highest court' of a legal order, tasked to adjudicate the validity of norms by reference to the constitution.[208] Stone-Sweet defines it as 'a constitutionally established, independent organ of the state whose central purpose is to defend the normative superiority of the constitutional law with the judicial order'.[209] Despite the creation of constitutional courts in Benin (under the 1990 Constitution) and DRC (under the 2006 Constitution), their mandate was exercised temporarily by the High Council of the Republic

207 For an assessment of backlashes between the Benin Constitutional Court and international courts, see Makunya (n 95) 485-489.

208 A Jakab 'Constitutional reasoning: A European perspective on judicial reasoning in constitutional courts' (2013) 14(8) *German Law Journal* 1217.

209 AS Sweet 'Constitutional courts' in M Rosenfeld & A Sajó (eds) *The Oxford handbook of comparative constitutional law* (2012) 817.

(Benin)[210] and the Supreme Court of Justice (DRC) (between 2006 and 2015). What the (current) Benin and DRC Constitutional Courts have in common is that, *structurally*, they replace an interim constitutional court. Interim constitutional jurisdictions had produced a certain amount of decisions before effective establishment of constitutional courts. By contrast, the current South African Constitutional Court did not replace any previous constitutional court. However, unlike the Benin and the DRC constitutional courts, the South African court delivered decisions under both the 1993 interim and 1996 final constitutions.

This situation raises two questions: What was the status of decisions delivered by interim constitutional courts (Benin and DRC), and what is the status of decisions delivered under the interim constitution (South Africa)? In the DRC and Benin, the question was not too difficult to resolve because both the interim and current constitutional courts use the same constitutional text.[211] In addition, the 2015 DRC Constitutional Court Act indicates that at the effective installation of the Constitutional Court, constitutional matters pending before the Supreme Court of Justice must be 'transferred as they are' to the newly Constitutional Court.[212]

The main question is in relation to the South African Constitutional Court, given that in 1996 the Constitution changed formally as well as, to a certain extent, substantively. The interim and the final constitutions did not deal with the question of the status of judgments delivered under the interim Constitution but left it to the Constitutional Court to resolve. In practice, the Constitutional Court uses the 'jurisprudence and analysis developed by [it] in relation to the interim Constitution'.[213] Understanding how these questions were resolved is important because the interim constitutional courts (Benin and DRC) and the South African Constitutional Court under the interim Constitution delivered such a wealth of judgments fostering a human rights culture that it

210 FJ Aïvo 'La Cour constitutionnelle du Benin' (2014) 99(3) *Revue française de droit constitutionnel* 725.

211 1990 Constitution of Benin and 2006 Constitution of DRC.

212 Art 117(2) of the 2015 DRC Constitutional Court Act.

213 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) SA 6, para 15. Ackerman J stated that '[i]n what follows I will proceed on the assumption that the equality jurisprudence and analysis developed by this Court in relation to sec 8 of the interim Constitution is applicable equally to sec 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions'.

would have been regressive for future courts not to consider them. This is so because the post-1990 Benin, DRC and South African constitutions entrusted constitutional jurisdictions with a multidimensional human rights protection mandate that is worth being examined.

4.2 Constitutional court powers to adjudicate human rights violations

The power conferred on (constitutional) courts to adjudicate constitutional rights is often viewed as the most important legacy of the 1990s wave of democratisation. Constitutions established constitutional courts, councils or tribunals in most civil law countries, and enabled them to interpret and find violations of bills of rights. Such is the case of the constitutional courts of Benin and DRC instituted, respectively, under the 1990 and 2006 constitutions. The discussion in this section starts with the powers of these two courts before discussing those of the South African Constitutional Court.

Articles 114 and 117 of the Benin Constitution indicate that the protection of human rights by the Constitutional Court can be performed in two ways.[214] The first is when performing the pre-promulgation or pre-enactment review of the constitutionality of laws and regulations, especially those that may violate fundamental rights and public liberties. Articles 117 and 3 of the Benin Constitution widen the scope of acts which are subject to its review, thus confirming its relevance in preventing the entry into force of human-rights-unfriendly legislation. The Constitutional Court held that it was competent to review 'legal instrument, actions, behaviour of any nature and from whoever: citizen, civil service, government, courts including the Supreme Court and the High Court of Justice'.[215]

214 Art 114 reads: 'The Constitutional Court shall be the highest jurisdiction of the state in constitutional matters. It shall be the judge of the constitutionality of the law and it shall guarantee the fundamental human rights and the public liberties. It shall be the regulatory body for the functioning of institutions and for the activity of public authorities.'

215 Decision DCC 09-087 of 13 August 2009. In December 2025, a constitutional amendment precluded the Court from extending its material jurisdictions to acts not contemplated under the Constitution. The new article 122 reads: 'The Constitutional Court should not extend its review to acts of organs of the judicial branch. Nor should it extend such review to texts or acts lacking a regulatory or administrative character, or to mere statements or declarations. The Constitutional Court lacks jurisdiction where, upon examining an application, it determines that such application has as its condition or effect the exercise of a review of legality.'

Secondly, the Court decides over direct violations of individual rights whether they result from decisions of public authority, judicial decisions or the behaviour of private individuals.[216] This can lead to a practical anomaly. Because the Constitutional Court is competent to review the constitutionality of a wide range of acts, there is a risk that the exercise of its protective mandate could see it clashing with other apex courts that are competent in similar issues. In 2001 the Benin Constitutional Court ruled that administrative measures adopted by the Ministry of Education to close down certain educational institutions were consistent with the Constitution as they respected laws and regulations, while the Supreme Court of Justice – constitutionally competent to review the legality of administrative decisions in regard to laws and regulations – found two years ago that they did indeed violate laws and regulations.[217]

The Constitutional Court of the DRC exercises its human rights mandate primarily through the constitutional review of laws, regulations[218] and acts having the force of law.[219] Article 150(1) of the Constitution empowers the judiciary to ensure that fundamental rights and freedoms are respected. Over the time, the Court has extended its jurisdiction over political acts such as resolutions of deliberative assemblies and judicial decisions under the condition that they violate a fundamental right which has a particular recognition under the Constitution and there are no other judges who can rule over such acts.[220]

The Court can additionally protect human rights in three types of litigation, the first being when it is exercising its power to interpret the Constitution under article 161. In Judgment R. Const. 126, the Court recognised the rights of former Members of Parliament to return to parliaments after they have exercised incompatible functions because the

216 Like DRC, the Benin Constitutional may decide over human rights matters when exercising its competence to interpret the Constitution and adjudicate national legislative and presidential elections.

217 G Badet *Les attributions originales de la Cour constitutionnelle du Bénin* (2014) 97-98.

218 Defined under Advisory Opinion RL 09 of 20 January 2004 and Judgment R.Const. 168 of 21 November 2015. See B Kahombo 'Les modalités d'exercice du recours individuel en inconstitutionnalité en droit positif congolais entre ambiguïté et nécessité de réforme juridiques' (2017) *Recht in Afrika Zeitschrift der Gesellschaft für Afrikanisches Recht* 120.

219 However, the Constitution did not clarify what it meant by 'acts having the force of laws', thus creating jurisprudential and scholarly controversies.

220 Decision R.Const 1800 of 22 July 2022.

2011 constitutional amendment enabled them to do so.[221] Furthermore, rights to political participation can be properly clarified and protected during the adjudication of presidential and national legislative elections on the basis of article 161(2) of the Constitution. This may include instances where candidates are excluded by the electoral commission but confirmed by the Court[222] or the annulment of elections when human rights violations occurred amid the process; through the prosecution of, among others, the President of the Republic and the Prime Minister for grave human rights violations.

Unlike the Benin and DRC Constitutional Courts, the South African Constitutional Court operates within the hierarchy of the judiciary, and, as such, can adjudicate, at the last instance, human rights complaints that were brought before inferior courts (High Court of South Africa and the Supreme Court of Appeal).[223] At the first instance, it can adjudicate human rights complaints brought to it directly by anyone 'in the interests of justice' when it decides so.[224] The Constitutional Court can protect human rights when reviewing the constitutionality of laws. Furthermore, it can entertain individual complaints alleging human rights violations by the state and its organs or by private individuals. The Court is also empowered to confirm the validity of declarations of constitutional invalidity of legislation made by the High Court of South Africa and the Supreme Court of Appeal.[225] Its human rights jurisdiction is thus not limited to acts but, like the Benin Constitutional Court, covers laws, regulations, the conduct of public authorities and private individuals, and actions or omissions.

The DRC Constitutional Court lacks a general human rights mandate, in contrast to the Constitutional Courts of Benin and South Africa. Its human rights mandate stems from the broader judicial responsibility to protect human rights and from a purposive and systemic interpretation of relevant constitutional provisions, aimed at ensuring that any act

221 Judgment R.Const. 126 of 21 November 2015.
222 During the 2018 presidential elections, the Constitutional Court ordered the Electoral Commission to re-inscribe two presidential candidates on the ballot paper. The two candidates were invalidated earlier by the Electoral Commission on the basis that they held foreign citizenship concurrently with Congolese nationality, which cannot be held with any other. See Judgment RCE 004 of 3 September 2018.
223 Art 36 of the 1996 Constitution of South Africa Constitution.
224 Art 167(6) and 33 of the 1996 Constitution of South Africa.
225 Sec 167(5) & 172(2)(a) of the 1996 Constitution of South Africa.

infringing upon fundamental constitutional values and principles is subject to constitutional review.

4.3 Individual and collective access to the constitutional court's jurisdiction

The effectiveness with which bills of rights are enforced increases when aggrieved individuals have a right to approach the courts for their enforcement.[226] According to article 8 of the Universal Declaration of Human Rights (UDHR), constitutions and laws ought to provide for effective remedial mechanisms before national tribunals to address human rights violations. Applications must be brought before courts of law[227] because most of them are empowered to review the constitutionality or/and the legality of acts, actions or behaviours of potential violators.[228] In this regard, a bill of rights or a constitution that does not envisage mechanisms for its judicial enforcement is not worth a dime.

Access to courts can be direct when one approaches the court primarily to seek redress for human rights violations through individual actions;[229] access is indirect when individual petitions are brought before constitutional courts incidentally.[230] Pursuant to articles 38 and 166 of the South African Constitution, individuals may lodge their complaints with courts directly before the High Court,[231] the Supreme Court of Appeal or the Constitutional Court.

Articles 3 and 122 of the Benin Constitution likewise allow citizens to challenge the constitutional validity of laws, instruments and actions before the Constitutional Court. Article 162(2) of the DRC Constitution allows citizens to challenge the constitutionality of legislation and regulation before the Constitutional Court. The subject matter of these complaints may be the violation of the Bill of Rights.

The three examples confirm one difference between African common law and civil law jurisdictions. The adjudication of the South African

226 Jayawickarama (n 123) 118.
227 Art 2(3) of the ICCPR envisage situations where administrative authorities and mechanisms may be resorted to but suggest that judicial review is the perfect tool.
228 Art 2(3) of the ICCPR. See Jayawickarama (n 123) 124.
229 CM Fombad 'An overview of contemporary models of constitutional review in Africa' in Fombad (n 66) 33-37.
230 As above.
231 Or a specialised court of similar rank, including the Labour Court as established under the Labour Relations Act of 1995.

Bill of Rights can be performed by inferior courts (the High Court and the Supreme Court of Appeal) and the Constitutional Court. Bills of rights or constitutional matters fall under the first and last jurisdiction of constitutional courts in Benin and the DRC. Be that as it may, two questions can test the strength of direct and indirect access: Who can lodge a human rights complaint before these courts and when, and can non-governmental organisations appear before courts on behalf of victims of human rights?

In the DRC, individuals and the Attorney-General are empowered to approach the Constitutional Court.[232] Individuals lodge their complaints within six months after the impugned Act is gazetted or enters into force.[233] Thus, after six months, the impugned Act cannot be directly challenged by individuals however anti-human rights they may be.[234] Two exceptions are envisaged: direct access by the Attorney-General and indirect access by individuals through the certified question of constitutionality (*exception d'inconstitutionalité*).[235] The Attorney-General is empowered *motu proprio* to challenge 'legislation, acts having force of law, provincial legislation, rules of procedures of parliamentary chambers, of congress and of institutions supporting democracy as well as regulations from administrative authorities'[236] when they violate constitutional rights or public liberties. This possibility may overcome challenges individuals face in accessing the court to challenge human-rights-unfriendly legislation. However, it requires that the Attorney-General is willing to petition the Court. The certified question of constitutionality may be raised by individuals, judicial organs and prosecutors during judicial proceedings to challenge the constitutional validity of an Act when such an exception is raised before an inferior court or tribunal.[237] This is because most civil law inferior courts do not have powers to decide on the constitutional validity of acts.

232 Art 162(2) of the 2006 DRC Constitution, art 88 of Act 13/026 of 2015 Governing the Organisation and Functioning of the Constitutional Court.

233 Art 50(1) of Act 13/026 of 2015 Governing the Organisation and Functioning of the Constitutional Court.

234 Judgment R.Const. 0007 of 29 January 2016 on the Constitutional validity of the death penalty. The application was rejected on procedural grounds.

235 Art 49 of Act 13/026 of 2015 Governing the Organisation and Functioning of the Constitutional Court.

236 Art 43 of Act 13/026 of 2015 Governing the Organisation and Functioning of the Constitutional Court.

237 Art 162(3) of the 2006 DRC Constitution and art 52 of Act 13/026 of 2015 Governing the Organisation and Functioning of the Constitutional Court.

In Benin, individuals may lodge human rights complaints with the Constitutional Court.[238] Direct access is recognised to them while in the meantime they have the right to access the Court indirectly by way of *exception d'inconstitutionalité* raised before an inferior court. In this instance, citizens will not be part of proceedings before the Court.[239] Petitions alleging the violation of human rights are not subjected to respect of a particular deadline.[240] Petitioners must have the legal capacity (non-governmental organisations must be registered).[241] Although admissibility conditions do exist, the Court has been lenient towards individual complaints and strict towards institutional complaints.[242] For example, in some cases, the Court did not need to ensure that the petitioner has interest to act nor that the impugned Act or provision directly infringes his or her right.[243] Consequently, individual petitions in the interest of justice or that of non-governmental organisations acting on behalf of its members or other persons are admissible as long as they allege the violations of a constitutional rights.

The South African Bill of Rights provides a liberal approach to accessibility because the type of petitioners that can approach courts directly or indirectly are diverse.[244] This is possible only when a right has been violated or is threatened to be violated. Five categories of persons are able to appear before the Court: an individual person seeking to vindicate his or her interest; an individual who seeks to defend the interest of a person that cannot act personally; a member (or non-member) of a group acting to defend the interest of the group or persons in a public interest action; and non-governmental organisations

238 Arts 3 & 122 of the Constitution and art 31 of the Rules of Procedure of the Constitutional Court.

239 Association des Cours Constitutionnelles Francophones 'Actes du 6e Congrès: Questionnaire addressé à la Cour Constitutionnelle du Benin, Accès du citoyen au juge constitutional' (2012) 237 https://accf-francophonie.org/publication/actes-du-6e-congres/#cour-constitutionnelle-du-benin (accessed 2 August 2019).

240 Association des Cours Constitutionnelles Francophones (n 239) 231.

241 Association des Cours Constitutionnelles Francophones (n 239) 232.

242 T Holo 'Handling of petitions by the Constitutional Court of Benin' in Fombad (n 66) 316.

243 Association des Cours Constitutionnelles Francophones (n 239) 231-232.

244 L Chiduza & PN Makiwane 'Strengthening *Locus standi* in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 9-10. For Francophone Africa, see SD Kamga 'An assessment of the possibilities for impact litigation in Francophone Africa' (2014) 14 *African Human Rights Law Journal* 467.

defending their members.[245] In addition, the South African Constitution requires that each order by the Supreme Court of Appeal, the High Court of South Africa or any other court of equal rank declaring an Act of Parliament unconstitutional be confirmed by the Constitutional Court.[246] Applications seeking to confirm the decisions of inferior courts have been termed as indirect access.[247]

Of the three constitutions under study, the South African Constitution explicitly establishes public interest litigation (PIL) or strategic litigation. PIL is a procedure which allows 'individual or group to bring an action without needing to prove that they have any personal interest in the matter'.[248] It is generally to protect the rights of marginalised persons such as poor, indigent, illiterates, women, children, persons with disabilities, illegal migrants or other individuals who have no access to justice.[249] Sections 38 and 167(6)(a) of the South African Constitution allow 'anyone acting in the public interest' to lodge complaints with courts.[250] PIL is a proper device in the defence of rights of persons who cannot afford to voice their concerns in courts of law. As Currie and de Waal argue, '[E]ffective enforcement of the Bill of Rights demands a broader approach to standing'.[251] In practice, the Benin Constitutional Court allowed petitions in the interest of justice to be adjudicated. It has also granted access to individuals whose petitions were inadmissible by arguing that, in cases of human rights violation, it could invoke its powers under article 121 of the Constitution to decide on allegations of human rights violations on its own rights before this provision was amended in December 2025 to disempower the Court from doing so.

The next point is to ensure that the type of individual judges appointed to adjudicate bills of rights are able to withstand pressure from potential violators of human rights. I examine this conundrum in the next section.

245 Currie & de Waal (n 2) 80-85.
246 Sec 167(5)& 172(2)(a) of the 1996 South African Constitution.
247 Fombad (n 229) 37.
248 Fombad (n 229) 34.
249 BL Wadhera *Public interest litigation: A handbook* (2009) 2; W-C Chang 'Public interest litigation in Taiwan: Strategy for law and policy change in the course of democratisation' in PJ Yap & H Lau (eds) *Public interest litigation in Asia* (2011) 142.
250 For examples with other common law jurisdiction, see E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in Killander (n 193) 164-166.
251 Currie & de Waal (n 2) 73.

4.4 Checks against arbitrary removal of constitutional court judges

In this section, I discuss conditions of appointment and removal of judges who decide over constitutional rights petitions and interpret the bill of rights in Benin, the DRC and South Africa. The aim is to understand whether those in charge of promoting a culture of human rights through interpretation are free from any interference or manipulation. In the discussion below, I show that the executive, unlike in Benin and the DRC, does not have extensive powers on the appointment of judges at the South African Constitutional Court.

Three institutions are involved in the appointment of judges to the DRC Constitutional Court: The President of the Republic (executive), the National Assembly and Senate (parliament) and the Supreme Council of Magistracy (judiciary).[252] The Constitutional Court is made up of nine members and each institution appoints three of them. They are appointed for a non-renewable term of nine years.[253] Unlike the DRC, only two institutions are concerned with the appointment of judges of the Benin Constitutional Court: The President of the Republic (executive) and the Bureau of the National Assembly (parliament).[254] The former appoints three judges, while the latter appoints four for a five-year term renewable once. However, in the DRC and Benin, powers of appointing authorities are constrained in terms of qualification of the person who gets to be appointed because constitutions and relevant laws provide for the nature and the type of individuals that can be appointed.

In the DRC, six of the nine judges must be lawyers (judges, legal practitioners and legal academics). Two of the three appointed by the President of the Republic and one of the three appointed by Parliament must at least be practising lawyers or legal academics. The three judges appointed by the Supreme Council of Magistracy are all drawn from the judiciary. Thus, the Constitutional Court is composed of career judges, non-jurists and legal scholars.[255] It is not specified whether members of

252 Art 158 of the 2006 DRC Constitution. See M Samba 'Désignation des members de la Cour constitutionnelle: Atouts, limites et perspectives' (2016) 1 *Annuaire congolais de justice constitutionnelle* 60-64.

253 A Sumaili & B Kahombo 'Le renouvellement tertiaire de la Cour Constitutionnelle en RDC: Cadre juridique, défis et perspective' (2018) 5 *KAS African Law Study Library – Librairie Africaine d'Etudes Juridiques* 157.

254 Art 115 of the 1990 Benin Constitution.

255 Ordinance 14/020 of 7 July 2014 appointed the first composition of the Constitutional Court. Art 1 provided the following nine names. (1) Banyaku Luape

the judiciary that the Supreme Council of Magistracy appoints shall be sitting judges (*juges*) or prosecutors (*magistrats du parquet*). Also, apart from the requirement that they have 15 years of experience as non-jurists or judges, it is not clear whether the judge to be appointed should come from a lower court (*Tribunal de paix, Tribunal de Grande Instance* or *Tribunal de Commerce*) or other superior courts (Court of Appeal, Court of Cassation, Council of State or High Military Tribunal). In practice, most career judges have been appointed from the bench of the former Supreme Court of Justice, the *Conseil d'Etat* and the Court of Cassation. There is no requirement for appointing female judges. Only two have been appointed since the effective operationalisation of the Court in 2015.

In Benin, of the seven judges appointed to the Constitutional Court, three must be career judges: one appointed by the President of the Republic and two appointed by the Bureau of the National Assembly.[256] It should in addition be composed of two qualified lawyers[257] (professors or practising lawyers), one appointed by the President and one by the Bureau of the National Assembly.[258] It must have two personalities with high professional reputation each appointed by the President and the Bureau of the National Assembly.[259] To limit the influence of non-jurist on the Court, the President of the Court must be drawn from active judges and qualified lawyers.[260] The Benin Constitutional Court has power to decide whether an appointed judge meets the criteria for the appointment, particularly when individual petitioners challenge the appointment on grounds such as the lack of 15 years-experience

Epote Eugène (politicians and political science Professor); (2)Essambo Kangashe (Professor of public law and career judge); (3) Funga Molima (career judge); (4) Kalonda Kele Oma Ivon (career judge); (5) Kilomba Ngozi Mala (career judge); (6) Luzolo Bambi Lessa (Professor of criminal procedure and Special Advisor to President Kabila) was replaced by Jean-Pierre Mavungu-di-Ngoma (Professor of public law and former Chief of Staff of the President of the National Assembly); (7) Lwamba Bindu Benoît (career judge); (8) Vunduawe Te Pemako Felix (Professor of administrative and constitutional law);(9) Wasenda N'Songo Corneille. Among them, Banyaku Luape was the only non-jurist.

256 Art 115 of the 1990 Benin Constitution.

257 The Benin Constitutional Court clarified the meaning and scope of such concepts in decisions on the validity of the appointment of Bruno Ahlonsou (1992) and Christophe Kougnianzondé (2003).

258 Art 115 of the 1990 Benin Constitution.

259 As above.

260 Art 3 of Act 91-009 of 4 March 1991, the Organic Law on the Benin Constitutional Court as amended in 31 May 2001.

for judges.[261] The appointment of South African Constitutional Court judges differs from the procedure in Benin and the DRC.

The South African Constitutional Court is composed of 11 judges. The Chief Justice and the Deputy Chief Justice are appointed by the President of the Republic 'after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly'.[262] The remaining nine judges are also appointed by the President of the Republic but after they have consulted the Chief Justice and 'leaders of parties represented in the National Assembly'. These judges are selected from among career judges, legal practitioners and legal academics. Section 174(5) requires that 'four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court'. They are appointed for a non-renewable term of 12 years. However, their term may end before they complete their 12 years-term under one condition, that is, when judges are 70 years.[263]

Unlike the case in Benin and the DRC, the status of the South African Constitutional Court judge is entrenched, which means that their removal is subject to stringent conditions. The Constitution establishes three-level scrutiny for a judge to be removed, including a constitutional court judge. Anyone who seeks to lodge complaints against judges must approach the JSC which, when necessary, establishes a sub-committee composed of the Chief Justice, the Deputy Chief Justice and four judges.[264] The sub-committee 'must consider every claim and decide whether it warrants further investigation or not'.[265] Most complaints, especially those that lack merit, end at this stage.[266] When the JSC is

261 Aïvo (n 210) 721; S Bohle 'La Cour Holo est bien partie' in *La Constitution en Afrique* 25 Juillet 2013 http://la-constitution-en-afrique.over-blog.com/article-la-cour-holo-est-bien-partie-119237549.html (accessed 5 April 2021).

262 Sec 174(3) of the 1996 Constitution of South Africa. For the critics of the Judicial Service Commission See, for example, MK Radebe 'The unconstitutional practices of the Judicial Service Commission under the guise of judicial transformation: *Cape Bar Council v Judicial Service Commission* (2012) 2 ALL 143 (WCC)' (2014) 17 *Potchefstroom Electronic Law Journal* 1200-1203.

263 Sec 176(1) of the 1996 South African Constitution.

264 Le Roux (n 76) 155.

265 As above.

266 This was, for instance, the case with a complaint lodged against Chief Justice Mogoeng in 2013 alleging judicial misconduct by him following a public speech where he defended criteria which the JSC used in the appointment process while the matter was being settled by superior courts.

convinced that a judge should be removed for only three grounds of removal (incapacity, grossly incompetence or guilty of misconduct),[267] the proposition must be approved by two-thirds of the members in the national assembly.[268] When the latter votes in favour of the removal, the President of the Republic is obligated to remove the judge from office. The three levels of scrutiny aim to ensure that allegations against judges are seriously investigated and that the parliament is involved.

The Benin Constitution provides that constitutional judges are irremovable. The Constitutional Court and the Bureau of the Supreme Court must approve prosecutions initiated against judges of the Constitutional Court.

DRC Constitutional Court judges can be removed. Pursuant to article 9 of Ordinance 16-070 of 22 August 2016 on the Special Status of Members of the Constitutional Court, removal forms part of four grounds for the termination of their term (when the nine years expire, voluntary or de jure resignation and death).[269] Removal can be decided by the President of the Republic in response to constitutional judge's disciplinary misdemeanour.[270] The Disciplinary Council established within the Court investigates allegations of misconduct and adopts appropriate decisions, at the first and last instance, including the removal of the Constitutional Judge.

A practice has emerged of appointing Constitutional Court judges to other positions that seem to threaten their independence. This happened at four occasions. One Constitutional Court judge was appointed as the new President of the Council of State, while the other became the President of the Republic Special Advisor on Corruption. Recently, two Constitutional Court judges were appointed against their consent to the Court of Cassation[271] while another, the then President of the Court, who fell in disgrace with the ruling coalition was removed through the

267 Sec 177(1)(a) of the 1996 Constitution of South Africa.
268 Sec 177(1)(b) of the 1996 Constitution of South Africa.
269 Art 9 of Presidential Ordinance 16-070 of 22 August 2016 on Special Status of Members of the Constitutional Court.
270 Art 23 of Presidential Ordinance 16-070 of 22 August 2016 on Special Status of Members of the Constitutional Court. Such misdemeanours are listed under art 23.
271 'Justice: Félix Tshisekedi nomme trois nouveaux membres à la Cour Constitutionnelle' in *Radio Okapi* 18 July 2020 https://www.radiookapi.net/2020/07/18/actualite/justice/justice-felix-tshisekedi-nomme-trois-nouveaux-membres-la-cour (accessed 16 June 2025).

procedure governing the periodic one-third renewal of constitutional court judges.

5 Conclusion

The three constitutions examined in this book provide for extensive human rights norms and establish constitutional courts that can serve as a bulwark against authoritarianism, particularly in the face of political leaders unwilling to be constrained by strong judicial institutions. The trajectory toward guaranteeing human rights has been shaped by similar macro-level events, although important contextual specificities at the micro level must not be overlooked. The broad scope of rights, encompassing the three classical generations of human rights and applicable both vertically and horizontally, provides constitutional jurisdictions with the necessary tools to act in a progressive manner. However, the 'never again' commitment echoed across the various bills of rights may prove meaningless if constitutional courts are unwilling to interpret human rights progressively.

Some divergence identified in this chapter among the three countries predispose the approaches the three constitutional jurisdictions adopt to differ, whether slightly or significantly. For example, the fact that the horizontal application is not explicit in Benin and that it has progressively been construed through jurisprudence can mean that one needs a *progressive judiciary* that understands the nature of their democracy to foster horizontal application. Also, the explicit obligation placed on South African constitutional adjudicators to apply international law may have more impact on interpretation than in a system where resort to international law is not made explicit and hinges on the ability of petitioners to invoke it and the willingness of judges to be persuaded by international norms. Finally, where individuals can only approach the constitutional court for a limited number of anti-human rights acts and behaviours, a number of other acts may not be litigated before the constitutional court, whether they infringe the bill of rights or not, and a *reactionary* or *status quo* court may find it difficult to expand its jurisdiction to acts and behaviours not explicitly indicated under positive law.