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Benin

1 Introduction

The Constitutional Court (Court) of Benin has been operational since 1993 and has produced a wealth of jurisprudence, notably in the protection of fundamental rights and freedoms.[1] In this chapter, I examine and evaluate the nature and type of interpretive methods it uses to construe the meaning and limitations of rights as well as the scope of state and other actors' obligations. By examining how the Court decides cases, I identify factors that influence the choice of methods of interpretation and their implications on the quality of (human rights) justice. Four sections, apart from this introduction and conclusion, make up the substance of this chapter.

2 Methods of constitutional interpretation

In this section, I review the methods of interpretation which the Benin Constitutional Court uses to decide human rights petitions. The examination is limited to methods used in litigation involving three types of rights, namely the right to equality and non-discrimination, fair trial rights and political rights. I first provide an overview of general interpretive methods, followed by an examination of the type of reasoning and teleological arguments the Court invokes. At the end, I examine the way international law rules are invoked as an aid to interpretation.

1 See generally https://courconstitutionnelle.bj/fr/decisions (accessed 21 June 2025). OOM Laleye *La Cour constitutionnelle et le peuple au Bénin: D'un juge constitutionnel institué à un procureur suzerain* (2018) 256-266; J Djogbenou 'L'accès à la justice constitutionnelle du Bénin' in FJ Aïvo, JB de Gaudusson & J Maïla (eds) *L'amphithéâtre et le prétoire au service des droits de l'homme et de la démocratie* (2020) 519. See also D Gnamou 'La Cour constitutionnelle du Bénin en fait-elle trop?' 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) 687.

2.1 General interpretive methods

The Court uses four methods to interpret the bill of rights: literal, teleological, contextual (internal context or systemic) and generous interpretation. The literal method consists of reading the text (words) of the Constitution, the African Charter on Human and Peoples' Rights (African Charter) and any other relevant statutes to extract their meaning.[2] It is the point of departure of the Court's interpretive approach. The Court used it in some cases based on the assumption that those that understand the language in which the Constitution is written are likely to understand the meaning of constitutional provisions,[3] or that the clarity of constitutional provision makes the resort to other methods unnecessary.[4] According to Troper and Gordies, literal interpretation helps the Court to refrain from providing substantiated justifications of its ruling or to justify its reasoning with minimum motivation.[5]

Three other methods are of relevance. The teleological method enables the Court to construe the meaning of constitutional provisions using justifications beyond the purview of the written constitution.[6] These arguments may rely on social, historical, political or economic considerations found either inside the text of the constitution (in its preamble, for example) or the country's political practices or history.[7] This enables the Court to attain substantive justice when the use of

2 M Fromont *Justice constitutionnelle comparée* (2013) 266; T Holo 'L'opposition, l'oxygène de la démocratie: L'oubliée de la Conférence nationale de 1990' in Aïvo, De Gaudusson & Maïla (n 1) 656-657; G Badet *Les attributions originales de la Cour constitutionnelle du Bénin* (2014) 97-98; H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: Le modèle béninois. A la lumière de la Charte africaine des droits de l'homme et des peuples* (2011) 129-130; D Degboe 'Les vicissitudes de la protection des droits et libertés par la Cour constitutionnelle du Bénin' (2016) *Les annales de droit* 119; H Akérékoro 'La Cour constitutionnelle et le pouvoir judiciaire' in Aïvo, De Gaudusson & Maïla (n 1) 183-184.

3 M Troper, J-L Gardies & C Grzegorczyk 'Statutory interpretation in France' in DN MacCormick & RS Summers (eds) *Interpreting statutes: A comparative study* (1991) 182.

4 M van de Kerchove 'La doctrine du sens clair des textes et la jurisprudence de la Cour de cassation de Belgique' in M van de Kerchove (ed) *L'interprétation en droit: Approche pluridisciplinaire* (2019) 13.

5 Troper, Gardies & Grzegorczyk (n 3) 182.

6 E Toni 'Les principes non écrits dans la jurisprudence de la Cour constitutionnelle du Benin' *Afrilex* 3-4 http://afrilex.u-bordeaux.fr/wp-content/uploads/2021/03/Afrilex_TONI_Errol_Les_PVC_au_Benin.pdf (accessed 28 June 2021).

7 See generally J Jaconelli 'Do constitutional conventions bind?' (2005) 64 *Cambridge Law Journal* 149.

the text alone could lead to an incomplete or absurd outcome.[8] The teleological method is accompanied by another method, the contextual (internal systemic) method, which enables the Court to combine the reading of different provisions of the Constitution, the African Charter and subsidiary laws. This is because they form a body of laws, a normative system that contributes to protecting certain constitutional rights.[9] There is also the generous interpretation, as used in an equality case that permitted the Court to exclude the application of an international law rule on the grounds that it accorded lower protection to individuals.[10]

The practice of the Court provides various explanatory factors justifying the resort to either of the methodological appraoches to interpret fundamental rights. As will become clear, while the need to uphold fundamental values inhereted from the early 1990 constitutional revival prompted the Court to adopt contextual and purposive methods in some cases, in others, it resorted to formalistic literal interpretation.

2.2 Types of teleological or policy-oriented arguments

In its interpretive practice, the Constitutional Court may resort to extra-legal and extra-textual concepts to resolve practical matters presented to it or to find the appropriate meaning of a constitutional provisions. In Decision DCC 09-016 of 19 February 2009, it ruled that the National Assembly, when adopting decisions, ought to consider the rights of minority parties represented therein due to its 'political configuration'.[11] Decision DCC 09-016 of 19 February 2009 (*Degla and Tossou* case) concerns two applications for constitutional review brought by members of the National Assembly challenging the procedure used, on 16 and 27 December 2008, to designate Benin's parliamentary representatives to the Pan-African Parliament, the ECOWAS Parliament, and the Inter-Parliamentary Committee of UEMOA.[12] The applicants contested the

8 Examples include Judgment DCC 10-086 of 15 July 2010, which is discussed further.

9 RA Amar 'Introduction to the new edition' in A Scalia (ed) *A matter of interpretation: Federal courts and the law* (2018) xxi.

10 See Judgment DCC 19-287 of 22 August 2019; O Narey 'Rapport général' (2019) 1 *Revue constitution et consolidation de l'Etat de droit de la democratie et des libertés fondamentales en Afrique* 7;19.

11 J-LA Amougou 'La Cour constitutionnelle béninoise: Un modèle de justice constitutionnelle en Afrique?' in Aïvo (n 1) 657.

12 Judgment DCC 09-016 of 19 February 2009 4-5.

decision of the plenary to adopt a nomination and election process based on open candidacies and a simple majority vote, following amendments introduced during the sitting, instead of a proportional representation mechanism reflecting the 'political configuration' of the National Assembly. They argued that this procedure violated both parliamentary rules of procedure and constitutional principles, including pluralist democracy, the protection of minority parliamentary rights, and equality of political participation, while also resulting in the exclusion of women from certain regional parliamentary delegations and the alleged non-compliance with regional legal obligations. The Court ruled that the designation of these violated the Constitution.

Yet, the principle of political configuration of political configuration is not written in the Constitution.[13] Other policy-related arguments the Court applied in human rights cases include 'fundamental options of the sovereign national conference', '*force majeure,*' 'constitutional imperative',[14] 'national consensus', 'transparency',[15] 'political configuration', 'power to regulate and to protect human rights', 'secular state',[16] 'spirit and the letter of the Constitution', 'general interest', 'continuity of public service', 'national solidarity',[17] 'regional wealth', 'internal equilibrium', and 'minority and majority'.[18]

The first question posed by the use of such arguments in constitutional interpretation pertains to their legal basis; the second relates to determining the circumstances under which the Court may resort to them. It is to be noted that these arguments derive from written constitutional norms,[19] unwritten constitutional principles and values (the so-called constitutional convention)[20] and general principles of

13 P Togbé 'La justice constitutionnelle Béninoise à l'épreuve des revirements de jurisprudence' in Aïvo (n 1) 677-678.

14 See generally A Kpodar 'L'impératif constitutionnel' (2019) 1 *Revue constitution et consolidation de l'Etat de droit de la démocratie et des libertés fondamentales en Afrique* 101.

15 Judgment DCC 01-011 of 12 January 2001.

16 Judgment DCC 02-144 of 23 December 2002.

17 Judgment DCC 06-099 of 11 August 2006.

18 EN Youmbi 'Les normes non écrites dans la jurisprudence de la Cour constitutionnelle du Bénin' (2018) 6 *Revue du droit public* 1706-1725. See generally, EN Youmbi 'Les normes non écrites dans la jurisprudence des juridictions constitutionnelles négro-africaines' (2019) Special Issue *Revue africaine et malgache de recherche scientifique* 269-300.

19 Including the Preamble.

20 See generally F Ahmed and others 'Enforcing constitutional conventions' (2019) 17 *International Journal of Constitutional Law* 1146.

public law.[21] As regards to the first category, the basis is the Constitution and relevant laws, while the second are drawn from the nature of Benin's political system, mainly the legacy of the national sovereign conference and the necessity to establish a state based on respect for human rights and political cohesion and unity.[22] The last category derives from the nature of the legal system itself, as general principles of law form part of the secondary sources of law applicable by courts and tribunals.[23] Their recognition does not necessarily imply they will be used by the Court in litigation. Determining conditions under which they can be used is crucial to avoid arbitrariness, and this can be done on the basis of analysis of the Court's jurisprudence. It is clear that for interpretive purposes the notion of the 'constitution' goes beyond the constitutional text and extends to the contextual constitution.

The Court has used teleological arguments to ascertain the supremacy of human rights norms and principles over legislative and executive powers.[24] When the latter exercise their constitutional powers, they must observe human rights. This practice increases human rights protection, as all the branches of government must respect human rights. The Court also used teleological arguments to reverse some of its earlier decisions. In Judgment DCC 18-126 of 21 June 2018, it weighed the principle of 'constitutional imperative' with 'national consensus' and ruled that the former is a constitutional principle while the latter is a political ideal.[25] The question this case raised was whether the Charter on Political Parties, the Electoral Code and the Constitution could be amended in the absence of consensus among parties represented in Parliament.[26] Parliament has the power to amend any laws when a majority approves this. However, the petitioner opposed this power on the principle of national consensus because earlier court decisions ruled that Parliament

21 EN Youmbi 'Les normes non écrites dans la jurisprudence de la Cour constitutionnelle du Bénin' in Aïvo, De Gaudusson & Maïla (n 1) 882-895.
22 Holo (n 2) 102-103.
23 See generally J Velaers 'Les principes généraux du droit à « valeur constitutionnelle »: Des incontournables de notre ordre constitutionnel' in I Hachez and others (eds) *Les sources du droit revisitées – vol 1: Normes internationales et constitutionnelles* (2012) 537-500.
24 Among others, Judgment DCC 00-078 of 7 December 2000, Judgment DCC 06-074 of 8 July 2006, Judgment DCC 09-002 of 8 January 2009.
25 See Judgment DCC 18-126 of 21 June 2018.
26 See Judgment DCC 18-126 (n 25).

must seek consensus from other parties represented in Parliament before amendment.[27]

Because the Court did not indicate how it reached the conclusion on the supremacy of the constitutional imperative over national consensus, one is tempted to suggest that teleological arguments may also be used to hide the process by which the Court came to the conclusion in a particular case. In this instance, the Court did not define the meaning, the nature and the scope of such arguments and the conditions under which they can be applied in litigation.[28] The underlying premise is that individuals who are familiar with the legal system and the language within which the argument is used might not need further definition of the concept,[29] save that some concepts may be used in their ordinary meaning while others may be used in their technical meaning.[30]

Troper, Gardies and Grzegorczyk suggest that civil law-styled courts rarely interpret teleological arguments 'because [they] [do] not require a complex intellectual construction and [leave] a wide discretion for the future'.[31] Courts thus avoid 'lay[ing] down a rule, not only for the particular case, but also for a whole class of future cases'.[32] Beranger argues that civil law courts may refrain from explaining their teleological or policy-oriented arguments for several reasons: courts may have reasons but refuse to provide them, or they may assume that because they reached a decision that furthers human rights, no one would care about the reasoning or motivation.[33] They also can assume that their role should not be conflated with that of academic writers or of 'philosopher kings prescribing what is good for society'.[34] Rather, they understand their role as that of 'trying to conform to what has been traditionally accepted as the function of the judiciary'.[35] Transparency and justification in constitutional interpretation are, however, key to increasing the

27 Earlier cases include Judgment DCC 06-074 (n 24).
28 See Judgment DCC 18-126 (n 25).
29 Van de Kerchove (n 4) 13.
30 RS Summers & M Taruffo 'Interpretation and comparative analysis' in MacCormick & Summers (n 3) 469.
31 Troper, Gardies & Grzegorczyk (n 3) 199.
32 As above.
33 D Beranger 'Sur la manière française de rendre la justice constitutionnelle – motivations et raisons politiques dans la jurisprudence du Conseil constitutionnel' (2012) 7 *Jus Politicum* 12.
34 G Christie *Philosopher Kings? The adjudication of conflicting human rights and social values* (2011) 20.
35 As above.

legitimacy of court decisions,[36] but, as Lasser suggests, if the Benin Constitutional Court believes that its legitimacy is institutional, there might not be good reasons for it to over-justify its reasoning.[37]

This can lead to the adoption of decisions that set bad precedents for the legitimacy of court decisions and the protection of human rights. An example is the use of '*force majeure*' to imply that the Court has the power to adopt decisions with a minimum of three judges. The Court's internal rules of procedure provide for a decision to be adopted by a minimum of five judges but permit derogations in instances of '*force majeure*'.[38] In the absence of a clear definition of '*force majeure*' and the conditions under which it could be invoked, the Court considered the absence of four judges on a professional trip as '*force majeure*'.[39] To what extent a trip for professional reasons could be considered as 'inevitable', 'unsurmountable' and 'unexpected' is a question the Court did not address. This sets a dangerous precedent because the Court might end up adopting decisions with two or one judge in the name of '*force majeure*'.

The same can be said on the way the principle of 'general interest' and 'continuity of public service' were used in Judgment DCC 01-005 of 11 January 2001 to restrict the right to equality and non-discrimination in public service. The case arose from an application lodged by Mr. Sylvain Hinnouho Aklé challenging the constitutionality of a communiqué issued by the Minister of Public Service on 4 June 1999, which set out conditions for recruitment into the public service, including the requirement that candidates be in 'good physical condition' and free from certain medical conditions.[40] The applicant argued that these requirements effectively excluded persons with disabilities and amounted to discrimination contrary to articles 8, 26, 30, and 36 of the Benin Constitution, as well as article 18(4) of the African Charter on Human and Peoples' Rights, insofar as they infringed the principles of equality before the law, the right to work, and the State's obligation to

36 T Groppi & I Spigno 'The Constitutional Court of Italy' in Jakab & Dyevre (n 42) 557-558.

37 M Lasser 'La MacDonald-isation du discours judiciaire français' (2001) *Archives de philosophie du droit* 145. Based on Judgment DCC 01-011 (n 15), the Court ruled that transparency, (whatever the Court meant by the concept) was an unwritten constitutional principle.

38 Art 21(2) of the 2018 Revised Internal Rules of Procedures of the Benin Constitutional Court.

39 Decision EL 19-007 of 12 March 2019.

40 Judgment DCC 01-005 of 11 January 2001.

protect persons with disabilities. The Constitutional Court was thus called upon to determine whether the physical fitness requirements for access to public employment constituted prohibited discrimination or whether, in light of the general interest and the need to ensure the proper functioning and continuity of public service, the legislature and the administration could lawfully introduce distinctions, provided they were objectively justified, proportionate, and accompanied by specific protective measures for persons with disabilities.[41]

No explanation was provided in relation to the use of broad policy argument to restrict rights. An unelected body whose decisions are far-reaching, such as the Benin Constitutional Court, can increase respect and support for it when its argumentative practices are not obscure.[42] In the choice and application of teleological arguments, courts should not only explain their reasoning and why arguments are being applied in a particular way, but also justify why they did not resort to similar arguments in other similar cases. This is true of any interpretive technique, including when the Court resorts to international law-based arguments or justifications.

3 The role of international law norms

The application of international law by the Benin Constitutional Court suggests that it has drawn upon some progressive understanding of rights, in the area of reparation in particular.[43] International law norms are understood in the sense referred to in article 38 of the Statute of the International Court of Justice: customary international law including the *jus cogens,* treaties ratified by states, general principles of international law, international human rights jurisprudence, as well as the doctrine of qualified scholars.[44] The Benin 1990 Constitution, like that of some other monist states, confers on international law norms a superior status to that of domestic laws.[45] They form part of norms that the Court can use in the interpretation and application of the Bill of Rights. It is through international law, among other things, that the Court ascertained the

41 Judgment DCC 01-005 (n 40).
42 C Hübner Mendes 'The Supreme Federal Tribunal of Brazil' in A Jakab & A Dyevre (eds) *Comparative constitutional reasoning* (2017) 149.
43 Adjolohoun (n 2) 129-130.
44 JR Crawford *Brownlie's principles of public international law* (2012) 21-23.
45 Art 147 of the 1990 Benin Constitution.

existence of a right to monetary compensation in cases of human rights violations.[46]

The Court based its decision on 'customary international law', in part because the Constitution does not provide for an explicit right to reparation. It considered that the seriousness of the violation – 'inhumane and degrading treatments' against an individual[47] – warranted reparation. It applied a systemic interpretation by way of a 'combined and crossed' reading of the Constitution, scholarly works and customary international law.

Yet nothing in its reasoning demonstrated the manner in which it found such custom, how and why it applied it, and what its possible consequences were for the guarantee of the right to reparation.[48] This lack of transparency gave the impression that the Court was overstepping its authority – the Constitution and the law governing the Constitutional Court did not provide for the Constitutional Court to grant reparations – and that, as several comparatists forewarned,[49] those arguments might have been cherry-picked to support a position the Court had already adopted. Despite its obscure reasoning, it can be noted that Judgment DCC 02-052 of 31 May 2002[50] laid the ground for future claims of reparation before the Court, but importantly, confirms that customary international law, especially when it is invoked to confirm the existence of a right, can be *directly* applied in the Benin legal system.[51] While this status accorded to customary international law represents progress and has many advantages when protecting human rights, direct application of international conventions is not conceivable. The approach *vis-à-vis* conventional international law is generally formalistic.[52]

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46 Judgment DCC 02-052 of 31 May 2002.

47 Judgment DCC 02-052 (n 46).

48 Judgment DCC 02-052 (n 46).

49 C Saunders 'The use and misuse of comparative constitutional law' (2006) 13 *Indiana Journal of Global Legal Studies* 67. See also R Hirschl 'The question of case selection in comparative constitutional law' (2005) 53 *American Journal of Comparative Law* 153.

50 In this case, the complainant approached the Court to declare his arrest and detention as being arbitrary and that the treatment he was subjected to amount to cruel, inhuman and degrading treatment in violation of art 18(1) and (4) of the Constitution and arts 4 and 5 of the African Charter.

51 Judgment DCC 02-052 (n 46). See also for example sec 232 of the 1996 South African Constitution.

52 Pursuant to art 147 of the Constitution, they must be 'duly ratified' and published. Treaties must be respected because they form part of the country's international obligations. In Judgment DCC 19-481 of

However, the Court abandoned formalism when it had to choose between applying a regulation adopted by a sub-regional organisation and a domestic statute. The Court believed that the latter offered sufficient protection to the individual and was consistent with the equality provision of the Constitution, unlike the sub-regional regulation.[53] In Judgment DCC 19-287 of 22 August 2019 (*Eric Dewedi* case), the petitioner challenged the decision to bar him from legal practice. He was a professor under contract with a state institution. According to the West African Economic and Monetary Union (WAEMU) Regulation on Legal Practice,[54] he could not be admitted to the Bar. Although the case does not offer sufficient ground for generalisation, it suggests that when a treaty offers less protection to the individual, the Court is more likely to apply domestic legislation (including the Constitution) than international law.[55]

The Court has shown increasing reluctance to rely on or follow the jurisprudence of regional human rights bodies interpreting treaties to which Benin is a party.[56] As demonstrated elsewhere, the ongoing tension between the Constitutional Court of Benin and the African Court on Human and Peoples' Rights undermines the robustness of human rights protection within the country. In several instances, following the adoption by the African Court of judgments finding that the Constitutional Court of Benin had breached the African Charter in its adjudication of certain rights, the latter asserted that it was under no legal obligation to align with the African Court's interpretation, invoking the purportedly distinct normative frameworks governing each

3 October 2019, the Court found that a petitioner seeking political asylum had no merit because Benin had complied with conditions provided for under art 1(c)(5) of the United Nations Conventions relating to the Status of Refugees as 'the circumstances in connection with which he has been recognised as a refugee have ceased to exist' and that he was offered voluntary repatriation or social reintegration.

53 On 8 July 2020, the WAEMU Community Court of Justice ruled that (Judgment 005/2020 of 8 July 2020) the Benin Constitutional Court's ruling in the *Eric Dewedi* case was inconsistent with Benin obligations under WAEMU Community Law and rejected it (see decision at pages 15-17).

54 D Gnamou 'Juridictions constitutionnelles et normes de référence' (2019) 1 *Revue constitution et consolidation de l'Etat de droit de la democratie et des libertés fondamentales en Afrique* 89; Narey (n 10) 19.

55 Gnamou (n 54) 89; Narey (n 10) 19.

56 See recently Judgment DCC 24-048 of 4 April 2024.

court, the African Charter for the African Court and the Constitution for the Constitutional Court of Benin.[57]

This insular and chauvinistic avoidance is legally unwarranted. Article 7 of the Constitution of Benin accords the African Charter a special constitutional status, incorporating it into the corpus of constitutional norms. Moreover, treaties duly ratified by Benin, including the Protocol establishing the African Court, are binding on the state and all its organs.[58] Consequently, the decisions and interpretive pronouncements of specialised human rights bodies, particularly the African Court, must serve as authoritative interpretative tools for the Constitutional Court. This is essential to ensuring coherence in the interpretation of the African Charter across jurisdictions, fostering interpretive harmonisation, and enabling jurisprudential dialogue and cross-fertilisation between constitutional and human rights bodies throughout the continent.[59]

4 The interpretation of substantive rights

In this section, I examine the choice and application of methods of interpretation and their implications. I examine litigation pertaining to three types of rights: the rights to equality and non-discrimination, political rights and fair trial rights.

4.1 The rights to equality and non-discrimination

The examination of the interpretation of the right to equality and non-discrimination is conducted at three levels. First, I look at the scope of the right as provided under the Constitution and the African Charter. Second, I examine the methods of interpretation and their application. Last, I provide an overview of the implications of interpretive approaches for the rights to equality and non-discrimination.

57 Decision EP 21-003 of 17 February 2021.
58 Art 147 of the 1990 Benin Constitution as amended.
59 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) 485-489.

4.1.1 The scope of the rights to equality and non-discrimination

The Benin 1990 Constitution and the African Charter offer far-reaching normative protection for the right to equality and non-discrimination. This owes to privileges accrued to individuals and obligations imposed on the state.[60] Articles 25 and 26 of the Constitution cover procedural guarantees translated into equality of treatments of individuals before the law as well as equality in rights between men and women. The two-fold protection is also encapsulated in article 3 of the African Charter, and the wording 'every individual' in the Charter or 'all' in the Constitution should be understood as extending protection to both nationals and foreign nationals at any times. Both instruments enumerate prohibited grounds for discrimination that extend to sex, race, religion, political opinion, social status, ethnic group, colour, language, national or social origin, fortune, birth or other status.[61] Whilst the enumeration by the Constitution may seem to be exhaustive in nature, that of the African Charter suggests that those grounds are indicative of the prohibitions and that any discrimination whatsoever may not be accepted.

The Constitution and the Charter explicitly name the state as the primary duty-bearer of the right to equality and non-discrimination on which negative and positive obligations are imposed.[62] This obligation first entails that every organ of the state (executive, legislature and the judiciary), and its institutions at the national and local levels as well as state enterprises must ensure that individuals are treated equally and freely from discrimination. The state and its organs specifically protect the 'mother and the child', and look after persons with disabilities (PWDs) and older persons.[63] For the mother and the child, the Constitution compels the state to 'protect' them, while it simply has the moral obligation to look after PWDs and the aged. Greater protection is, however, afforded through article 18 of the African Charter at four levels: the protection of the family; the obligation on the state to assist the family; the positive obligation to eliminate discrimination perpetrated on women and ensure active protection of women's rights

60 EN Youmbi *La justice constitutionnelle au Bénin: Logiques politique et sociale* (2016) 471.
61 See art 26 of the 1990 Benin Constitution, and arts 2 & 3 of the African Charter on Human and Peoples' Rights.
62 Art 26 of the 1990 Benin Constitution and art 1 of the African Charter.
63 Art 26 of the 1990 Benin Constitution.

as defined under international human rights instruments; and specific protection for the aged and PWDs.[64]

Equality and non-discrimination encompass state efforts to remove all legal barriers to equal treatment of individuals, to ensure that legislation prohibits discrimination and unequal treatment, and to meet positive duties imposed on the state for the promotion of equality.[65] The Benin equality clause is formalistic and furthers formal equality, which may handicap the quest for substantive equality.[66] This situation brings to fore the role that interpreters of the Constitution may play in reaching substantive equality, not only by ensuring that individuals have the same opportunity but that the treatment results in effective equality.[67] It calls for appropriate application of a systemic approach to interpretation since various instruments, legally binding on the Court, protect the right to equality and non-discrimination. Further, the African Charter has judicial (the African Court on Human and Peoples' Rights) and quasi-judicial (the African Commission on Human and Peoples' Rights) institutions that interpret it and which have issued decisions pertaining to the equality provision.[68] As the then Chief Justice of Zimbabwe, as quoted by Alston, recalled, 'a judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many jurisdictions, than if it is based upon the parochial experience or foibles of a particular judge or court'.[69] Thus, the African Court's and Commission's jurisprudence might provide

64 Art 18 of the African Charter.

65 S Fredman *Discrimination law* (2011) 6.

66 Human Rights Council *Substantive equality: Guidance document of the Working Group on Discrimination Against Women*, 42nd Session, 27-30 May 2025.

67 M Bell 'The right to equality and non-discrimination' in T Hervey & J Kenner (eds) *Economic and social rights under the EU Charter of fundamental rights: A legal perspective* (2003) 91-92.

68 Examples include *Kembonge v Tanzania* (merits) (2018) 2 AfCLR 369; *Evarist v Tanzania* (merits) (2018) 2 AfCLR 402; *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9; *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (2018) 2 AfCLR 380; *Actions pour la Protection des Droits de l'Homme (APDH) v Cote d'Ivoire* (merits) (2016) 1 AfCLR 668; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 219.

69 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* (2000) 12.

greater guidance for interpretation of the equality provision before the Constitutional Court.

4.1.2 Methods of constitutional interpretation and their application

The Court has used the literal, teleological, systemic and generous methods of interpretation to address issues raised by parties, construe the meaning of the right to equality and non-discrimination, and render justice. Literal interpretation was the commonly used method and has enabled the Court to reach positive and negative outcomes.[70]

Positive application of this method includes cases such as the *Child's Name* case,[71] *Polygamy* case,[72] the *Adultery* case,[73] the *Inheritance* case[74] as well as the *Géronime Tokpo* case.[75] The *Child's Name* case involves a petition alleging a violation of the right to equality under articles 6 and 12 of the Benin Family and Persons Code, on the grounds that the Code grants the husband the exclusive right to name the child, even after he has acknowledged a child born out of wedlock. The Court declared these provisions unconstitutional.[76] In the *Polygamy* case, a MP approached the Court to review the Family and Persons Bill that would have introduced the possibility for men to be married to more than one woman while the same opportunity was not given to women.[77] Because sex should not constitute a ground for discrimination, the Court ruled, by way of a literal reading of the Constitution, that the impugned provision of the bill was invalid.[78]

70 A-J Adelouï 'Loi portant règles particulières pour l'élection des membres de l'Assemblée nationale: Judgment DCC 10-117 du 8 Septembre 2010. Observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 354-355.
71 Judgment DCC 21-269 of 21 October 2021.
72 Judgment DCC 02-144 (n 16). See the discussion in J-L Atangana-Amougou 'Du code des personnes et de la famille devant la Cour constitutionnelle du Bénin. Judgment DCC 02-144 du 23 décembre 2002: Observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 433.
73 Judgment DCC 09-081 of 30 July 2009.
74 Judgment DCC 13-082 of 9 August 2013.
75 This list does not suggest that these are the only cases where literal interpretation progressively protected human rights. The choice of these rights is based on their importance in advancing the rights of marginalised members of the community and their impact on the Benin legal system.
76 See the full discussion in Makunya (n 59) 476-478.
77 Atangana-Amougou (n 72).
78 Judgment DCC 02-144 (n 16).

A similar approach was adopted, seven years later, in the *Adultery* case where the petitioner challenged the constitutional validity of articles 336 to 339 of the Criminal Code.[79] The Code sanctioned adultery committed by the male partner only when the sexual intercourse occurred under the conjugal roof, while that of the female partner was sanctioned irrespective of where it occurred.[80] The provisions were declared unconstitutional.[81] The Court applied this very same reasoning in the *Inheritance* case where petitioners challenged the decision by the Court of Appeal.[82] The Court of Appeal had ruled that petitioners were not entitled to inherit because customary law did not enable children from a female parent to inherit on her behalf when she passed on.[83] The Court of Appeal decision was declared unconstitutional.[84] The literal reading also enabled the Court to protect the right of a female visually impaired candidate to the magistracy to receive reasonable accommodation because the Constitution and the African Charter imposed positive obligations on the state.[85]

One notes from the five cases that unequal treatment and discrimination were self-evident.[86] The nature of these cases enabled literal interpretation to further progressive goals by enhancing equality among citizens. This will, however, not be the case in every instance. There might exist cases where discrimination is not manifest or where discrimination is positive: it aims to advance equality of people who have been historically marginalised.[87] Applying literal interpretation may thus lead to a negative outcome.

79 Adelouï (n 70) 355.
80 Judgment DCC 09-081 (n 73).
81 Judgment DCC 09-081 (n 73).
82 Judgment DCC 13-082 (n 74). It is to be noted here that instead of taking the case to the Supreme Court on a normal appeal procedure, perhaps because of time limits, the claimant took it to the Constitutional Court instead alleging the unconstitutionality of the Court of Appeal decision.
83 Judgment DCC 13-082 (n 74).
84 As above.
85 Judgment DCC 12-106 of 3 May 2012.
86 A simple literal reading of the impugned legislation enabled the Court, in Judgment DCC 10-117 of 8 September 2010, to understand that the law-maker added a category which was not contemplated by drafters of the Constitution.
87 Judgment DCC 10-117 of 8 September 2010. See the discussion in J-L Atangana-Amougou 'L'élection des membres de l'Assemblée nationale. Judgment DCC 10-117 du 8 septembre 2010: Observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 452-454.

The *Gender Parity* case[88] demonstrates that an indifferent application of literal interpretation may prompt the Court to overlook significant contextual elements that would have led to a different outcome. The *Gender Parity* case arose from a MP petition challenging the validity of a bill as it enjoined political party electoral lists to bear 20 per cent of female candidates.[89] Gbadamassi, the petitioner, convinced the Court that such provision amounted to the violation of the right to equality between male and female candidates. The Court eventually ruled in his favour because a literal reading approach to such a provision leads to the logical conclusion of unequal treatment.[90]

There are several conclusions to draw from the application of literal interpretation in equality and non-discrimination cases. Depending on the nature of the case, literal interpretation can lead to outcomes that either advance or undermine the prospects for inducing a culture of rights.[91] The analysis of the four cases where literal interpretation served to advance equality demonstrates that many other factors should be considered, such as the nature of the case, the type of alleged violation and its purpose. The *Gender Parity* case demonstrates that, although the bill on the face of it provided for an unequal treatment between male and female candidates, 'formal inequality' addressed historical imbalances between men and women regarding political participation.[92] Applied in equality cases, the literal interpretation rule furthers formal rather than substantive equality. The Court maintained one line of thought to assess whether unequal treatment occurred, namely whether likes were treated alike.[93] Concretely, what interested the Court was whether individuals belonging to similar categories or facing the same situation were treated alike. This approach has its inherent problems and may lead the Court, when confronted with complex facts, to undermine the quest for substantive justice.[94] From a methodological standpoint, the analysis

88 As above.
89 Atangana-Amougou (n 72) 449.
90 As above.
91 Adelouï (n 70) 355.
92 C Bazy-Malaurie 'Le Conseil constitutionnel et la parité' in X Bioy & M-L Fages (eds) *Égalité – parité: Une nouvelle approche de la démocratie?* (2013); G Calvès 'Le Conseil constitutionnel et les quotas par sexe: Une fuite en avant' in X Bioy & M-L Fages (eds) *Égalité – parité: Une nouvelle approche de la démocratie?* (2013); G Merland 'Le principe d'égalité' (2004) 57 *La Revue administrative* 370.
93 Sec 4.1.3 takes this argument further.
94 R Madja 'La protection constitutionnelle des droits civils' in Aïvo, De Gaudusson & Maïla (n 1) 766.

shows that the Court did not explain when literal interpretation can or cannot be applied in the adjudication of equality cases. The same can be said regarding other methods applied by the Court, including the teleological and systemic interpretation methods.

The resort to teleological and systemic interpretation of the Bill of Rights in other cases seems to have been guided by the assumption that the literal approach was either unable to provide an understanding of the rights and facts or that it could have led to an absurd outcome. Like literal interpretation, the (mis)use of teleological and systemic interpretation has had positive and negative effects on the protection of individual rights. In the *Gender Parity* case, for instance, the resort to the letter and the spirit of the Constitution led to the conclusion that drafters of the Constitution had not sought to favour female candidates at the expense of their male colleagues.[95] The Court seems to have preferred the 'subjective intent' of drafters, although it did not explain what such 'intent' was and what was its legal basis. Jayawickrama and other scholars have pointed out that resorting to the intent of framers in interpreting human rights may be a dangerous practice because it may deprive individuals of their rights and prevent the Bill of Rights from evolving.[96] The Decision DCC 10-013 of 4 March 2010 (*Offense against the head of state* case) illustrates the misuse of teleological and systemic interpretation.

In the *Offense against the head of state* case, the petitioner challenged the constitutional validity of articles 23 and 32 of the 1960 Benin Act on the Freedom of the Press because the law treats the President of the Republic differently from other citizens. This violated the right to equality and the freedom of expression and could affect rights such as the right to defence.[97] The impugned provisions provided that any offense committed through the press, be that defamation, insult or others against the President of the Republic or his or her representative, the prime minister, or the Speaker of Parliament is punishable with between one and five years' imprisonment and a fine of 1 000 to 5 000 000 CFA Francs.[98] The Court applied a systemic and

95 See Judgment DCC 10-117 (n 87).
96 N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 159-173.
97 Judgment DCC 10-013 of 4 March 2010.
98 As above.

teleological reading of articles 3, 4 and 41 of the Constitution and ruled that because the position of the President of the Republic is important, in the sense that the office embodies the sovereignty of people, it should not be treated as any other citizen. Such differential treatment is manifested by way of other jurisdictional privileges and immunities incumbent presidents enjoy during their term. In other words, the President of the Republic should be protected against defamation, criticism and other sort of insults committed in the media to protect the nation and its sovereignty.[99]

For obvious reasons, the Court eclectically applied systemic and teleological arguments to suit a particular understanding of the protection accorded to the President of the Republic. Arguably, the conclusion the Court arrived at was flawed. If the right to equality were the sole right on the basis of which the petition was filed, one might agree that, as demonstrated later,[100] different situations (President of the Republic and citizens) may receive different treatment regarding certain aspects of public conduct. However, apart from the right to equality, the petitioner invoked freedom of expression, a constitutional right that he thought was unlawfully restricted by the Freedom of the Press Act because both the Constitution and the African Charter empower everyone to express and disseminate their opinions 'within the law'.[101] The Court was expected to explain the extent to which the Freedom of the Press Act was consistent with the Constitution and international law, particularly whether one to five years' imprisonment and a fine were proportional to the 'legitimate purpose' the Act sought to protect, namely protecting the President of the Republic against offense to their honour, reputation and dignity.[102] How does that contribute to protecting the freedom of the press protected under article 24 of the Constitution?

Another approach to the application of teleological arguments rule would have led the Court to a conclusion similar to that adopted by the African Court on Human and Peoples' Rights (the African Court) to uphold equality of treatment between citizens. The African Court was of the view that the 'assessment of the need for the limitation must

99 As above.
100 See the discussion in sec 4.1.3.
101 Art 23 of the 1990 Benin Constitution and art 9(1) of the African Charter on Human and Peoples' Rights.
102 Judgment DCC 10-013 (n 97).

necessarily vary depending on whether the person is a public figure or not'.[103] According to the Court, 'freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures'.[104] In the same vein, the European Court on Human Rights ruled:

> The limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[105]

The decision by the African Court was adopted after the Benin Constitutional Court ruling in the *Offense against the head of state* case. However, at the time the Benin Constitutional Court made the decision in the *Offense against the head of state* case, the African Commission had already established jurisprudence on how treatment of defamation against individuals holding public office could be approached.[106] The position of the African Commission is important in highlighting that the right to equality should be upheld and that public authority may not claim differential treatment solely on the basis of the official position. The Benin Constitutional Court could interpret the freedom of expression in a manner which is consistent with the equality provision under the Constitution. In the 1994 *Media Rights Agenda and Others v Nigeria* case, the African Commission ruled that 'people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'.[107] The decisions in the *Media Rights Agenda* and the *Lohé Issa Konaté* cases point in the direction of the existence of a regular and coherent practice by human rights bodies in relation to laws that restrict the freedom of expression to protect public officials from which the Benin Constitutional Court could have learnt.

In the *Eric Dewedi* case, the Court's approach seems to suggest that, if it were called to adjudicate a right regulated by both a domestic legislation

103 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR (2014) 338, para 155.
104 As above.
105 *Eon v France*, Application 26118/10 (2013) para 59.
106 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 74-75 in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 303.
107 As above.

and supranational instrument, it would adopt an interpretation which is in line with the Constitution irrespective of whether this is consistent with the supra-national instrument. The Constitution prevails over any other legal text to protect individual rights. Such a conclusion is drawn from the Court's ruling in the *Eric Dewedi* case discussed earlier. The Court adopted a generous interpretation. It assumed that supranational legal instruments ought not to breach fundamental rights and that the Court has the power not to apply supranational instruments that contravene the Bill of Rights. The Court's ruling seems to raise more questions than answers, especially in relation to the construction of the status of sub-regional instrument. What is the status of sub-regional norms and when may they be applied when interpreting human rights? When, if at all, can legislation and constitutional norms trump sub-regional regulations or international norms?

4.1.3 Implications for the right to equality and non-discrimination

The application of the four methods of interpretation discussed earlier – literal, teleological, systemic and generous – have two implications: first, for the definition of the nature and the scope of the right and, secondly, the quality of the protection of the right to equality and non-discrimination.

The definition of the nature and the scope of the right

The right to equality means that 'individuals in the same category or situation should be subjected to the same treatment without discrimination'.[108] The right to equality also entails that the law should be the same for all, both in its adoption and its application. Although it can contain discriminatory provisions, such discrimination should be justified.[109] Two conclusions flow from the Court's understanding: difference in treatment of individuals not belonging to the same category is lawful and that discrimination can be enforced to protect the public interest.[110]

108 Judgment DCC 06-099 (n 17)
109 Judgment DCC 14-116 of 1 July 2014.
110 Judgment DCC 01-005 (n 40).

Yet the Court prefers to deal with the meaning of 'same category', 'same situation' and 'lawful discrimination' on a case-by-case basis. This means that it has not laid sufficient theoretical foundation to enable one to comprehend when individuals may be said to belong to the same category or be in the same situation. Such failure led it to an eclectic interpretation of the equality clause because it will never be clear-cut whether individuals are in the same category. Scholars such as Fredman criticise the application of the 'treating likes alike' test based on the problems it generates, notably the issue of threshold, because it is difficult to demonstrate 'when two individuals are relatively alike'.[111] Another problem is the constant need to find a 'comparator' under the assumption that 'there exist a universal individual' on the basis of whom to compare one situation to another.[112]

In Judgment DCC 12-092 of 12 April 2012, the Court ruled that because the applicant failed to demonstrate that he and his superior lodged their judicial complaint on the same day and that such application was dealt with by the same rapporteur, he could not claim to have been subjected to a discriminatory treatment. In this case, the petitioner contended that he and his superior approached, separately, the Administrative Chamber of the Supreme Court to invalidate decisions adopted against them by the Minister of Interior, Security and Decentralisation.[113] While his superior's case was decided swiftly, his case was not promptly decided, raising the issue of unequal treatment.[114] This decision is important as it illustrates that being in the same category with regards to judicial processes means that the case must be dealt with by the same judge and lodged the same day. The unit for comparison is not the Administrative Chamber of the Supreme Court but the judge-rapporteur. Furthermore, in Judgment DCC 06-099 of 11 August 2006, the Court ruled that although the petitioner compared himself with his colleague teacher employed by the same university and having the same manager, they did not belong to the same category because they worked in different departments.[115] Petitioners were all teachers and their contracts were terminated by the rector of the university.

111 Fredman (n 65) 8-9.
112 Fredman (n 65) 11.
113 Judgment DCC 12-092 of 12 April 2012.
114 As above.
115 J-L Atangana-Amougou 'De la discrimination dans la carrière d'enseignant. Judgment DCC 06-099 du 11 août 2006' (2013) 1 *Annuaire béninois de justice*

The two decisions suggest that when defining sameness of 'category' or 'situation', there exists two groups: in the case of the university staff, individuals must belong to the same departments, while in the case of a complaint lodged before the Administrative Chamber of the Supreme Court, according to what emerges from the Constitutional Court decision, the case must have been lodged before the 'same judge' for one to claim one was subjected to unequal treatment. In these two cases, the Supreme Court or the university can be considered as '*macro*' units, while the judge before whom the case is presented or the department where the staff belong may be considered '*micro*' units. In its interpretation, the Court thus had the choice between considering sameness of category based on 'macro' units or 'micro' units.

As can be seen, a '*macro*' unit is broader and more inclusive than a '*micro*' unit. An approach which takes the '*macro*' unit as the unit for assessing sameness of category would accord greater protection to petitioner than one which considers the '*micro*' unit. If Judgment DCC 12-092 of 12 April 2012 is taken as an illustration, a *macro* analysis would merely question whether the individuals approached the Administrative Chamber of the Supreme Court for the same issue and whether a decision has been issued. The Court would have thus reached the conclusion that because the two individuals approached the Supreme Court and that in one case, a final decision was adopted and in the other, there was never a ruling (irrespective of who the judge was), the Administrative Chamber of the Supreme Court treated the two petitioners unequally.

The same could be said of Judgment DCC 06-099 of 11 August 2006. In this case, a macro analysis leads to ascertaining that the two employees were dismissed for the same fault by the same employer and that their belonging to different departments, should have had no bearing on the outcome of the case. The application of micro analysis narrowly defined 'sameness' of category, thus failing to increase respect for human rights by state organs. This can entrench a culture of inequality and affect the quality of the protection of the right to equality and non-discrimination.

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constitutionnelle 477.

Quality of protection of the right to equality and non-discrimination

Whilst one can claim that the Court's approach increased the protection of women by tempering the hegemonic and patriarchal position of men towards women in marriage through its decisions in the *Child's Name*, *Polygamy* and *Adultery* cases, it upheld the unequal representation of women in politics by rejecting the proposed 20 per cent quota in the *Gender Parity* case. The Court refrained from seeking to achieve substantive justice because, seemingly, it was unwilling to examine the purpose of the 20 per cent quota. This would have prompted it to address the inadequate distribution of resources, wealth and power between men and women in Benin's society, a consideration which formalistic interpretation tends to overlook.[116] Fredman recommends that teleological arguments may be needed if the Court is willing to address the historical as well as cultural marginalisation of certain groups. One can consider the dignity of a group and the importance of its participation in the decision-making process as highlighting the need for a teleological approach.[117]

How would a National Assembly deliberate on women's issues when it is male-dominated and its members could potentially approach women's issues from a male-patriarchy vantage point? The Benin National Assembly was composed of seven female MPs out of 83 in 2015 and only five out of 83 in 2019.[118] These numbers have rarely progressed since Benin's return to democracy in 1990. There were four female MPs out of 60 between 1991 and 1995, 10 out of 82 between 1995 and 1999, six out of 83 between 1999 and 2007 and eight out of 83 between 2011 and 2015.[119]

I do not claim that the Court had not attempted to seek substantive justice. There are equality cases where the Court embraced a value-based interpretation to address imbalance of representation in national

116 Fredman (n 65) 2.
117 Fredman (n 65) 8; 227.
118 P Folly 'Bénin: cinq femmes sur 83 députés pour la huitième législature' https://archives.beninwebtv.com/2019/05/benin-cinq-femmes-sur-83-deputes-pour-la-huitieme-legislature/ (accessed 26 March 2020).
119 'Législatives 2015 au Bénin: la disparité entre femmes et hommes se creuse davantage' (*Gender Links*, 30 November 1AD) https://genderlinks.org.za/classification/themes/lgislatives-2015-au-bnin-la-disparit-entre-femmes-et-hommes-se-creuse-davantage-2015-06-18/ (accessed 26 March 2020).

civil service among different divisions of the country.[120] Its ruling in Judgment DCC 10-086 of 15 July 2010 shows that to ensure the participation of under-represented regions in national service, a quota could be imposed and in service of social peace, national solidarity and regional equilibrium.[121] What I contest is the Court's inability to conduct substantive analysis of the right to equality for all the equality cases that, like the *Gender Parity* case, required value-based interpretation.[122] If the imposition of a quota to ensure representation of some regions in the public administration does not violate the principle of equality,[123] how would the Court maintain that similar quota to increase women's political participation would amount to the violation of equality between male and female candidates?

4.2 Political rights

In this section, I discuss the way the Court chose and applied methods of interpretation in political rights litigation. This analysis examines whether or not the nature of rights can influence the choice and application of the method and their implications for fundamental rights. In the next sub-section, I consider primarily the scope of political rights as provided for under the Constitution and the African Charter, while in the second and third sub-sections, I examine the type of methods used and how they were applied as well as their implications for political rights.

4.2.1 Constitutional protection and the scope of political rights

Political rights are provided for under the Constitution and the African Charter, but specific laws, such as the General Electoral Law and the Charter of Political Parties, define the way some can be implemented.[124] These rights include direct and indirect civic participation in the management of public affairs through elections, referendums and elected representatives.[125] Political parties are recognised and may be formed by

120 Judgment DCC 10-086 of 15 July 2010.
121 As above.
122 Atangana-Amougou (n 72) 454.
123 Judgment DCC 10-086 (n 120).
124 Art 81 of the Constitution. This includes conditions in which petitions for presidential elections may be presented to the Electoral Commission.
125 Arts 3, 4 & 6 of the 1990 Benin Constitution.

individuals that enjoy civil and political rights.[126] Although suffrage is equal, secret and universal, only citizens aged 18 years and above may participate.[127] They should, in addition, meet specific conditions when they run for particular offices. For instance, candidates to the presidency of the Republic must be aged between 40 and 70 years and must reside in Benin during elections.[128] Members of the army, state security must resign in advance to run for Parliament.[129] This protection is strengthened by provisions of the African Charter, given that article 7 of the Constitution recognise rights therein as part and parcel of itself.[130] Article 13 of the Charter guarantees three types of political rights: direct participation of citizens, for instance by running for any office, indirect participation by choosing their representatives, and access to services provided by public institution and to public property and services.[131]

However, in December 2025, the President of the Republic of Benin enacted the constitutional amendment Act 2025-20 of 17 December 2025. The Act affected directly the exercise of several political rights. Article 4-1, while reiterating the principle of political pluralism enjoins political groupings to contribute to the 'institutional stability, strengthening of the state and the continuity of public action'. Relatedly, article 5-1 requires that opposition political parties ceases actions and activities aimed at electoral competition while encouraging them to strive to propose alternative or constructive solutions. Some have considered this provision as a direct violation of the right to freedom of assembly and association and an afront to political competition which is the backbone of any democratic regime.[132]

Meanwhile, both the African Commission and Court recognise that, although countries may have the right to regulate the implementation of political rights, the regulation should not render the enjoyment of rights illusory.[133] This is the case, for example, with the requirement

126 Art 5 of the 1990 Benin Constitution.
127 Art 6 of the 1990 Benin Constitution.
128 Art 44 of the 1990 Benin Constitution as revised in 2025. See Judgment DCC 05-069 of 27 July 2005 and Judgment DCC 25-293 of 12 December 2025.
129 Art 81 of the 1990 Benin Constitution. See Judgment DCC 10-117 (n 87).
130 A Tanoh & H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 115.
131 Art 13 of the African Charter.
132 Petitioners in Decision DCC 25-293 (n 128).
133 *Tanganyika Law Society, Legal and Human Rights Centre and Reverand Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 54, para 109.

that individuals be members of political parties before they can stand for election, which does nothing to advance democratic values.[134] Political rights impose a positive obligation on states to organise and finance elections as well as ensure that the electoral management body is independent in the sense meant by the African Court, which is that it should be constituted according to law in a way that guarantees its independence and impartiality.[135] The presence of political appointees must be balanced by considering relevant political forces.[136] An amendment to the electoral framework for the sake of advancing a particular candidate or party may affect the right to free and fair elections.[137] This implies that any limitations imposed on political rights in Benin must be consistent with the Constitution, the African Charter and the interpretation provided by regional human rights bodies in the application of the African Charter.[138]

In the light of the foregoing, it is apparent that the Constitutional Court is surrounded by a wealth of interpretive tools it can use to advance political rights given their complementarity and the diversity of political rights they cover.[139]

The following analysis will explore whether these tools were of any help to the Court in its interpretive approaches.

4.2.2 Methods of constitutional interpretation and their application

The Court resorted to literal, teleological, systemic and generous interpretation when deciding over political rights matters. Unlike the case with the interpretation of the right to equality and non-discrimination, I demonstrate here that the Court used teleological and systemic interpretation as there are several legal instruments regulating and

134 As above.
135 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, paras 123-125.
136 As above, paras 129-130.
137 Art 23(5) of the 2007/2012 African Charter on Democracy, Elections and Governance in Heyns & Killander (n 106) 131. Benin ratified the African Democracy Charter on 28 June 2012.
138 These bodies may include the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the Economic Community of West African States Court.
139 CM Fombad 'Internationalization of constitutional law and constitutionalism in Africa' (2012) 60 *The American Journal of Comparative Law* 468.

implementing political rights which the Court needed to read together. These cases involved various components of political rights including the right to run for President, the right of political parties to compete in elections, the invalidation of an MP for criminal conviction, the right of opposition and minority parties in Parliament, or the competence of the national assembly to establish an electoral management body.[140] The modalities of exercise of most of these rights are regulated through subsidiary laws such as the Electoral Law, the Charter of Political Parties, National Assembly Internal Rules of Procedures, the Criminal Code or the National and Autonomous Electoral Commission Act. Along with the Constitution and the African Charter, they form a body of laws, or a coherent system. As such, the interpreter must consider this system in order to construe the meaning of political rights or address issues emerging from relevant cases.[141]

In some cases examined, the resort to the combined application of teleological and systemic methods reinforced the protection of a number of rights, while in other cases, it led to a negative outcome *vis-à-vis* petitioners. In cases where it led to positive outcome, interpretation played a transformative role within the political arena, while in cases where it led to negative outcome, it furthered the *status quo ante* by preserving the ruling party's interests and expanding the hegemony of the President.

The application of teleological-*cum*-systemic approaches in interpretation appeared in the Court's early political rights case, Judgment DCC 34-94 of 23 December 1994. In this decision, the Court ruled that it was within the powers of the National Assembly to establish the National and Autonomous Electoral Commission (CENA) because this contributed to implementing the rule of law and human rights (political rights) provided in the preamble.[142] This case illustrates how far the Court can go to recognise to the National Assembly powers that were not explicitly conferred on it by the Constitution in the furtherance of political rights.[143] It arises in the context of mistrust between the president of the Republic and members of the National Assembly over

140 Decision EL 11-005 of 13 April 2011, Judgment DCC 01-011 (n 15); Judgment DCC 00-078 (n 24), Judgment DCC 34-94 of 23 December 1994.
141 Fromont (n 2) 267.
142 S Dako 'Le contentieux électoral dans la jurisprudence de la Cour constitutionnelle du Bénin' (2013) 1 *Annuaire béninois de justice constitutionnelle* 630.
143 Dako (n 142) 632-633.

which organ should be the adequate authority to organise elections. While the National Assembly preferred such a role to be exercised by an autonomous and independent body, the president of the Republic, on their part, intended to confer this role to public administration.[144] The nub of contention was thus whether parliament had the power to institute the CENA and whether by doing so it did not violate the principle of separation of powers.

The Court inferred, based on article 98 of the Constitution, that the National Assembly was empowered to adopt legislation on citizenship, public liberties and determine the legal regime on the election of the President of the Republic and members of the national and local assemblies. As such, it was entitled to establish a body to ensure that these rights are effectively realised.[145] Analogically, if the National Assembly can do more (protecting political rights), it also can do less (establishing a body to realise political rights). The absence of an explicit rule preventing the National Assembly from establishing the CENA meant that the National Assembly could establish the CENA without breaching the Constitution and the principle of separation of powers.[146]

A literal approach in this case would, for all intents and purposes, have led to the denial of such powers to the National Assembly, thus enabling the executive, generally through the Ministry of Interior, to organise elections that could be contested on grounds of lack of independence and impartiality. The Court's examination of the purpose of the National Assembly Act was far-reaching: it examined the preamble, the adherence to democratic and human rights ideals, the Universal Declaration on Human Rights (article 21(3)), and provisions of the Constitution as well as of the impugned Act.[147] The Judgment DCC 34-94 of 23 December 1994 is relevant since it shows that the National Assembly has positive obligations to realise political rights through the adoption of enabling legislation which in turn contributes to the implementation of constitutional rights.[148]

144 Dako (n 142) 631.
145 Dako (n 142) 630.
146 As above.
147 Dako (n 142) 629-630.
148 CM Fombad 'Problematising the issue of constitutional implementation in Africa' in CM Fombad (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016) 15-16.

The National Assembly can, however, also hamper the prospects for the enjoyment of political rights by a group of elected officials if decisions are passed through the majority vote and do not take into consideration the opinions of minority parties. In some cases, the Court invoked teleological and systemic arguments to prevent the assembly from acting *ultra vires*. The Court also protected the rights of minority parties in the assembly. In the first case scenario, the Court invalidated legislative provisions that inserted additional conditions for admissibility of presidential or legislative candidate applications. Examples include the obligation imposed on presidential candidates to live in the country between the establishment of the CENA[149] and the publication of election results, or for certain civil servants (ministers, directors, state project managers) to resign before they can run for Parliament.[150] The Constitution never contemplated these additional conditions.

In the second case scenario, the Court used 'policy argument'[151] to force the parliamentary majority to consider the parliamentary minority opinion when adopting certain decisions. In Judgment DCC 09-016 of 19 February 2009 the Court appealed to the ideals of social order and the common good which the Constitution aims to achieve, and inferred from them that democracy, apart from entailing the rule of the majority, must strive to protect the minority.[152] What emerged from the Court's interpretation was the obligation to consider the National Assembly's 'political configuration', that is, 'all the political forces represented in the National Assembly and organised in parliamentary groups and/or in non-registered groups'.[153] This is in line with the constitutional obligation to safeguard, strengthen and promote 'respect, dialogue and mutual tolerance' among the people of Benin.[154]

This decision, and others relating to 'political configuration', exemplify the active role the Court can play, by way of interpretation,

149 Judgment DCC 05-069 of 27 July 2005.
150 Judgment DCC 10-117 (n 87).
151 D Baranger 'Sur la manière française de rendre la justice constitutionnelle – motivations et raisons politiques dans la jurisprudence du Conseil constitutionnel' (2012) 7 *Jus Politicum* 18.
152 Judgment DCC 09-016 of 19 February 2009.
153 Judgment DCC 00-078 (n 24).
154 Judgment DCC 01-011 (n 15). Art 36 reads: 'Each Beninese has the duty to respect and consider his fellow man without any discrimination whatsoever and to maintain relations with others which make it possible to safeguard, strengthen and promote respect, dialogue and mutual tolerance with a view to peace and national cohesion.'

to advance the enjoyment of rights for all.[155] The Court puts a dampener on the idea that democracy is the rule of the majority because, viewed as such, democracy does not necessarily guarantee that individuals who cannot express themselves through democratic and representative channels, notably since they do not constitute the majority, would have their concerns catered for by representative assemblies.[156] The majority may be selfish, guided by clientelistic, chauvinistic, paternalistic and power-seeking motives which, if not balanced by the judiciary, could lead to the tyranny of the majority.[157] It is thus important to prioritise the quality of deliberations and participation of relevant stakeholders to foster 'deliberative democracy',[158] rather than applying the principles of 'representative democracy' across the board. Deliberative democracy can address the unequal distribution of powers in parliament.[159]

This does not necessarily imply the overhaul of representative democracy because, for obvious reasons, it remains the model under which political power is acquired and exercised. Decisions by representative bodies will thus need to be logical and reasoned in addition to being adopted in accordance with procedures the Constitution, legislation and regulations provide. In South Africa, where the necessity to push parliament towards 'deliberative democracy' has emerged, it has been suggested that deliberation and participation should be conducted on an equal footing and with the assembly compelled to justify its decisions.[160]

The question of whether a court made up of unelected officials is a legitimate body to enforce such a form of democracy, given that this could lead to partiality, has been a matter of debate in Benin.[161] Looking at it differently, invoking teleological arguments to control the power of the majority in Parliament raises issues of the separation of powers between the Court and the legislature. This might have prompted the bench of the Court that took over in June 2018 to abandon the 'political configuration' principle as ground for deliberative democracy

155 See for example Judgment DCC 09-002 (n 24).
156 P Togbé 'La justice constitutionnelle béninoise à l'épreuve des revirements de jurisprudence' in Aïvo (n 1) 677-678.
157 As above.
158 O Nay *Histoire des idées politiques: La pensée politique occidentale de l'antiquité à nos jours* (2016) 826.
159 See generally CH Mendes *Constitutional courts and deliberative democracy* (2013).
160 JL Pretorius 'Deliberative democracy and constitutionalism: The limits of rationality review' (2014) 29 *Southern African Public Law* 408-440.
161 Gnamou (n 54) 93.

and reaffirm the primacy of the representative and majoritarian nature of Benin's democracy. Representative democracy as a principle cannot be trumped, according to the Court, by the quest for consensus when adopting decisions in Parliament.[162]

From an interpretive standpoint, the problem that emerges regarding political rights pertains to the weight one accords to different forms of policy arguments used in teleological-*cum*-systemic interpretation. For the Court to rely on the principle of political configuration, it assumed that Benin's constitutionalism and the willingness of political and civil society forces to establish a democratic state was founded on the principle that 'national consensus' is the basis on which decisions are adopted.[163] This was so in part because, during the National Sovereign Conference, no political force or grouping could impose its position on others without consensus, as a result of which decisions were reached.[164] The analysis of cases shows that the Court failed to explain persuasively how national consensus could override other constitutional principles such as the idea that Benin's democracy is representative and is based on the rule of the majority. The Court's assumption seemed to have rested on shaky legal (constitutional) ground that any equally valid argument could have debunked. Is there a hierarchy among the various policy arguments it invokes when the Court resorts to teleological interpretation? If such a hierarchy exists, how does it ensure that the choice of one type of argument over another does not undermine the prospects for the realisation of the fundamental rights of all in a democracy?

The ruling in Judgment DCC 18-126 of 21 June 2018 suggests that, although different teleological arguments may be invoked when interpreting rights or the Constitution, they do not have the same weight and value, given that some are constitutionally binding principles while others are political ideals. [165] The latter cannot be invoked to supersede a constitutional imperative.[166] The case arose against the background of the desire by some political parties, largely from the ruling party, to amend the Charter on Political Parties, the Electoral Law, and the Constitution to strengthen women's participation and establish the

162 Judgment DCC 18-126 (n 25).
163 Judgment DCC 06-074 (n 24).
164 As above.
165 Judgment DCC 18-126 (n 25).
166 As above.

Audit Court.[167] Whilst the petitioners argued that such reforms could not be implemented unless relevant parties were consulted on the basis of the constitutional principle of 'national consensus', the Court ruled that national consensus forms part of the political ideals of Benin's democracy and cannot supersede the principle of majoritarian and representative democracy. This ruling is relevant in showing how the Court reversed its earlier positions on the importance of political configuration, in highlighting the instability of policy argument, and in signalling the dawn of the tyranny of the majority, inasmuch as the ruling risks turning the Court into an instrument enabling the majority to undermine minority rights.[168] The decision also demonstrates that teleological or systemic justifications may be cherry-picked to suit a preferred outcome, given that if article 36, which calls for 'respect, dialogue and mutual tolerance with a view to peace and national cohesion' were considered, this could have led to different outcome.

Be that as it may, the Court failed to respond to some valuable questions that would have spared it from accusations of advancing the agenda of the ruling party. What, for instance, is a constitutional imperative? When and how do we know one? How can it be invoked to reverse previous court decisions that have set precedent for the participation of small parties in decision-making in Parliament? When and how does a principle become a constitutional imperative or a constitutional value principle? An examination of two series of decisions seems to suggest that there is no unique standard for ascertaining this and that a principle can be plucked from the air and framed as constitutional value to suit a particular outcome irrespective of whether this advances or encroaches on political rights.

The first series of cases involve the reinterpretation by the Court of the age requirement for presidential elections. Two decisions, namely Judgment DCC 15-156 of 16 July 2015 *(Hermes* case) and Judgment DCC 18-125 of 21 June 2018 *(Adioula* case), will be compared. The *Hermes* case pertains to presidential elections and the *Adioula* case to legislative elections, but their object, the minimum age to run for office,

167 As above.

168 See for example Judgment DCC 21-011 of 7 January 2021 on the constitutional validity of the godfathering regime for presidential candidates. The Constitutional Court declared it was incompetent to review the 'will' of the 'constituent power' thus failing to review a constitutional amendment which, in practice, resulted in the exclusion of several candidates from running for president.

is similar. In the *Hermes* case, the petitioner challenged his political party's decision to exclude him from running for President because only a few months separated him from reaching 40 years, the minimum age required; Hermes's 'birthyear' mate's application, by contrast, was accepted since, although he was born in the same year as Hermes, his month of birth was not known. This prompted the party to consider that Hermes's 'birthyear' mate had reached 40 years in the absence of any indications about the month.

The Court ruled that this was a discriminatory practice. Based on a French general principle of law – 'year begun, year gained', or '*annus incoeptus habetur pro completo*'[169] – it reasoned that the month and date of birth were irrelevant in determining whether the individual had reached 40 years: only the year counts. This generous interpretation adopted by the Court to enable the individual to participate in the political process was called into question three years later in the *Adioula* case.[170] Adioula approached the Court to clarify whether political parties had sufficient grounds to reject his application to participate in legislative elections because he had not reached 25 years during the month of application.[171] He based his claim on the Court's ruling in the *Hermes* case. Reversing its earlier decision, the Court ruled that the earlier ruling erred in its reasoning by applying to constitutional matters a principle of law applicable to private litigation (civil, commercial and fiscal).[172] According to the Court, the intention of the drafters of the Constitution and law-makers when providing the age in terms of 'minimum' and 'maximum' is to ensure that the date, the month as well as the year are considered in the assessment.

The second series of decisions involve the declaration of the constitutional validity of the Political Parties Charter on the basis of cherry-picked teleological grounds the implementation of which undermined some political party's rights to participate in elections. Decision EL 19-001 of 1 February 2019 and Decision EL 19-007 of 12 March 2019 will be briefly discussed to provide background information. In Decision EL 19-001 of 1 February 2019, the Court

169 This means: 'The year begun is to be considered completed.' Judgment DCC 15-156 of 16 July 2015.
170 Judgment DCC 18-125 of 21 June 2018.
171 As above.
172 As above.

rejected a constitutional petition challenging a presidential decree on the organisation of legislative elections because nothing precluded political parties from registering with the Ministry of Interior in less than six months.[173] The petitioner argued that the decree contravened the Political Parties Charter because it amounts to forcing parties to register in less than six months and may lead to the exclusion of parties that did not register, among others, since the registration process is too cumbersome to be completed in less than six months.[174]

The Court applied several teleological arguments to confirm the validity of the decree, that is, to maintain the necessity to organise elections in time as a constitutional value principle that can only be trumped in instances of *force majeure* and assert that the six-month timeframe was not a *force majeure*.[175] Parties must present the certificate of registration of the Ministry of Interior, a condition not contemplated under the Electoral Law, the Charter of Political Parties, or the Constitution.[176] Challenging this ruling, which endorses a substantial amendment to the law that requires political parties to present the 'certificate of compliance', was central to the application in Decision EL 19-007 of 12 March 2019. Whilst the petitioner called on the Court to reverse its decision to bring it in conformity with the Constitution, the African Charter, and the International Covenant on Civil and Political Rights, among others, the Court ruled that its ruling in Decision EL 19-001 of 1 February 2019 was final.[177]

What can be gathered from these decisions is that the application of teleological-*cum*-systemic arguments in political rights cases leads to negative outcomes that undermine the prospects for advancing such rights. Firstly, to reverse an earlier ruling, the Court resorted to the intent of the drafters of the Constitution and of law-makers to extract the purpose of constitutional provisions,[178] but in the absence of clear indication of the source of such intent and the extent to which it related to the facts of the case, the procedure was subjective, mechanical and arbitrary. As one commentator suggested, an interpreter may depart from the intent of drafters of the Constitution or legislation to ensure

173 Decision EL 19-001 of 1 February 2019.
174 As above.
175 As above.
176 As above.
177 Decision EL 19-007 of 12 March 2019.
178 Judgment DCC 18-125 (n 170).

that interpreted provisions are compatible with human rights,[179] and, in the case of Benin, with human rights ideals including political participation.[180] In either event, sound and motivated reasons should be provided.[181]

Secondly, the Court demonstrates that it has no clear guidelines on when a previous ruling may be reversed or not. The reversal of earlier rulings, although lawful, is subject to specific conditions[182] to ensure the stability and security of constitutional norms and rights, which are necessary elements of the rule of law and prevent arbitrariness.[183] Whilst in Decision EL 19-007 of 12 March 2019 the Court used article 124 of the Constitution to recall that its decisions were final, in the *Adioula* case it reversed a previous ruling. The reversal of the earlier position in *Hermes* was based on the assumption that the Court erred in applying a general principle of law. The outcome of the Court's position in both cases is that the rulings were against greater participation in the political process.

Thirdly, unsubstantiated application of teleological arguments may lead the Court to increase, conditions for the participation of relevant actors, such as political parties and individual candidates, in the absence of an explicit constitutional basis. Such is the case in Decision EL 19-001 of 1 February 2019, which added an additional condition, the certificate of registration by the Ministry of Interior.[184] The Court might have been guided by the assumption that requesting a certificate of compliance could increase the effectiveness of the Political Parties Charter because it enables the electoral commission and other stakeholders to ensure that political parties comply with formal and substantive conditions provided for by the law. However, as this examination is not to be conducted by an independent, impartial or technical body but by the Ministry of Interior, and given that there is no legal requirement in regard to the timeframe

179 A Kavanagh 'The role of parliamentary intention in adjudication under the Human Rights Act 1998' (2006) 26 *Oxford Journal of Legal Studies* 196.
180 See Judgment DCC 34-94 (n 140) in Dako (n 142) 629-630.
181 See Judgment DCC 34-94 (n 140).
182 M Disant 'Justice constitutionnelle et évolution jurisprudentielle' (2019) 1 *Revue constitution et consolidation de l'Etat de droit de la democratie et des libertés fondamentales en Afrique* 35-43; Narey (n 10) 11.
183 Togbé (n 13) 661. See also Disant (n 182) 34.
184 Decision EL 19-001 (n 173).

by which the Ministry of Interior can issue the certificate of compliance, the Court's requirement lacked fairness.[185]

The same can be said of the application of policy arguments as a justification for a ruling, inasmuch as these arguments can lead to arbitrariness: how had respect for the date on which elections are held become a constitutional value principle? To what extent the Court could apply the condition of *force majeure* in Decision EL 19-007 of 12 March 2019?

It is perhaps for all these reasons that the President of the Benin Supreme Court, Ousmane Batoko, and some civil society organisations suggested that some recent decisions of the Benin Constitutional Court sounded the death knell for democracy.[186] This comment arises in the context of the appointment of new judges to the Constitutional Court of Benin in June 2018 who have adopted several positions that reversed previous decisions of the Benin Constitutional Court as discussed earlier. Some activists have seen the move of new judges, for example, the then President of the Constitutional Court being former Minister of Justice under the current President and his personal lawyer, as an attempt to adopt decisions that provide the ruling coalition political advantage and stifle electoral and political competitions altogether.[187] In *XYZ (010)* case, the African Court observed that the Benin legislation did not provide sufficient guarantee for the independence of Constitutional Court judges given that the renewal of their term is under the discretion of the President.[188] Clearly, judges willing to see their term renewed may adopt decisions that advance the interest of the appointing authority. This boils down to the fact that interpretive approaches in the Benin Constitutional Court varied with the composition of the Court and can be influenced by the background of judges.

185 Decision EL 19-001 (n 173).

186 Narey (n 10) 10; 'Bénin: La décision *EL19-001* de la CC est inquiétante et discutable, selon un juriste' *BENIN WEB TV* https://archives.beninwebtv.com/2019/02/benin-la-decision-el19-001-de-la-cc-est-inquietante-et-discutable-selon-un-juriste/ (accessed 21 February 2020); West Africa Early Warning and Early Response Network 'Le Bénin risque gros à perdre son juge constitutionnel' https://www.wanep.org/wanep/files/2018/Oct/BENIN%20POLICY%20BRIEF%202018[1].pdf (accessed 11 February 2020).

187 *XYZ v Republic of Benin*, Application 010/2020, Judgment of 27 November 2020, para 74.

188 As above, para 69-72. See the discussion in TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons' (2021) 21 *African Human Rights Law Journal* 1255-1256.

4.2.3 Implications for political rights

The application of teleological and systemic methods not only neglects the progressive jurisprudence the Court built to ensure greater political participation by all within and outside political institutions, but also gives the impression that the Court tends to select such methods to suit a particular outcome. Giving reasons would have not only spared the Court from criticism but been relevant in ensuring the consistency of its jurisprudence, the security and certainty of rights, and the preservation of constitutional norms.

In its progressive jurisprudence, the Court has embraced the history of Benin's politics, characterised as they have been by the exclusion of several segments of the political sphere from the management of the country, by the dictatorship of the majority, and by the use of positive laws for selfish interests.[189] It applied the purpose of the 1990 Constitution to promote values and norms that seek to prevent a recurrence of pre-1990 wrongs.[190] This was lauded by many, but one can also see that such progress lacks sufficient justification insofar as the application of policy arguments is haphazard and sometimes unsubstantiated.

Notions such as 'political configuration' and 'national consensus' introduced deliberative-democracy practices in Parliament but were not conceptualised within the court's interpretive approach. Such conceptualisation would have explained these notions' meaning, nature and scope and, in particular, elaborated on when they may be applied or not in order to resolve specific cases. The jurisprudence demonstrates that the Court's obscure reasoning plunged the rights of the minority in Parliament into legal insecurity because the absence of a solid legal foundation meant that any other court decision could reverse them – even on frivolous grounds, as Decision 18-126 of 21 June 2018 aptly demonstrates.

However, over the past five years, the Court has not progressively utilised its mandate to enhance the protection of fundamental rights by being too deferential to parliament and the executive and turning a blind eye to constitutional reforms which endager deliberative and participatory democracy. As highlighted previously, the December

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

190 See for example Judgment DCC 06-074 (n 24).

2025 constitutional amendment sparked serious criticism as an attempt by the ruling coalition to maintain its grip in power and control all the institutions. The power of the Constitutional Court has been affected. For example; it no longer has the power to seize cases on its own volition, and its jurisprudentially constructed power to decide over several non-legal acts and judicial decisions was removed. In December 2025, several opposition leaders and citizens approached the Court in respect of the constitutional amendment bill, alleging the violation of several constitutional provisions. Only those related to human rights are however considered as part of this research.

In Judgment DCC 25-293 of 12 December 2025, which concerns the control of the constitutional validity of the December 2025 constitutional amendment, petitioners invoked the violations of several human rights provisions. They argued that the amendment process violated article 2(1) of the ECOWAS Democracy Protocol proscribing the amendment of electoral rules six months before elections without the consensus of the 'large majority of political actors'. They also claimed that articles 4-1 and 5-1 violated the right to freedom of information, of association and assembly under the African Charter while the entire amendment process was in contradiction with the African Democracy Charter and the progressive interpretation of the African Court that no constitutional amendment should be reached without 'national consensus'.[191] The amendment was also seen as a threat to peace and security, economic, social and cultural development provided for under the preamble to the constitution and its articles 9, 15 as well as articles 22(1) and 23 of the African Charter.[192]

The Court determined whether it had jurisdiction to rule over the case and, if so, whether the petitions were admissible. In terms of jurisdiction, the Benin Constitutional Court started by recalling its earlier ruling under *Judgement DCC 19-504* of 6 November 2019, in which it held:[193]

> Considering that constituent power, exercised by the people through referendum and by the National Assembly pursuant to articles 154 and 155 of the Constitution, is sovereign, provided it is exercised under the conditions and in accordance with the procedures laid down by the Constitution; that, in examining the conformity of a constitutional amendment law with the Constitution, the [Constitutional

191 Judgment DCC 25-293 (n 128) 12.
192 As above.
193 Judgment DCC 25-293 (n 128) 18.

> Court] therefore undertakes, on the one hand, a review of whether the National Assembly has complied with the constitutional amendment procedure as prescribed by articles 154 and 155 of the Constitution, and, on the other hand, a review of compliance by the national representation with the provisions set out in article 156 of the Constitution

The Court then went on to indicate:[194]

> It follows that the [Constitutional Court] intervenes in the process of constitutional amendment solely for the purpose of reviewing compliance with the prescribed procedure, and not to assess the substance of the will of either the original or the derived constituent power;
>
> Accordingly, the Court's jurisdiction does not extend to reviewing the choices made by the derived [constituent power, which is the] legislator, in respect of which alleged violations of articles 3, 4, 15, 16, 17, 26, 57, and 125 of the Constitution, as well as articles 10 and 11 of the African Charter on Human and Peoples' Rights, have been invoked.

The Court further rejected applications submitted by individual citizens because they had no *locus standi* to challenge the constitutional validity of the constitutional amendment bill given that the only possibility they have is to wait until the bill is assented to.[195]

In relation to the principle of 'large consensus' provided for under the ECOWAS Protocol, the Court argued the constitutional amendment Act was passed by 4/5 of members of National Assembly from both the ruling party and the opposition. This implies the condition that amendment be obtained through 'large consensus' was but met.

Elsewhere, I have offered an extensive evaluation of the Court's jurisprudential shift through a critique of Judgment DCC 19-504 of 6 November 2019 and assessed how it contradicts both previous rulings and the position of the African Court.[196] It is worth noting that the Court has kept its deferential posture with respect to Benin's ruling coalition at the expense of entrenching a culture of human rights which requires overcoming barriers imposed on judges by a formalistic approach to jurisdiction and admissibility rules and ensuring international norms are read in conjunction with constitutional norms to protect rights.

194 Judgment DCC 25-293 (n 128) 18-19.
195 Judgment DCC 25-293 (n 128) 19.
196 TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in Viljoen and others (n 59) 481-483.

4.3 The right to a fair trial (due process of law)

In the previous section, I provided an analysis of the application of teleological arguments in political rights cases. Although there were instances of the application of such arguments that led to both positive and negative outcomes, one can note that the Court failed to conceptualise most of them. The focus in this section shifts to the way fair trial rights were interpreted. In the next section, I provide an overview of the scope of the right to a fair trial in the Benin Constitution and the African Charter, which is followed by a discussion of the methods of constitutional interpretation and their application to concrete cases. The last part examines the implications thereof for rights to fair trial.

4.3.1 Constitutional protection and scope of the right to a fair trial

The Constitution covers certain aspects of the right to a fair trial such as the legality of prosecutions, non-retroactivity of criminal laws and sentences, and the legality of crimes and sanctions, of arrest, and of detention, as well as the presumption of innocence.[197] It would be unrealistic to expect the Constitution to cover all aspects of fair trial rights. However, their recognition under the Benin Constitution has two shortcomings: generally recognised components of the rights to fair trial, such as the right to be heard or the right to be tried within reasonable time, are not mentioned. Aspects covered lay emphasis on the rights to fair trial during criminal proceedings, while these rights may also be violated in the public administration and state or private enterprises.[198] This lacuna might be attributed to the fact that the Constitution was written in a legal and political tradition that avoids long and detailed constitutional provisions. Drafters of the Benin Constitution sought, however, to minimise their adverse effects by recognising rights contained in the African Charter as part of the Constitution. As such, the African Charter brings into the domestic system rights which were not directly

197 Arts 16, 17 & 18 of the 1990 Benin Constitution.
198 See Judgment DCC 13-139 of 19 September 2013, Judgment DCC 13-091 of 16 August 2016, Judgment DCC 15-248 of 26 November 2015 among others.

recognised under the Constitution, with the effect that petitioners may directly invoke the African Charter to support their claims.[199]

As far as interpretation is concerned, two issues are worth noting. Because fair trial rights are poorly formulated under the Constitution, constitutional judges may be called upon to rely on other sources, such as normative and jurisprudential guidelines the African Commission and the African Court have developed to ensure rights are properly interpreted.[200] The moral substructure of certain guarantees, like the right to be tried within 'reasonable' time, fair treatment, procedural fairness, due process, calls for a substantive analysis rather than merely the black-letter application of constitutional provisions. What time may be considered as being 'reasonable'? What treatment should be fair? To what extent should an individual be heard for the hearing to be fair? Should an individual under prosecution for embezzlement still be allowed to perform public office functions?

In addition, fair trial rights may increase the protection of other rights given that they (fair trial rights) lay down procedures for the adoption of a judicial, administrative, disciplinary or political decision.[201] They thus cannot be interpreted in isolation. Rights such as the right to dignity, the right to liberty and individual security are some of those that may be affected by decisions adopted unfairly.[202] The indivisibility, interdependency and interconnectedness of rights make fair trial a shield against tyrannical decisions that may use the law to curtail fundamental rights. Judges may thus play an important (substantive) role when construing fundamental rights, although they should be cognisant of who the right-holders and duty-bearers are in relation to fair trial rights and the type of obligations imposed on the latter.

Natural and juristic persons, be they nationals or foreign nationals, are constitutionally vested with the rights to have a fair trial; by the same

199 Art 7 of the 1990 Benin Constitution. In a number of cases, petitioners relied on the African Charter.

200 See among others *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (2016) 1 AfCLR 299, para 155; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 197, para 92-97; *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, para 104.

201 NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa focus: Twenty years after the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 301.

202 As above.

token, the Constitution imposes duties on the state, its organs, and public and private enterprises to respect these rights when adopting decisions.[203] Potential violators of this rights may range from public administration,[204] political cabinets (ministerial offices),[205] and, importantly, the judiciary, on which the power to render justice in good time has been vested. The right to a fair trial can reduce the enormous power of the public administration. This is the case when the administrative authority suspends individuals pending the outcome of judicial, administrative or disciplinary proceedings without giving them the right to defend themselves.[206]

One sees at the normative level a progressive framework aimed at ensuring that the rights of individuals are respected when their personal situation may be affected, but how this is translated in the Court's interpretive practices requires thorough analysis of decided cases.

4.3.2 Choice and application of methods of constitutional interpretation

The Court applied the literal as well as teleological and systemic methods to construe the meaning of fair trial rights and constrain powers of state organs and other actors. The discussion in this section focuses on the interpretation of the presumption of innocence and the right to be tried within reasonable time because not only were they the most adjudicated before the Constitutional Court, but they do not explicitly appear in the Constitution. Furthermore, while the Constitution may be said to contain elements of the right to the presumption of innocence – the notion that accused individuals should be proven guilty, by a legally constituted tribunal, as a result of a public trial where necessary guarantees for their defence are ensured[207] – this is not the case for the right to be tried within reasonable time, the normative content of which is unclear. Studying the interpretation of these rights may lead to some insightful lessons.

203 Judgment DCC 13-044 of 11 April 2013.
204 Judgment DCC 15-248 of 26 November 2015.
205 Decision 13-091 of 16 August 2013.
206 J Djogbenou 'Principe du respect du contradictoire préalable. Judgment DCC 98-005 du 8 janvier 1998' (2013) 1 *Annuaire béninois de justice constitutionnelle* 613.
207 Art 18(1) of the 1990 Benin Constitution.

In applying literal interpretation in presumption of innocence related-cases, the Court read formalistically whether conditions laid down under article 17(1) of the Constitution were met, for example whether the accused had been definitively sentenced, while supporting its interpretive inquiry with systemic and teleological arguments. The Court faced a floodgate of cases of individuals who were prevented from returning to their positions because of criminal prosecutions they faced. The Court was used as a mechanism to combat arbitrariness.

In Judgment DCC 15-248 of 26 November 2015, Judgment DCC 13-139 of 19 September 2013, Judgment DCC 13-091 of 16 August 2013, Judgment DCC 13-044 of 11 April 2013 and Judgment DCC 13-033 of 21 March 2003, the Court considered that only a final judicial decision can warrant suspension, removal or refusal to reinstate an accused employee who is found guilty. The first two decisions pertain to the refusal by the employer to reinstate an accused employee who has been released on bail. In Judgment DCC 13-091 of 16 August 2013, the Ministry of Public Administration invoked the Act on the Status of Civil Servant which granted him the power to suspend a prosecuted civil servant even in the absence of a final decision.[208] Not only did these decisions not meet the requirement set forth under article 17(1), but the Court also prioritised the liberty of the individual.[209]

These decisions illustrate that literal interpretation may yield to decisions that are favourable to petitioners when cases are less complex. They also demonstrate that any organ of the state, ministries and public and private enterprises are bound to respect the presumption of innocence and may not rely on any law whatsoever to trump a constitutional guarantee.[210] The question these cases do not answer is whether the seriousness of the crime can have any bearing on the decision to reinstate an individual awaiting final determination of their case. Suppose that the staff member is charged with murder or embezzlement of public funds, would they still be reinstated while awaiting a final decision?

An aspect of this issue was dealt with in Judgment DCC 14-163 of 28 August 2014 (*Chabi Adimi* case). This decision illustrates the clashes that may occur between protecting individual rights and

208 Judgment DCC 13-091 of 16 August 2013.
209 As above.
210 Judgment DCC 13-139 (n 198), Judgment DCC 13-091 (n 198), Judgment DCC 15-248 (n 198).

protecting constitutional values and principles of transparency and good governance. It shows the limitations that the literal interpretation may face when the case involves competing values or rights.[211] The petitioner challenged the appointment of Chabi Adimi to the High Authority of Audio-Visual and Communication (HAAC) because he was being prosecuted for embezzlement of public funds and falsification of official documents.[212] A final determination of the matter had not yet been made, but the petitioner sought to protect the transparency and good governance underpinning Benin constitutionalism by preventing the appointment of an individual lacking probity and morals for misusing public fund.[213] The Court ruled that because he was presumed innocent, his appointment was constitutional, irrespective of charges levelled against him.[214] This is a purely formalistic and legally valid construction of the right to presumption of innocence, the essence of which 'lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings ... and until his guilt is legally established'.[215] In this decision, the Court preferred to uphold individual rights, perhaps because preventing the accused from being appointed to the HAAC could have caused irreparable damages if he were not later found guilty.

However, this approach prevented the Court from enhancing the constitutional values of good governance, transparency in the management of public affairs, and having people of good moral character in public office.[216] The fact that Chibi Adimi was accused of having embezzled public funds and yet was still appointed to the HAAC by the National Assembly, with this confirmed by the Court, undermined the ideals of the 1990 Constitution. Post-1990 Benin constitutionalism sought to combat corruption of any kind[217] and to further a culture of transparency and good governance. Because the right to presumption of innocence does not prevent individuals from being arrested and deprived of their

211 GC Christie 'The adjudication of human rights' (2005) 13 *Journal of Religion in Europe* 417-432.
212 Judgment DCC 14-163 of 28 August 2014.
213 As above.
214 As above.
215 *Ingibire Victoire Umohoza v Rwanda* (merits) (2017) 2 AfCLR 165, para 83.
216 RM Kalubi 'La nouvelle compétence de la Cour constitutionnelle fondée sur la protection des droits humains: Une lecture critique de l'arrêt R.Const. 0038 du 20 août 2015' (2016) 1 *Annuaire congolais de justice constitutionnelle* 212.
217 Preamble to the 1990 Benin Constitution.

liberty temporarily when serious charges are levelled against them, the seriousness of charges could have prompted the National Assembly and the Court to be mindful of values the Constitution promotes and hold back on the appointment of Chabi Adimi until a final judicial decision was made. It would be absurd to believe the drafters of the Constitution expected that people accused of embezzlement could be appointed to higher office.[218]

The obligation to try the accused within reasonable time is imposed on judicial organs. The major problem the Constitutional Court faced when interpreting this right was linked to the absence of an agreed-upon time within which a decision should be rendered, which implies that literal interpretation cannot lead to a satisfactory response if not coupled with other methods.[219] The Court may not eschew a value-based approach to interpret concepts such as 'reasonableness'. There is, on the one hand, an obligation to ensure that justice is not delayed and, on the other, that it is not accelerated to cause irreparable harm to the accused. This led to the development of two tests, namely whether the time has been prolonged, and whether such length of time could be considered reasonable.[220]

In Judgment DCC 03-144 of 16 October 2003, the Court ruled that 24 years of criminal prosecution without a final decision were an 'unduly prolonged' time, while in Judgment DCC 05-125 of 25 October 2005, the seven months taken by the Supreme Court to transmit its decision

218 In Decision EL 07-125 of 14 May 2007, the Constitutional Court approached the matter in a like manner by refraining from inquiring into the conviction of a Member of Parliament (MP) in France who was released on bail; according to the Court, the accused appealed to the French Court of Cassation and thus it was not final. Similar criticisms levelled against the *Chabi Adimi* case may be raised in relation to this case. This case relates to the conviction to three years' jail of Mr Désiré Vodonou for financial fraud, production and utilisation of counterfeit currency. The petitioner urged the Court to nullify his election due to his conviction, but this could not be done by the Court because the case was still pending before French courts. There was not yet a final decision in that matter. The MP's election was later annulled in 2011 when the Court obtained sufficient evidence that a final decision had been reached in his case.

219 See generally EI Salamoura 'The right to be tried within a reasonable time and the restoration of the party's "presumptive" prejudice' (2010) SSRN Scholarly Paper ID 1709473 https://papers.ssrn. com/abstract=1709473 (accessed 1 April 2020).

220 *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (2016) 1 AfCLR 299, para 155; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 197, para 92-97; *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, para 104.

to the Office of the Prosecutor for implementation were deemed long.[221] In Judgment DCC 20-029 of 23 January 2020, the Court ruled that a period of four years of judicial proceedings in criminal matters without final decision was an undue prolongation inasmuch as the accused had been under arrest for almost 10 years. Two other decisions rendered the same day are worth mentioning. In Judgment DCC 19-493 of 31 October 2019, the Court ruled that 20 months of detention without trial were not reasonable, while in Judgment DCC 19-492 of 31 October 2019, the five years taken by the Supreme Court to rule on an appeal were considered reasonable. In Judgment DCC 07-153 of 22 November 2007, the Court ruled that, on the basis of charges levelled against the accused, six years (from 2001, the period of arrest, until it was approached in 2007) without a final decision were reasonable. These examples are important for two reasons: they demonstrate that the length of proceedings or trial is not enough to ascertain the violation of the reasonable-time requirement, and that literal and teleological interpretation was used to arrive at the Court's conclusions in these cases.

However, if the Court ruled, in Judgment DCC 19-496 of 31 October 2019, that when individual liberties are at stake, judges have the duty to ensure that decisions are adopted with due diligence, why did it not prescribe what such due diligence should look like and how it should be exercised to enable future cases to be resolved in similar ways? In cases where literal interpretation was applied, such as Judgment DCC 03-144 of 16 October 2003 or Judgment DCC 05-125 of 25 October 2005, the Court merely looked at the length of time proceedings took; where teleological interpretation was applied, it combined the timeframe criteria with other criteria, such as the complexity of the case and charges. The complexity of cases forms part of the element to ascertain whether the length of proceedings was reasonable, and fosters a substantive approach to the construction of right.[222] The complexity of the case must be assessed on a case-by-case basis. However, the Court did not clarify this notion in Judgment DCC 07-153 of 22 November 2007, where the seriousness of charges was used as an element of complexity

221 Judgment DCC 05-125 of 25 October 2005.

222 *Wilfred Onyango Nganyi and Others v Tanzania* (n 269) 299, para 155; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (n 269) 197, para 92-97; *Alex Thomas v Tanzania* (n 269) 465, para 104.

without the Court's explaining what the charges were they and how serious they were to warrant the deprivation of individual liberties for almost six years without final decision.[223]

The differences in the criteria of interpretation may be attributed to the fact that these cases, although raising issues pertaining to the right to be tried within reasonable time, are not similar in substance, that is, their facts, legal grounds, victims and alleged violators are different. The Court's interpretive approach could provide these guidelines in order to set standards for the interpretation of the right and avoid inconsistent positions.

4.3.3 Implications for the interpretation of the rights to fair trial

The Court's interpretive approaches limit violations of the rights to fair trial in two ways. Due observance of the law must be done, and in instances when those rights may be restricted, a culture of justification should be promoted. Using a teleological approach, it was decided that judges and prosecutors may not justify undue delay of judicial proceedings of a detained person simply by invoking the removal of a former judge and the appointment of a new one.[224] The Court fostered the principle of the unity of the judiciary. Similar approaches demonstrated that the liberty of individual is a value and a constitutional right.

Whether the method is literal or teleological, it can be seen that the Court enhanced dialogue among citizens who were victims of unfair treatment and the state on the relevance of fair trial rights and due process of law. The administration of justice remains a key component of democracy and the rule of law, and its quality and efficiency can be improved when the parties involved are accountable to each other.[225] This is particularly so when the Court deals with cases where individuals have been deprived of their means of survival or liberty. Accountability in fair trial rights, as interpreted by the Court, fosters horizontal equality among parties. Powerful state organs and private institutions may abuse their powers to undermine the powerless, but fair trial ensures that

223 Judgment DCC 07-153 of 22 November 2007.
224 See Judgment DCC 03-144 of 16 October 2003.
225 Working Group on Protecting Human Rights While Countering Terrorism 'Basic Human Rights Reference Guide: Right to a fair trial and due process in the context of countering terrorism' (2014) 6 https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf (accessed 3 April 2020).

powerful and powerless parties are equal in the application of rights:[226] there is no hierarchy.

The dialogue can also be enhanced when the Court justifies its reasoning in its decisions such that parties are made aware of relevant elements to consider in future cases.[227] The Court did not lay down guidelines that may help it prevent future violations. One way of doing this was to resort, as an aid to interpretation, to the vast jurisprudence the African Commission and African Court are developing in matters of presumption of innocence and the right to be tried within reasonable time. This approach would prevent rendering the enjoyment of rights illusory and ensure that limitations and restrictions comply with domestic and international law, as is pledged in the preamble to the Constitution.[228]

5 Limitation of fundamental rights

Generally, states use the argument of protecting a 'governmental legitimate purpose' as a justification for the limitation of constitutional rights.[229] Both the Constitution and the African Charter provide for

226 Professor Makau Mutua, Public Lecture, Centre for Human Rights, Faculty of Law, University of Pretoria, 2017.

227 A Klaasen 'Constitutional interpretation in the so-called "hard cases": Revisiting *S v Makwanyane*' (2017) 50 *De Jure* 1;5.

228 See Preamble to the Benin Constitution. See also D Rousseau 'Le Conseil constitutionnel et le Préambule de 1946' (1997) 50 *La Revue administrative* 160; 161.

229 Youmbi (n 60). Using a literal approach, the Court annulled the election of an MP convicted for financial fraud, production and utilisation of counterfeit currency based on the constitutional and electoral law provision which permits the annulment of such election if it is discovered that the individual has been convicted chiefly for corruption, robbery, fraud, insider trading. In Decision EL 11-005 (n 140), the Court logically inferred that, because to be qualified to vote, one needs to meet requirements laid down under the Constitution and the law, and that Mr Désiré Vodonou, having been sentenced to three months jail loses his status as voter, this also implies the loss of his status as an MP and removal from the voters' roll. This decision is significant for three reasons. First, it confirms that conditions for restriction/suspension of the right should be laid down under the law (electoral laws in this case). Secondly, an accused political right may be suspended only when a final decision has been adopted by a competent tribunal. Thirdly, when the accused is an MP, this entails the loss of their office and removal from the voters' roll. In its approach, however, the Court fails to demonstrate whether the removal of the accused from the voters' roll was a definitive removal or that he could run for office in future elections.

limitation,[230] but the extent to which 'reasons' invoked may be said to fall under the ambit of the law is perpetually contested terrain that, it is submitted, the Court had not sufficiently addressed to generate proper theories. Chapter 2 demonstrated that reasons for limitation include respect for the rights of others, respect for the law, protection of public order, and exceptional circumstances such as states of siege and emergency.[231] However, they have to be balanced with, on the one hand, the gain they seek to achieve and, on the other, the harm they cause to individuals. In other words, the reasons for the limitation of a right must be of greater value in order to warrant limitation, and whenever possible, states should adopt less intrusive means. The proportionality test as the basis for limitation of rights does not exist in the Benin Constitution, but has been steadily constructed by the Court in its interpretive approaches using different standards.

The legitimate governmental purpose may differ from case to case. A poor construction of the relationship between the purpose and the means adopted to reach it may encroach upon rights; likewise, the purpose must be important. In Judgment DCC 10-086 of 15 July 2010, 'regional equilibrium as a mean to ensure social peace' and increasing the participation of less demographically populated regions in public administration stood as a legitimate purpose that warranted the imposition of a recruitment process based on quota by region.[232] The restriction imposed on individual rights is outweighed by national solidarity and allows the government to realise its positive obligation in relation to political participation for all. In Judgment DCC 01-005 of 11 January 2001, *the* restriction of right of persons with disabilities to participate in public administration was justified on the basis of a paternalistic view according to which the state must look after PWDs and can prevent their participation to preserve the continuity of public service.[233]

The petition was lodged by a person with disability challenging an announcement by the ministry of public administration. The latter required individuals who wanted to benefit from government scholarship

230 C Heyns & W Kaguongo 'Constitutional human rights law in Africa: Current developments' (2006) 22 *South African Journal on Human Rights* 680.
231 Youmbi (n 60) 536-537.
232 Judgment DCC 10-086 (n 120).
233 Judgment DCC 01-005 (n 40).

to study abroad to be in good physical health and free from infections such as poliomyelitis and tuberculosis.[234] The petitioner argued that these conditions excluded PWDs, but the Court ruled that the state may discriminate against PWDs in access to public administration provided they are offered other opportunities that accommodate their physical conditions.[235] There are many convincing criticisms that may be levelled against the Court's paternalistic view, one informed by the medical model of disability.[236] However, based on the legal context prevailing at the time of the ruling and the poor development of the rights of PWDs on the continent, its ruling is understandable. Nevertheless, it gave political authorities leeway to violate equality rights and sow the seed of interpretive obscurantism in relation to the limitation of human rights.

6 Conclusion

The interpretation of the three substantive rights covered in this chapter gives some hope that the Constitutional Court has used its power to further a human rights culture, even though recent jurisprudential developments, for example in relation to political rights, suggest that the Court is abandoning its activism. The Court should elucidate its reasoning in its decisions and specify the parameters within which its policy arguments operate so as to ensure that its progressive interpretations rest on a solid argumentative and legal grounds and avoid being easily reversed in the future.

It is clear from the analysis of the Benin Constitutional Court jurisprudence that the Bill of Rights and the Constitution as a whole provide judges with solid textual and contextual foundations enabling them to adopt an interpretive approach that promotes a culture of human rights, increases the range of protection of individuals' rights, and tames executive authoritarianism. The existence of Janus-faced jurisprudence entails that judicial activism and restraint coexist at the Benin Constitutional Court and lead to the divergent outcomes discussed in this chapter.

234 As above.
235 As above.
236 J Swain & S French 'Towards an affirmation model of disability' (2000) 15 *Disability and Society* 579.