6

Promoting a human rights culture through constitutional interpretation

1 Introduction

I have shown, this far, that the constitutional courts of Benin, the DRC and South Africa (referred to as the three constitutional courts or the three courts) contribute, through interpretation, to the promotion of a human rights culture. The petitions brought before constitutional courts provide them with an opportunity to consolidate and enhance democracy and the constitutional order through human rights adjudication. The progress made in the protection of human rights by constitutional jurisdictions in these three countries could not be possible, in part, without the ability of the drafters of their constitutions to confer on the constitutional courts a direct or indirect mandate to protect human rights. In a sense, constitutional courts contribute to upholding the constitutional order that was established post-1990.

In this chapter, I build on the discussions and analysis in the three previous chapters to compare, contrast, and draw lessons from the way the three constitutional courts, across different legal traditions, interpret the rights to equality and non-discrimination, fair trial and due process rights, and political rights. I conclude by arguing that constitutional jurisdictions across legal traditions have used their interpretive powers to infuse a culture for promoting human rights protection in Africa. In theory, constitutions, and bills of rights, equip courts to take up a proactive approach and to stand by the very individuals whose rights are being denied by established political and judicial systems. Legal traditions may have built walls between systems operating on the African continent. These walls are not so impenetrable that they preclude judges from adopting pragmatic stances towards external legal and extra-legal norms that can improve the quality of their interpretation and human rights protection.

2 Convergences and divergences

If we look at how the constitutional courts of Benin, the DRC and South Africa interpret bills of rights, it is fair to posit that legal traditions do, to a certain degree, converge and diverge in constitutional rights interpretation. These convergences and divergences[1] invariably impact on the quality of the interpretation of constitutional rights and the promotion of a human rights culture in the three countries covered in this book.[2] I have identified four main trends and lessons distilled from the comparison of the methods used in interpreting bills of rights.

2.1 The use of similar methods of constitutional interpretation

The constitutional courts of Benin, the DRC and South Africa have both similar and divergent approaches in the choice and application of methods of constitutional interpretation of bills of rights. In this section, I focus on these approaches by looking first at the multiplicity, the diversity and interplay among various methods; and second, the degree to which each method is used and applied.

2.1.1 Multiplicity, diversity, and interplay among methods applied by courts

Interpretation of the words of the constitutional or legislative provision is the point of departure in the practice of the three constitutional courts. It enables the courts to ascertain the legal basis and regime applicable to the matter at hand. By relying on the word of the provisions, courts are guided by certain interpretive assumptions. When the text is clear, the literal approach suffices to construe the meaning of the constitution. Simply put, it is generally argued that when a provision is written in ordinary language, individuals who understand the language in which a provision is written can easily decipher its meaning.[3] Textual

1 On convergence and divergence in comparative law; see U Mattei & L Pes 'Civil law and common law: Toward convergence?' in KE Whittington, DR Kelemen & GA Caldeira (eds) *The Oxford handbook of law and politics* (2008) 268.

2 K Nash 'Human rights culture: Solidarity, diversity and the right to be different' (2005) 9 *Citizenship Studies* 337.

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.

interpretation can, however, be the smokescreen of judicial prudence or conservatism, where judges indirectly avoid becoming entangled in quarrels between policy decision-making and the strict application of legal norms to solve legal problems. In non-complex cases, literalism can lead to an outcome that upholds individual rights. Several decisions by the Benin and DRC Constitutional Courts in equality and fair trial rights litigation were resolved through literalism because they were not complex, and so the violation of the right was 'easy' to determine.

Judging by the outcome of literalism in hard cases that the Benin and DRC Constitutional Courts have decided,[4] for a number of reasons, the textual approach should not be insulated from other methods when courts interpret bills of rights.[5] When the Benin and DRC Constitutional Courts use literalism, the approach does not help much to clarify the reasoning of courts. As some provisions of a bill of rights are formalistic,[6] judges may be invited to combine textual approach with other methods in order for courts to promote a human rights culture. Jayawickrama is of the view that '[a] bold, liberal, generous, and benevolent construction should be given [to rights] not a narrow, pedantic, literal or technical interpretation'.[7] When the constitutional courts of Benin, the DRC and South Africa combine the textual approach with other canons of constitutional interpretation, they engage in a constructive discourse which transcends the strictures of the text of the provision they interpret.[8]

---

4 See for example Judgment R.Const. 624/630/631 of 30 March 2018 and Judgment RCE 001/PRCR of 19 January 2019 before the DRC Constitutional Court; the *Gender Parity* and the *Chabi Adimi* cases by the Benin Constitutional Court.

5 R Uitz *Constitutions, courts, and history: Historical narratives in constitutional adjudication* (2005) 65-78.

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

7 N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2017) 119-120.

8 See generally D Degboe 'Les vicissitudes de la protection des droits et libertés par la Cour constitutionnelle du Bénin' (2016) *Les annales de droit* 119-121; *S v Mhlungu and Others* 1995 (3) SA 867 (CC). For a critic, see Z Motala 'The Constitution is not anything the Court wants it to be: The *Mhlungu* decision and the need for disciplining rules' (1998) 115 *South African Law Journal* 141-142; DM Davis 'The need for disciplining rules: A reply to Ziyad Motala' (1999) 116 *South African Law Journal* 157.

It is important to note that the three constitutional jurisdictions examined in this book also resort to the purposive approach (or purposivism) to extract and uphold the purpose of the constitutional provision. However, the examination of their case law reveals that there exists a diversity of purposes such as the purpose of the right, the purpose of the constitution, the purpose of the bill of rights, of constitutional values, the purpose of the criminalisation of an offence, the purpose of an institution and the purpose of constitutional democracy. A direct consequence of this diversity of purposes across the three constitutional jurisdictions is, first, that not every right reveals overtly its purpose,[9] secondly, purposes do not carry the same weight,[10] and lastly, there is possibility of conflicts between different purposes.[11] The three constitutional courts face many of these puzzling issues which reveal the pivotal role of constitutional interpretation in ensuring that they construe the various purposes in a manner that enables the Bill of Rights to achieve its transformative role.[12]

One other method the three constitutional courts apply is the contextual approach, which can be internal to the constitutional provision or external to it.[13] The internal legal context implies that constitutional provisions do not stand alone as they form part of a system of 'interdependent, indivisible and interconnected' rights.[14]

Cases from the three constitutional courts suggest that there are six levels of internal legal contexts which are instrumental in the application of a systemic approach to constitutional interpretation.[15] First, there is the connection between constitutional values and principles (equality and dignity, or democracy and rule of law); secondly, the interplay between constitutional values or principles with constitutional rights

9 See the discussion and comments on Judgment R.Const. 624/630/631 of 30 March 2018 in ch 4.
10 See the debate in the *New Nation Movement* case in ch 5.
11 See the debate in the *Mhlungu* case and the *New Nation Movement* case in ch 5.
12 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.
13 R Sullivan *Statutory Interpretation* (2007) 128.
14 DJ Whelan *Indivisible human rights: A history* (2011) 3-9; DJ Whelan 'Indivisible human rights and the end(s) of the state' in K Mills & DJ Karp (eds) *Human rights protection in global politics: Responsibilities of states and non-state actors* (2015) 69; JW Nickel 'Rethinking indivisibility: Towards a theory of supporting relations between human rights' (2008) 30 *Human Rights Quarterly* 985.
15 AS Sweet *Governing with judges: Constitutional politics in Europe* (2000) 92-93.

(human dignity with the right to privacy);[16] thirdly, the interplay among constitutional rights (freedom of association and political participation);[17] fourthly, the relationship between constitutional rights and non-rights provisions (political participation and electoral system);[18] fifthly, the relationship between constitutional rights and norms inferior within the normative hierarchy;[19] and lastly, the relationship between constitutional rights and international law norms.[20] At each one of these levels there exists cross-pollination of rights, which enables them to improve the quality of each other's protection.

The resort to the external context in constitutional interpretation is one of the most contested approaches, for obvious reasons. The DRC and Benin constitutions, in the formulation of most constitutional rights provisions, do not sufficiently take account of the context and extra-legal factors.[21] In reaction against the application of the external context by the Benin's Constitutional Court to extend its human rights jurisdiction, some scholars have tended to warn the Court that it should not act *ultra vires*.[22] I have shown in the three previous chapters how courts under study have applied, in some cases, non-formalistic and extra-legal arguments.[23] Some arguments are explicitly provided in the preamble to constitutions,[24] while others are drawn from social, political, historical, economic and

16 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 32.

17 Judgment R.Const. 113/TSR of 26 March 2010 reported in EM Wafwana and others *Jurisprudence. Cour suprême de justice. Contentieux constitutionnel et législatif* (2011) 70.

18 *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC); *August and Another v Electoral Commission and Others* 1999 (4) SA (CC); *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 (3) SA 615 (CC); *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC).

19 *South African Police Service v Solidarity obo Barnard* 2014 (35) SA 2981 (CC) para 40.

20 Decision DCC 02-052 of 31 May 2002; *New Nation Movement* (n 18) para 38.

21 Kanté (n 6) 14. Compare the equality provisions in the constitutions of the three countries covered in this book.

22 J Djogbenou 'Le contrôle de constitutionnalité des décisions de justice: Une fantaisie de plus' (2014) *Afrilex* http://afrilex.u-bordeaux.fr/le-controle-de-constitutionalite-des-decisions-de-justice-une-fantaisie-de-plus/ (accessed 25 June 2021).

23 See generally M Troper *Le droit et la nécessité* (2011) 194-195.

24 On the value of preambles, see B Ba 'Le préambule de la Constitution et le juge constitutionnel en Afrique' (2016) *Afrilex Revue d'étude et de recherche sur le droit et l'administration dans les pays d'Afrique* 1-35.

cultural considerations of respective countries.[25] Taking into account the conditions within which the bill of rights was drafted and operates provides a holistic picture of the right being interpreted, and ensures that the decision the court adopts aligns with the lived realities of people.[26] The constitutional courts of Benin and South Africa, for example, rely on the nature of the right and other elements of context of the ligation, in order to choose which extra-legal factor to apply in a case.[27] When conflicts among extra-legal considerations arise, South Africa's Constitutional Court chooses those that better fit the fact and the purpose of the right.[28]

The last interpretive approach is generous interpretation. In cases where the three constitutional courts use this approach,[29] they prioritise an interpretation which better protects the rights of individuals against the state or its organs, or against a construction which could undermine the ability for the bill of rights to bring about transformation.[30]

It can be seen from the foregoing that there is some degree of convergence between the constitutional courts of Benin, the DRC and South Africa in relation to the nature and type of methods of interpretation they choose and apply in human rights litigation. Methods of interpretation complement each other and aim to extract the meaning of constitutional rights, and resolve the problem at hand. This convergence shows that approaches to constitutional issues, possibly at the technical level, are similar, although the devil may lie in the details; for example, the degree to which each method of constitutional interpretation is used.

2.1.2 Degree of use of each method of constitutional interpretation

The three constitutional courts differ on several elements' worth considering. First, the Benin Constitutional Court in particular, and, at times, the DRC's, seem to have an underlying theory of hierarchy of

25 P de Vos 'A bridge too far – History as context in the interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.

26 N Ndlovu & M Omino 'The functional constitutionalism of Justice Thembile Skweyiya' in N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 186.

27 Decision DCC 34-94 of 23 December 1994 and the Decision DCC 09-016 of 19 February 2009*; Bothma v Els and Others* 2010 (2) SA 622 (CC) paras 38-39.

28 *New Nation Movement* (n 18) para 143.

29 See for example *S v Mhlungu* (n 8) para 45; Decision DCC 19-287 of 22 August 2019 (Benin); Judgment R.Const. 0038 of 28 August 2015 (DRC).

30 Decision DCC 19-287 of 22 August 2019; *S v Mhlungu* (n 8).

methods of constitutional interpretation. Several cases demonstrate that when they perceive that the text of the provision to interpret is clear, they are not inclined to resort to approaches other than literalism when construing the right. By contrast, the South African Constitutional Court generally ensures it uses various approaches simultaneously.[31] Judges seem to take seriously Michelman's warning that methods of constitutional interpretation are not 'alternatives, among which a judge chooses; they are multiple poles in a complex field of forces, among which judges navigate and negotiate'.[32] This rightly reiterates the need for synergy among methods, and the importance of methodological pluralism.[33]

Secondly, although the three constitutional courts apply similar methods of constitutional rights interpretation, the breadth and weight given to each vary across courts and time. The Benin Constitutional Court adopts literalism as the standard method of constitutional interpretation and avoids any proclivity to entertain considerations which are not provided by the positive law (the Constitution and the legislation regulating the Constitutional Court). Before 2017, some decisions made reference to conditions within which the Benin Constitution was adopted,[34] the mode of adoption of decisions (national consensus),[35] and the nature of parties represented in parliaments,[36] to cite just a few, in order to contextualise the interpretation of constitutional rights. Based on decisions I examine, there is little evidence to suggest that the Benin Constitutional Court continues to use these considerations in interpretation.[37]

Unlike its Benin counterpart, the DRC Constitutional Court, in a number of decisions, adopts some liberal form of justification and applies the internal legal context to liberate itself from the shackles of formalism in relation to jurisdiction.[38] The use and application of arguments based

31 See among others *S v Mhlungu* (n 8).
32 FI Michelman 'A constitutional conversation with Professor Frank Michelman cases and comments' (1995) 11 *South African Journal on Human Rights* 483.
33 L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013) 32-191.
34 See for example Decision DCC 09-016 (n 27).
35 Decision DCC 06-074 of 8 July 2006.
36 Decision DCC 09-016 (n 27).
37 See Decision EL 19-001 of 1 February 2019; Decision EL 19-007 of 12 March 2019. See also Decision EP 21-016 of 17 February 2021.
38 See Judgment R.Const. 250/TSR of 11 March 2015; Judgment R.Const. 0038 (n 29); Judgment R.Const. 469 of 26 May 2017; Judgment R.Const. 356 of 10 March 2017.

on democracy and the rule of law empower the Court to extend its material jurisdiction to legal acts and to individuals for whom there were no possible avenues for judicial remedy.[39] However, the Court applies formalism in other types of cases, suggesting that it has developed a Janus-faced approach to the admissibility of human rights petitions.

2.2 Categorising and explaining the meaning, content and relevance of constitutional rights

In this section, I discuss two features related to the interpretation of the content of constitutional rights. I demonstrate how the Benin and DRC Constitutional Courts do not, in many cases, explain the content and scope of constitutional rights. I then highlight the absence of clarifications of the content of policy arguments used in interpretation.

2.2.1 The Benin and DRC Constitutional Courts' reluctance to explain the content and scope of constitutional rights

The interpretation of the right to equality is used as an example to demonstrate how the Benin and DRC Constitutional Courts mainly do not define the normative content of constitutional rights. These observations can be extended, *mutatis mutandis*, to other rights under study. A look at the Benin Constitutional Court's approach to the interpretation of the right to equality does not provide any idea of what the normative content of the right to equality is, what the exact meaning of the right is, to which category it belongs, and what the significance of equality is within the Benin political and constitutional spheres. Can it be considered that 'equality' is simply a 'right', or is, in addition, a 'principle' and a 'value'?[40] What is the foundation of its 'fundamentality'; when can it trump other rights, and what is its relationship with equality under the African Charter, which is an integral part of the 1990 Benin Constitution?[41]

39 See among others, Judgment R.Const. 250/TSR (n 38), Judgment R.Const. 0038 (n 29), Judgment R.Const. 137/TSR of 22 October 2010, Judgment R.Const. 152/TSR of 26 April 2011, the Judgment R.Const. 469 (n 38) and the Judgment R.Const. 356 (n 38).

40 C Albertyn & B Goldblatt 'Equality' in Woolman & Bishop (n 33) 35-5.

41 Art 7 of the 1990 Benin Constitution. See generally 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).

The relevance of some of these questions is due to the fact that the Benin Constitution uses, somehow interchangeably, concepts of 'fundamental rights', 'fundamental human rights' and 'public liberties', which have different meanings and legal status in the French constitutional doctrine where they originate.[42] The preamble to the Constitution mentions the willingness 'to create a state of law and pluralistic democracy in which the fundamental human rights, public liberties, the dignity of the human being' and the cooperation based on 'principles of equality …' shall prevail. This establishes categories of rights that judges have not attempted to clarify as part of their interpretive tasks.[43] It can be posited here that the relevance of equality as a fundamental right and principle in the Benin Constitution must prompt the Court to ensure that the exercise of other rights does not hinder the prospect of achieving equality in Benin, and that public officials abide by it in the exercise of their powers.

Another puzzle not clearly addressed pertains to the content of the right. Although the Court uses the 'treating likes alike'[44] test in various cases – 'individuals in the same category or situation should be subjected to the same treatment without discrimination'[45] – this does not help much to understand the meaning and significance of equality. The Court also does not identify normative benchmarks it can use in similar equality cases. Equality is an important right and value which the Court must robustly clarify to promote a culture of rights. It missed an opportunity that the *Eric Dewedi* and the *Offense against the head of state* cases afforded it to ascertain the normative power of equality as a shield against norms, of whatever origin, that discriminate against individuals.[46]

The DRC Constitutional Court rarely explains the meaning and the legal status of rights it interprets,[47] their minimum content, and whether a certain normative power is attached to these rights in order to assess the

42 M Levinet *Droits et libertés fondamentaux* (2010) 4-8; J Morange *Les libertés publiques* (2007) 7.

43 Preamble to the 1990 Benin Constitution.

44 Examples in Decision DCC 12-092 of 12 April 2012. See generally S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712; S Fredman *Discrimination Law* (2011) 8-9.

45 Decision DCC 06-099 of 11 August 2006.

46 DP Zongwe 'Discrimination: Concept, types, impact, and remedies' in WL Filho and others (eds) *Reduced Inequalities* (2021) 1-18.

47 Exception of right to defence and legal remedy (see Judgment R.Const. 1737/1738/1739/1740/1741 of 3 May 2022, Judgment R.Const. 1954 of 27 April 2023 and Judgment R.Const. 469 (n 38)). However, this was not used in similar other cases or in the interpretation of other constitutional rights.

conformity of behaviour of private and public officials to fundamental rights.[48] The existing internal legal context surrounding equality dictates the need of some elaborations on the right to equality in the Court jurisprudence. The first consideration is the relationship equality has with dignity. It can be suggested that, because article 11 provides that human beings are 'born equal' in dignity and rights, the Court should explain the status of equality, dignity, their fundamentality and type of limitations, if any, that can be brought thereof.[49] Most importantly, the Court must clarify the extent to which equality and dignity are rights, values or principles.[50] Unlike article 12, article 11 evokes natural rights considerations. Article 11 seems to suggest that equality and dignity are not 'conferred on' human beings by the state because they are 'born' 'equal in dignity'. Concretely, equality and dignity have a moral foundation, and they transcend the state and government above which they are placed.

This provision echoes founding French and American human rights declarations and demonstrates the significance of equality in the DRC constitutionalism. Equality and dignity have an 'essential content' that legislation and other measures cannot derogate when regulating the exercise of the right to equality as provided under article 12. It behoves the Constitutional Court to clarify what the essential content is. Whilst Judgment R.Const. 624/630/631 of 30 March 2018[51] illustrates attempts to institute inequality between men and women in relation to political participation, and inequality between political parties as well as inequality between candidates registered with a political party and independent candidates, the Court does not establish what the importance and the value of equality actually is.[52] Like the Benin Constitutional Court, it uses the 'treating likes alike' test and admits possible restrictions to attain 'general interest'.[53] This interpretation deprives equality of its very normative power. Not only does the Court not attempt to examine the

48 However, sec 3.2.4 demonstrates several characteristics of the right to be heard and legal remedy as they emerge from various court cases. Whilst there is clearly an absence of the systematisation of these characteristics, an assemblage of court cases can show the existing pattern. We could only examine two cases on equality. Surely, this may limit any attempt to generalise the findings.

49 See Judgment R.Const. 624/630/631 of 30 March 2018.

50 The use of 'principle' of and 'right' to equality in Judgment R.Const. 624/630/631 (n 49).

51 Judgment R.Const. 624/630/631 (n 49).

52 As above.

53 As above.

relationship between article 11 and article 12, but it also conflates the 'right to equality' and the 'principle of equality' without proper explanations.[54]

In comparison with the Benin and DRC Constitutional Courts, the South African Constitutional Court conceptualises the right to equality and its significance.[55] The Court indicates the fundamental nature of equality, both as a value and a right in South Africa.[56] It refers to the history of the marginalisation of some racial groups, their exclusion from public affairs and the debilitating effects of legal norms informed by patriarchy on equality between men and women.[57] Equality, along with dignity, is a founding value of South Africa (as provided explicitly under the Constitution).[58] The Court utilises them to assess the extent to which other rights in the Bill of Rights achieve equality and dignity.[59] The awareness by the Court of the fact that section 9 on equality is connected to other rights within the bill of rights and other constitutional provisions serves to reiterate the significance of equality.[60] It can be used both as a right and a value.[61] This helps the Constitutional Court transcend formalism in the approach to equality, and embrace its ability to contribute to the transformation of both the law (previous repressive and apartheid-like legislation) and administrative, political and judicial practices.

The connection between equality and the need to attain social justice through constitutional transformative interpretation[62] is reflected in the Court's approach, notwithstanding the fact that judges might have diverging understanding of what should be the applicable test to examine

54 As above.
55 T Ngcukaitobi 'Equality' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2016) 224-226; C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441.
56 Already secs 1 & 7 of the 1996 South African Constitution provide for this status.
57 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) paras 77-78; F Osman 'The ascertainment of living customary law: An analysis of the South African Constitutional Court's jurisprudence' (2019) 51 *Journal of Legal Pluralism and Unofficial Law* 93-113; O Mireku 'Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision' (2010) 10 *African Human Rights Law Journal* 515-516.
58 Sec 1 of the 1996 South African Constitution.
59 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012).
60 Sec 4.1.2 (ch 4).
61 Sec 1 and 9(1) of the 1996 South African Constitution.
62 D Moseneke 'The fourth Bram Fischer memorial lecture – transformative adjudication' (2002) 18 *South African Journal on Human Rights* 315.

the compliance of restrictive measures with equality.[63] This connection is rendered possible because of the obligation to pursue substantive equality under section 9(2) and of judges' willingness to effect the said transformation. The existence of a very detailed equality provision also helps the Court to clarify the meaning of each component, and the relationship among them.[64] Quite a number of affirmative action cases are an opportunity for the Court to clarify the relationship between positive discrimination and the prohibition of unfair discrimination on any grounds whatsoever.[65] The evident discrimination inherent in affirmative action measures prompts the Court to develop three tests for the assessment of their validity and constitutionality,[66] thus enabling those 'positively' discriminated against to understand the meaning and importance of such discrimination, and the obligation to foster social justice post-apartheid.[67] In a nutshell, the equality clause in a constitution serves particular purposes and it behoves constitutional interpreters to give meaning to its abstract content, to align it with the historical, political and social backgrounds of the society they operate in.[68]

These three examples highlight the evident necessity for the conceptualisation of rights by civil law constitutional jurisdictions and the categorisation of fundamental rights, especially when it comes to the use of teleological and policy-related arguments to support their decisions.

2.2.2 Lack of clarity on policy arguments used in the interpretation

The Benin and DRC Constitutional Courts use some policy-related arguments.[69] Some of these arguments are drawn from the preamble

63 *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 67;108;135.

64 The equality test was cemented in *Harksen v Lane NO and Others* 1997 (11) BCLR 1489, para 54.

65 MS Kende *Constitutional rights in two worlds: South Africa and the United States* (2009) 167-168.

66 *Van Heerden* (n 63) para 37. 'The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality'.

67 *South African Police Service* (n 19) para 174.

68 Ngcukaitobi (n 55) 212-213.

69 See generally A Jakab, A Dyevre & G Itzcovich 'Introduction' in A Jakab, A Dyevre & G Itzcovich (eds) *Comparative Constitutional Reasoning* (2017) 15.

of the constitution itself, while others are based on constitutional conventions.[70] These arguments raise two problems. One relates to their precise, or constitutional, content and another to their suitability to be used in cases. The lack of an exact meaning the courts confer on policy arguments lays the foundation for haphazard use of certain arguments. For instance, the Benin Constitutional Court does not explain the difference between and the weight of 'constitutional imperative' and 'political imperative' in constitutional adjudication.[71] Similarly, the use of arguments such as '*force majeure*', 'political configuration', 'constitutional value principle' are not methodologically enhanced by a clarification of their content. In a fair trial case, the Court alludes to judges' obligation to adopt decisions with 'due diligence' but it does not further indicate what due diligence entails in the prevention of unduly prolonged trials. A human rights culture requires that litigants know the content of principles that can be used before and by the Court for purposes of certainty of the law.

A similar trend is found in the practice of the DRC Constitutional Court and, to a certain extent, in that of South Africa. The DRC Constitutional Court case law shows a trend to use arguments such as the consolidation of democracy, the rationalisation of the electoral system, the moralisation of politics, the enhancement of political party disciplines or the conflict of interest. Scholars' criticism of the inappropriate use of the argument of 'conflict of interest'[72] by the DRC Constitutional Court is a sign that the Court must start clarifying its arguments. The Court can explain not only the meaning of the concept but, importantly, whether the facts of the case require the use of such arguments and if so, the circumstances or criteria under which it can resort to them.[73] In South Africa, the use of 'open and democratic society' is not followed by the explanation of its meaning. Cases examined demonstrate how the Court

70 EN Youmbi 'Les normes non écrites dans la jurisprudence de la Cour constitutionnelle du Bénin' (2018) 6 *Revue du droit public* 1706-1725; 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.

71 Decision DCC 18-126 of 21 June 2018.

72 JC Hengelela & JJK Mapela 'Conflit d'intérêt au sein d'un parti politique comme motif d'invalidation d'une candidature à une élection présidentielle: Une étude de l'arrêt *RCE 5/6/PR* de la Cour constitutionnelle du 3 septembre 2018' (2018) 3 *Annuaire congolais de justice constitutionnelle* 480.

73 Hengelela & Mapela (n 72) 511-512.

merely invokes the argument and cites several countries it understands to be 'open and democratic'.[74] The clarification of the content of some of these arguments can lay the foundation for a transparent protection of human rights and increase the quality of their interpretation through litigation.[75]

2.3 Quality of protection of fundamental rights through constitutional interpretation

Judging by the number of its decisions and the outcome it reaches, the Benin Constitutional Court promotes, on many occasions, the right to equality, political rights and fair trial rights. By nullifying certain legislation, the Court elucidates the positive role it can play in nurturing a democratic state where individuals are considered equal.[76] In other cases, however, the Court's formalistic stance does not provide constitutional rights with the opportunity to transform unconstitutional legislation.[77] The Court does not conduct a substantive examination of the conformity of the legislation with human rights principles and the practical consequences of legislation.[78] The absence of consequentialist reasoning considerably hampers the rights of individuals in some cases.[79] The existence of successful adjudication of political rights regarding parliamentary participation, but the inability to prevent the entry into force of legislation whose effects can lead to discouraging the participation of minority political parties, is a cause for concern.[80]

Furthermore, the adjudication of fair trial rights shows some progress and regression; progress where the interpretation of non-complex cases enables public administration to understand their duty not to dismiss employees awaiting trials, but regression due to the fact that in similar

74 See also DW Jordaan 'The open society: What does it really mean?' (2017) 50 *De Jure Law Journal* 396.
75 C Hübner Mendes 'The Supreme Federal Tribunal of Brazil' in A Jakab & A Dyevre (eds) *Comparative constitutional reasoning* (2017) 149.
76 Degboe (n 8)119; A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 282.
77 J-L Atangana-Amougou 'L'élection des membres de l'Assemblée nationale. *Décision DCC 10-117* du 8 septembre 2010: Observations' (2013) 1 *Annuaire béninois de justice constitutionnelle* 454; Decision DCC 10-013 of 4 March 2010; Decision EL 19-001 (n 37); Decision EL 19-007 (n 37). See also Decision EP 21-016 (n 37).
78 Jayawickrama (n 7) 166.
79 Decision EL 19-001(n 37); Decision EL 19-007 (n 37). See also Decision EP 21-016 (n 37).
80 As above. See also Jayawickrama (n 7) 166.

cases, the Court adopts different decisions without setting standards for evaluation.[81] This, notwithstanding, there is much to celebrate in relation to the quality of fair trial rights interpretation. The Court subjects the public administration and the judiciary to the observance of fair trial guarantees.[82] It considers empirical evidence and the plight of litigants to trump positivistic obstacles to access it.

In the DRC Constitutional Court, the quality of human rights protection varies across fundamental rights: some rights are relatively offered better protection and interpretation than others. The equality litigation provides two directions the Court followed. The application of formalism in Judgment R.Const. 624/630/631 of 30 March 2018[83] minimises the prospect of adopting affirmative action to increase the participation of women. There is evidence that women are less represented in the public sphere generally.[84] The fundamentality of equality and dignity under articles 11 and 12 were not considered. This could have enhanced the participation of women, minority political parties and independent candidates in the political process. In Judgment R.Const. 113/TSR of 26 March 2010, the Court read the right to equality together with the right to freedom of association to promote equality among economic operators.[85] Perhaps an area where the Court shines is in the admissibility

81 Decision DCC 15-248 of 26 November 2015, Decision DCC 13-139 of 19 September 2013, Decision DCC 13-091 of 16 August 2013, Decision DCC 13-044 of 11 April 2013 and Decision DCC 13-033 of 21 March 2003.

82 Decision DCC 19-496 of 31 October 2019; Decision DCC 03-144 of 16 October 2003; Decision DCC 05-125 of 25 October 2005; Decision DCC 07-153 of 22 November 2007.

83 Judgment R.Const. 624/630/631 (n 4).

84 TM Makunya 'Beyond legal measures: A review of the DRC's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67 *Journal of African Law* 225-240; V-A Touché 'La situation des femmes en République démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 15-22; CN wa Mbombo 'Le rôle de la femme politique en République démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 67-80; M-JT Lusamba 'Défis de la participation des femmes à la vie politique' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 87-96; DN Kota 'Regard critique sur la participation des femmes à la vie politique en République démocratique du Congo' in Konrad Adenauer Stiftung (ed) *Femmes et engagement politique en République démocratique du Congo* (2014) 97-112.

85 Judgment R.Const. 113/TSR of 26 March 2010 reported in EM Wafwana and others *Jurisprudence. Cour suprême de justice. Contentieux constitutionnel et législatif* (2011) 70.

and substantive decisions related to the right to defence and legal remedy. The Court subdues political organs to bill of rights ideals and enhances the bill of rights ability to regulate the proper functioning of state institutions. By going beyond strict literalism to impose an interpretation of jurisdiction based on the significance of democracy and rule of law and of the role of courts to protect fundamental rights,[86] the Court has offered greater protection to the rights to defence and legal remedy.

The need for transformation through interpretation is echoed in interpretive practices of the South African Constitutional Court. The equality jurisprudence is revolutionary in the protection of rights of women,[87] sexual minorities[88] and racially disadvantaged groups.[89] Affirmative action petitions reiterate the state and obligation of individuals to work towards the attainment of equal and equitable representation of different races.[90] They offer an opportunity to address unequal representation of black South Africans in public services but also to significantly ensure white South Africans are not discriminated against arbitrarily.[91] Acting very much like an agent of redistribution of wealth and resources in an unequal society,[92] the Court transcends the classical understanding of courts as simply the technical expounder of the law.[93] The context of South Africa, and the transformative ideology which underlies post-apartheid institutions, can be seen to guide the adjudication and the interpretation of equality.[94] Fair trial rights litigation attempts to

86 Art 150(1) of the 2006 DRC Constitution.

87 *Bhe* (n 57); *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC).

88 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality* (n 16); *Satchwell v President of Republic of South Africa and Another* 2002 (6) SA 1 (CC).

89 *South African Police Service* (n 19); *Van Heerden* (n 63).

90 TM Makunya 'Le rôle et l'apport des tribunaux dans la réalisation de la justice sociale en Afrique du Sud' in JB Akilimali & TM Makunya (eds) *L'Etat africain et la crise postcoloniale: Repenser 60 ans d'alternance institutionnelle et idéologique sans alternative socioéconomique* (2021) 186-188.

91 *South African Police Service* (n 19) para 174.

92 S Stacey 'Social justice, transitional justice, and political transformation in South Africa' in M Reisch (ed) *Routledge international handbook of social justice* (2014) 95; D Miller *Principles of social justice* (1999) 1.

93 A Dyevre 'The French Constitutional Council' in Jakab, Dyevre & Itzcovich (n 69) 337.

94 See I Shai 'Radical transformation and the limits of law' (2019) 51 *Acta Academica: Critical Views on Society, Culture and Politics* 145; arguing against hopes one can place in the law to bring 'radical transformation'.

foster victim-friendly criminal justice, humanises criminal proceedings, and re-ascertains the normative power of procedural guarantees by aligning criminal laws and procedures to the Bill of Rights philosophy. The prosecution of crimes like rape aims to dignify women[95] and combat the patriarchal nature of laws and institutions.[96] The adjudication of constitutional rights thus contributes to the recognition of the status of the marginalised gender, community or groups of individuals.[97]

Of great significance is the application of outcome-driven consequentialist reasoning[98] to construe harmoniously the meaning and essence of the sunset clause in the (interim) constitution, Criminal Procedure Act and the bill of rights, to assure equal protection among offenders and protect them from state prosecutors' abuses.[99] The interpretation of political rights also offers examples of blatant departure from the ordinary meaning of statutes to a construction that better enables the Bill of Rights to prevent disenfranchisement of individuals and to increase the participation of different political parties.[100] The South African Constitutional Court experience provides numerous illustrations of the use of positive law and its multidimensional context to 'procure private and public well-being' and promote a just society.[101]

Evidently, each of the three constitutional courts endeavours, in accordance with its legal and judicial practices, the nature of cases, the interests to be protected, the peculiarity of the country's history, and the jurisdiction conferred on it, to increase the protection of fundamental rights through interpretation. Some courts' decisions have a greater impact on the working and functioning of state organs, such as the judiciary and public administration. This is the case of the DRC and Benin Constitutional Court about fair trial and due process of law petitions particularly. The practice of the South African Constitutional Court

95 *Bothma v Els and Others* (n 27) para 45.
96 A Catherine '"The stubborn persistence of patriarchy"? Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 165.
97 N Fraser 'Social justice in the age of identity politics: Redistribution, recognition, and participation' in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003).
98 D Kapiszewski, G Silverstein & RA Kagan 'Introduction' in D Kapiszewski, G Silverstein & RA Kagan (eds) *Consequential courts: Judicial roles in global perspective* (2013) 3-4.
99 *S v Mhlungu* (n 12).
100 *African Christian Democratic Party v Electoral Commission and Others (ACDP)* 2006 (3) SA 305 (CC).
101 D Moseneke *All rise: A judicial memoir* (2020) 7.

is more discursive, argumentative and value-laden, both in examining components of fundamental rights and in enhancing the dialogue among state organs on the importance of rights. In comparison with the Benin and DRC Constitutional Courts, the South African Constitutional Court's constant reference to extra-legal factors and outcome-driven attitudes increases the quality of human rights protection. Drawing examples from the history of the country and linking them to lived realities of individuals is crucial to providing a credible system of constitutional justice and making it clear that fundamental rights, whatever their epistemological origin may be, are interpreted in accordance with hopes, aspirations, expectations and, imaginably, fears of a particular nation.

Cases that this book examines clearly indicate the constitutional courts of Benin, the DRC and South Africa have sufficient legal and jurisprudential tools at their disposal to enhance the quality of human rights. But to understand this, it is important to bear in mind that precedents and international law standards are valuable sources for enhancing the quality of human rights protection.

2.4 Aids to interpretation and their impact on enhancing a human rights culture

In this section, I review the place and role of precedents and international law instruments as contextual tools for the interpretation of bills of rights. I argue that where courts use them, these sources enhance the argumentative practices of courts: they enable courts to engage in dialogue with international human rights standards and organs, and they make it possible for courts to bridge the gap between the past and the present through the application and adaptation of precedents.

2.4.1 The power and status of domestic and foreign precedents

The constitutional courts of Benin, the DRC and South Africa rely on their previous decisions as an argumentative strategy; but the methodology and the way they do so significantly differ. In comparative law literature, the principle of precedent is generally invoked as one of the main distinguishing features between the common law and civil law legal

traditions.[102] Whilst civil law courts can use their precedents simply to refer to an established practice and a growing trend in their jurisprudence, common law courts properly articulate the use and significance of precedents as a source of law. The main difference between the three courts lies in the fact that the South African Constitutional Court can decide using rules laid down in previous precedents, legislation and the Constitution.[103] Whilst it frequently relies on foreign precedents, the Court can also reverse its previous decisions in the interest of justice.[104]

The Benin Constitutional Court invokes its previous rulings to reiterate the significance of the principle of 'national consensus' or 'political configuration', among others, as procedural guarantees for the adoption of decisions or constitutional amendment by Parliament. The Court subsequently highlights the centrality of these principles to the furtherance of deliberative and inclusive democracy. It can also invoke a precedent to refrain from examining the merit of a petition which it has dealt with in its previous decisions. This normally follows general principles of law such as the '*non bis in idem*' and the '*res judicata*' which prevent the Court from resolving a matter twice and reversing earlier decisions.[105]

Article 124 of the Benin Constitution underscores the relevance of the final and binding characters of the constitutional court decisions implying that one cannot present a case with similar facts and legal grounds unless this purely aims to correct material errors made in the previous decision. In Decision EL 19-007 of 12 March 2019, the court upholds its previous ruling in Decision EL 19-001 of 1 February 2019 and rejects a claim to re-examine the decision to bring it into conformity with the Constitution, the African Charter and the International Covenant on Civil and Political Rights. Reversals of jurisprudence occurred in 2017. The basis for reversing a decision is when the law is not properly applied by the previous ruling.[106] In sum, precedents have a place in constitutional litigation before the Court, and they can be invoked by litigants and the Court on its own

102 G Mousourakis *Comparative law and legal traditions: Historical and contemporary perspectives* (2019) 170-171; G Mousourakis *Roman law and the origins of the civil law tradition* (2014) 307.

103 D Kleyn and others *Beginner's guide for law students* (2018) 82-84.

104 *Molaudzi v The State* 2015 (2) SACR 341 (CC).

105 A Dube & M Machaya 'The doctrine of *res judicata* revisited: *Molaudzi v The State*' (2017) 39 *Strategic Review for Southern Africa* 78-91.

106 Compare the Court rulings in Decision DCC 15-156 of 16 July 2015 and Decision DCC 18-125 of 21 June 2018.

accord. However, precedents do not serve to lay down rules applicable in a case. Precedents by foreign jurisdictions do not feature in the Court's decisions either.

The DRC Constitutional Court also uses its precedents. The Court regularly invokes its own precedents to ascertain principles underlying the adjudication of certain types of constitutional rights cases.[107] The Court uses its precedents to observe a trend in admitting petitions based on the importance of democracy and the power of a court to protect human rights.[108] The Court can also distinguish two cases to preserve the principles of '*non bis in idem*' and '*res judicata*'.[109] This is what it does in Judgment R.Const. 126 of 21 November 2015 that distinguishes the latter from Judgment R.Const. 189/TSR of 18 November 2013. Foreign precedents are not mentioned in the Court's decisions. A Constitutional Court judge avers that the Court uses and applies principles invoked in foreign decisions, but it does not make that clear in its decisions.[110] Indeed, the equality test applied in Judgment R.Const. 624/630/631 of 30 March 2018 (treating likes alike and limitations to equality)[111] looks similar, sometimes word for word, to early French Constitutional Council or Benin Constitutional Court equality decisions.[112] In non-human rights related cases, there is some evidence of the DRC Constitutional Court's reliance on the Benin Constitutional Court rulings to affirm the Court's powers as the regulator of political life.[113] Although they may simply be characterised as 'soft' use of foreign precedents due to a lesser reliance on

107 Judgment R.Const. 1272 of 4 December 2020 and Judgment R.Const. 1438 of 15 December 2020.

108 Judgment R. Const. 1272 of 4 December 2020.

109 Judgment R.Const. 126 of 21 November 2015.

110 N Kilomba 'Cour constitutionnelle de la République démocratique du Congo' (2019) 13 *Association des cours constitutionnelles francophones (Bulletin 13)* 419-420.

111 Judgment R.Const. 624/630/631 (n 49).

112 Judgment R.Const. 624/630/631 (n 49). See T Debard *Dictionnaire de droit constitutionnel* (2007) 166.

113 M Wetsh'Okonda Koso Senga 'A propos du pouvoir de "régulation de la vie politique" par la Cour constitutionnelle congolaise: Une analyse de l'arrêt R.Const. 0089/2015 du 8 septembre 2015' (2016) 1 *Annuaire congolais de justice constitutionnelle* 225; N Mede 'La fonction de régulation des juridictions constitutionnelles en Afrique francophone' (2008) 23 *Annuaire international de justice constitutionnelle* 45. On the contribution of Benin in the constitution-making process, see J-LE Kangashe *La Constitution congolaise du 18 février 2006 à l'épreuve du constitutionnalisme* (2010) 64-67.

them,[114] they demonstrate the possibility for courts to engage in cross-fertilisation of constitutional ideas among themselves in Africa.

The Constitutional Court of South Africa relies on its previous decisions to lay down rules applicable to cases, to indicate relevant principles, to balance reasons, to distinguish among various court decisions, and to demonstrate the growing trends in the protection by the Court of particular rights.[115] The Court has the ability to apply its own precedents in various ways to enhance a culture of human rights. Its reputation in constitutional rights protection in the world is partly attributable to the body of jurisprudence which upholds various aspects of rights and to which it resorts in future cases. The three tests for the validity of measures of affirmative action developed in the *Van Heerden* case[116] continue to be applied in similar cases on positive discrimination.[117] The Court can also distinguish precedents. In fact, it is an established common law principle that the 'later court is free not to follow the earlier case by pointing to some difference in the facts between the two cases, *even though* those facts do not feature in the *ratio* of the earlier case'.[118] This practice may perhaps attenuate the application of outdated precedents and enable the law and the protection of fundamental rights to evolve with time.

The Court's position in the *Molaudzi* case is suggestive of the fact that the interest of justice can prompt it to depart from its earlier rulings.[119] It argued that 'where significant or manifest injustice would result if a final order stands, the doctrine [of *res judicata* can be] relaxed in a manner which permits this Court to revisit its past decisions in accordance with its inherent powers and constitutional mandate to develop the common

114 T Annus 'Comparative constitutional reasoning: The law and strategy of selecting the right arguments essay' (2004) 14 *Duke Journal of Comparative and International Law* 303.

115 On different ways to apply precedents; M Arshakyan 'The impact of legal systems on constitutional interpretation: A comparative analysis: The US Supreme Court and the German Federal Constitutional Court' (2013) 14 *German Law Journal* 1306-1307.

116 *Van Heerden* (n 63) para 37.

117 See the discussion in S Vice 'Dignity and equality in *Barnard*: Affirmative action' (2015) 7 *Constitutional Court Review* 135.

118 G Lamond 'Precedent and analogy in legal reasoning' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2016). For Nigeria, see A Guobadia 'Constitutional adjudication in Nigeria: Formal structures and substantive impact' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 149.

119 *Molaudzi* (n 104); Dube & Machaya (n 105) 78-91.

law. This requires rare and exceptional circumstances, where there is no alternative effective remedy'. Unlike the Benin and DRC Constitutional Courts, the South African Constitutional Court openly relies on precedents by inferior courts as well as foreign precedents, including those from African jurisdictions but mainly Western jurisdictions (the European Court of Human Rights, United States, Canada, New Zealand, Australia, Germany and the United Kingdom). This internal and external judicial dialogue, or cross-fertilisation of constitutional ideas, enables human rights protection to benefit from views that are varied and enrich the Court's reasoning. These views may also be drawn from international law instruments and standards which the three constitutional courts resort to, but differently.

2.4.2 The use and application of international law instruments and standards

The interpretation of constitutional rights by the three constitutional courts acknowledges the significance of international human rights instruments. The weight given to them, and the type or source of international law – conventional or customary – that can be used, vary across the three jurisdictions. The frequent use of international human rights standards increases the quality of human rights mainly in the definition of the scope of rights and obligations attached thereof.[120] In comparison with the Benin and DRC Constitutional Courts, the South African Constitutional Court relies sufficiently on international law to provide context to rights adjudicated.[121]

Methodologically, the South African Constitutional Court uses international law to, among others, clarify the scope of rights, to emphasise the relevance of a constitutional right, and to establish the existence of a state obligation towards a practice, or to combat an unconstitutional practice. The combination of 'hard' and 'soft' international human rights instruments provides the Court with a wide range of international law

120 See generally M Killander 'How international human rights law influences domestic law in Africa' (2013) 17 *Law, Democracy and Development* 378. Also M Killander 'The role of international law in human rights litigation in Africa' in E Quansah & W Binchy (eds) *The judicial protection of human rights in Botswana* (2009).

121 E de Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2004) 28 *Fordham International Law Journal* 1529.

perspectives on the rights being adjudicated. Even if there is a constitutional obligation imposed on the Court to 'consider' international law when interpreting the bill of rights or to consider an interpretation that aligns with international law,[122] it is fair to posit that the successful application of international law is a matter of judicial courage and awareness of the relevance of international law to further a human rights culture. In fact, the Constitution does not indicate generally when the Court should resort to international law,[123] which international law source the Court should apply, and how it should apply it in litigation. Clearly, there is the possibility for judges to resolve cases without resorting to international law at all.[124] It is necessary for judges to navigate among and weigh the various sources of international law, and consistently apply them in accordance with the Bill of Rights.

International law standards are not frequently used in the practice of the Benin[125] and DRC constitutional courts. Benin in particular can benefit from the flexibility due to the relationship of its Constitution with the African Charter, the invocation of which has been instrumental in the protection of rights, such as the right to be tried within a reasonable time, not provided explicitly in the Constitution.[126] The successful application of customary international law in Benin dates back to a 2002 decision where the Court ascertained the obligation to provide reparation for inhumane and degrading treatments in the absence of a constitutional basis.[127] Putting aside methodological deficiencies in the way the Court discovers the existence of a right to reparation, the decision has significant impact on the existence of a legal obligation to pay monetary compensation.[128]

The DRC Constitutional Court also applies a number of the conventions of the United Nations, the African Union and the Rome Statute on the International Criminal Court, invoked by parties in

122 M Killander 'The effects of international law norms on constitutional adjudication in Africa' in Fombad (n 118) 217. This constitutional provision is said to reflect a common law statutory interpretation presumption.

123 Sec 233 of the 1996 Constitution of South Africa simply alludes to issues of clashes between statutory and international law-based interpretation.

124 Some cases where it did not use international law include *Richter* (n 18).

125 Even when the Benin Constitutional Court invokes the African Charter, it rarely does so from an international law perspective and does not rely on the jurisprudence of organs that have interpreted the African Charter.

126 Decision DCC 03-144 (n 82); Decision DCC 05-125 (n 82); Decision DCC 20-029 of 23 January 2020.

127 Adjolohoun (n 41) 117-118.

128 Adjolohoun (n 41) 117-118.

their memorials.[129] In various respects, the application of international law advances certain human rights and democratic values.[130] However, unlike the Benin and the South African Constitutional Courts, the DRC Constitutional Court approach towards international law is passive; the Court awaits parties to cite international instruments.

2.4.3 African philosophical thoughts as contextual aids to constitutional interpretation

To provide external context to constitutional rights, the South African Constitutional Court invokes (and is well known for such a practice) several indigenous thoughts.[131] Resort to indigenous philosophies and thoughts does not exist in the practice of the DRC and Benin Constitutional Courts. The position of the latter two courts may reflect the general view among certain legal scholars according to which (constitutional) law should be insensitive to theories, philosophies, and values that underpin the normative content of constitutions.[132] They believe that the role of judges and lawyers is to provide a descriptive account of what normally constitutional norms are, in their pure and technical form (*quid juris*) as opposed to some speculative questions relating to the ontology of (constitutional) law (*quid jus*).[133] The separation between law and philosophy on the one hand and between law and theories of justice undermines the possibility for judges to question the moral and philosophical foundations of constitutional norms and their ability to advance or hinder the prospects for establishing a 'just society'.[134] The application of African indigenous thoughts in constitutional litigation thus provides, in addition to a descriptive account of constitutional rights, a normative account of rights. This contributes to making constitutional law 'human',[135] to bridge the gap

129 Judgment RCE 002 of 3 September 2018.
130 As above.
131 C Rautenbach 'Exploring the contribution of Ubuntu in constitutional adjudication: towards the indigenization of constitutionalism in South Africa?' in Fombad (n 118) 295-302.
132 On the rupture between law and philosophy, see L Hennebel & H Tigroudja *Traité de droit international des droits de l'homme* (2016) 22-23.
133 As above.
134 Moseneke (n 101) 6-7.
135 *S v Makwanyane and Another* [1995] (SACC) CCT 3/94, 2 [131]. The Court argues, 'Although [the commitment for understanding *but not for vengeance*, (...) for reparation but *not for retaliation*, (...) for *ubuntu* but *not for victimisation*] has

between abstract constitutional provisions and the reality of the society where they are applied and to reduce the likelihood of applying 'unjust' laws and norms.[136] These thoughts and philosophy of life stem from proverbs, practices and human rights-friendly traditions of Africans and ensure that Courts infuse an 'African voice' in the interpretation of the meaning of rights.[137] They are diverse and serve different functions in interpretation; primarily to place human rights in their African cultural, traditional, and historical context which can subsequently strengthen their cultural legitimacy.[138]

Although human rights are constitutionalised through bills of rights and widely recognised by international human rights instruments (formal sources of the law), they have their 'material' origin in philosophical thought, life experiences as well as culture, economic, social, political phenomenon that occur in societies. They indicate the manner in which a human person and life should be treated, considered, and valued.[139] These considerations thus serve to underscore the importance of looking beyond the four corners of bills of rights to identify the philosophies underlying the respective rights.[140]

The experience of the South African Constitutional Court shows that there are multiple African proverbs and ideas applicable to different rights that offer practical advantages.[141] Judges have the opportunity to apply a philosophy that best suits the fact and nature of the law among the various existing philosophies. The increasing concern about the Western origin

---

its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu* ours should be a society that «wishes to prevent crime ... [not] to kill criminals simply to get even with them.»'

136 On the importance of such philosophy in the furtherance of sexual minorities' rights, see EY Ako 'Domesticating the African Charter on Human and Peoples' Rights in Ghana: Threat or promise to sexual minority rights' (2020) 4 *African Human Rights Yearbook* 99, 99-121.

137 Ndlovu & Omino (n 26) 186.

138 W Twining *Human rights, southern voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (2009) 80-81.

139 K Appiagyei-Atua 'Contribution of Akan philosophy to the conceptualisation of African notion of human rights' (2000) 33(2) *Comparative and International Law Journal of Southern Africa* 174.

140 N Bohler-Muller, M Wentzel & J Viljoen 'Breaking the chains of discrimination and forging new bonds: The extraordinary journey of Justice Yvonne Mokgoro' in Bohler-Muller, Cosser & Pienaar (n 26) 109-110.

141 *Bothma v Els and Others* (n 27) para 77.

of the human rights discourse[142] and their adaptability to the African context or culture can progressively be attenuated when constitutional jurisdictions use local practices in harmony with the language of rights to enhance their protection.

The use and application of indigenous thoughts do not necessarily lead to similar conclusions; different judges can use different or the same philosophy to construct the right in a manner that suits their preferred conclusions.[143] This underlines the importance of constitutional interpretation as a tool to harmoniously construe the meaning of indigenous values in the adjudication of constitutional rights.

Interpretation helps to find normative content that reflects the meaning and significance of indigenous thoughts in the society where they apply. It can serve to persuade ethnic or racial groups to which such thoughts might be culturally illegitimate about the relevance to respect values propelled by indigenous philosophy. One may understand, in this perspective, the invocation of *uBuntu* in a separate decision in the *Barnard* case as a convincing strategy towards white South Africans that they must admit some forms of 'positive' discrimination in order to attain the collective dignity of all South Africans.[144]

The experience of the South African Constitutional Court with indigenous thoughts suggests that constitutional courts have many things to gain than to lose when they apply African philosophies to construe the meaning and scope of fundamental rights. They can draw inspiration from academic writings that provide an account of such philosophies but broadly from the experience of people in the society within which they operate.

142 AMB Mangu 'Africa's long and hard road to constitutionalism and democracy: two decades on' in S Adejumobi (ed) *Democratic renewal in Africa: Trends and discourses* (2015) 108.

143 Compare the conclusion Mokgoro & Sachs reached in *Dikoko v Mokhatla* [2006] (SACC) CCT 62/05, 6. See for discussion Bohler-Muller, Wentzel & Viljoen (n 140) 115.

144 *South African Police Service v Solidarity obo Barnard* [2014] (SACC) CCT 01/14, 35 para 174. See also the use of ubuntu in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] (SACC) CCT 110/19, 8 para 25.

3 Factors influencing methods of constitutional interpretation

In this section, I look at two major sets of factors – factors related to the differences between legal traditions, and those related to the nature and scope of bills of rights. These are distilled primarily from cases decided by courts, constitutional provisions and comparative literature.

3.1 Factors related to differences between legal traditions

In this section, I discuss the influence of three factors on approaches to constitutional interpretation of bills of rights: the role of judges' judicial philosophy and the conception of judicial role in constitutional democracy, the model of constitutional review, and the strength and the weakness of constitutional culture.

3.1.1 The role and impact of judges' judicial philosophy

Judicial philosophy, generally understood as 'the underlying set of ideas and beliefs of a particular judge or justice which shapes his or her rulings on particular cases',[145] can affect the way judges interpret fundamental rights and contribute to the improvement of a culture of human rights.[146] According to Barak, judicial philosophy is 'an organised thought about the way in which a judge is to contend with the problematics of a hard case'.[147] How judges perceive the extent to which they must defer to legislative or executive acts and behaviours, or which method of interpretation they may apply in carrying out their mandate, is guided by their judicial philosophy.

In the American context, Benzoni and Dodrill define judicial philosophy as 'a chosen, articulable, and rationally defensible method of judicial decision-making that generally includes an explicitly articulated view of such things as the role and proper interpretation of the Constitution, the judiciary's place in our constitutional regime, the function of the law, the separation of powers, federalism, and how relevant

145 'Judicial philosophy' https://ballotpedia.org/Judicial_philosophy#:~:text=The%20phrase%20judicial%20philosophy%20refers,terms%20like%20liberal%20and%20conservative (accessed 25 February 2021).
146 A Barak *The judge in a democracy* (2008) 116-117.
147 Barak (n 146) 118.

sources are to be interpreted'.[148] This definition has elements that enable a distinction to be made between judicial philosophy and ideology. Ideology pertains to the 'outcomes and the way one thinks the world – and the law – ought to be'.[149]

It is important to also distinguish the mandate and the vocation of constitutional judges and how these influence interpretations. According to Kanté, while the mission or mandate of judges is to shore up the supremacy of the constitution through constitutional review, their vocation is to pacify political space and promote core values of fundamental rights.[150] The mandate is constitutionally imposed and the vocation is conditioned by the (African) context within which constitutional judges operate.[151] Be that as it may, judges can be activists.[152] They can openly affirm their role in the democratic process and effectively protect human rights against the legislature, the executive and the judiciary; they can apply self-restraint under the assumption that litigants must not use courts as forum to set public policy questions, and defer to other organs of the state.[153]

Despite internal differences among judges, decisions by the South African Constitutional Court offer some manifestations of judges'

148 FJ Benzoni & CS Dodrill 'Does judicial philosophy matter: A case study' (2010) 113 *West Virginia Law Review* 288; L Martineau 'Does judicial courage exist, and if so, is it necessary in a democracy' (2018) 8 *Western Journal of Legal Studies* 12.

149 Benzoni & Dodrill (n 148) 288.

150 B Kanté 'Le juge constitutionnel dans les processus de sortie de crise et de transition en Afrique noire francophone' (2017) 8 (Paper presented at the *Colloque international sur le role des juridictions constitutionnelles dans la consolidation de l'Etat de droit*, Bamako (Mali) 27 April 2017 (on file with the author); JLE Kangashe 'Du réalisme constitutionnel au réalisme en droit constitutionnel: Vers quel modèle de constitutionalisme en République démocratique du Congo' (*La Constitution en Afrique*, 4 December 2010) http://la-constitution-en-afrique.over-blog.com/article-du-realisme-constitutionnel-au-realisme-en-droit-constitutionnel-62347936.html (accessed 26 February 2021).

151 See also S Issacharoff *Fragile democracies: Contested power in the era of constitutional courts* (2015).

152 E Quansah & C Fombad 'Judicial activism in Africa: Possible defence against authoritarian resurgence?' 3-4 https://ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf (accessed 30 June 2021); M La Torre 'Between nightmare and noble dream: Judicial activism and legal theory' in LP Coutinho, M La Torre & SD Smith (eds) *Judicial activism: An interdisciplinary approach to the American and European experiences* (2015) 6-7.

153 J Waltman *Principled judicial restraint: A case against activism* (2015) 58; AS Sweet (n 15). See also M Killander 'Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality' (2019) 35(1) *South African Journal on Human Rights* 91.

underlying judicial philosophy.[154] This is underpinned by the general framework of transformative constitutionalism based on which courts and judges conceive interpretation as an opportunity to further a culture for promoting human rights and their justification in South Africa, in order to protect the minority against majoritarian policies, and to tame executive authoritarianism.[155] Beyond what the Constitution prescribes the Court should do, the context has also imposed on judges their vocation; this vocation runs through their decisions and is the basis for several momentous rulings.[156] Judicial activism and a liberal (value-oriented) approach characterise decisions examined in South Africa.

The Court makes unflinching statements on the way the executive and the legislation ought to fulfil their human rights obligations. Certain decisions are, however, minimalist in their reasoning: they provide reasons derived from the positive law and make little reliance on extra-judicial factors. Others are maximalist, expansive and philosophical.[157] Judges can use different tests in the assessment of the constitutionality of acts, and use different interpretive arguments guided by their individual judicial philosophy, while they remain bound together by the collective judicial philosophy of transformative constitutionalism. Most judges at the South African Constitutional Court agree about the transformative nature of their constitution and their role in advancing the protection of individual human rights, but may differ from time to time on the extent to which the Court can defer to the executive and legislature, the applicable test for evaluation, and the kind of extra-judicial materials they can use to support their claim.

A collective judicial philosophy of substantive constitutionalism at the DRC and Benin constitutional courts level can be traced back to some decisions at some period in the functioning of courts, particularly in

154 See judges' discussions and opinions in *South African Police Service* (n 19); *S v Mhlungu* (n 8).

155 FI Michelman 'Redemptive-transformative: Edwin Cameron and the point of the Bill of Rights (as read through the prisms of subsidiarity and pleading priorities)' in N Ally & L Boonzaier (eds) *Edwin Cameron: Influence and impact* (2025) 521; H Klug 'Transformative constitutions and the role of integrity institutions in tempering power: The case of resistance to state capture in post-apartheid South Africa' (2019) 67 *Buffalo Law Review* 701-742; CM Fombad 'Taming executive authoritarianism in Africa: Some reflections on current trends in horizontal and vertical accountability' (2020) 12 *Hague Journal on the Rule of Law* 63.

156 MS Kende *Constitutional rights in two worlds: South Africa and the United States* (2009) 169.

157 *Fourie* (n 88); *August* (n 18).

Benin. Other decisions show the persistence of a formalistic, procedural, conservative or symbolic constitutionalism that hardly advances constitutional values and human rights. In this latter instance, strict judicial self-restraint is constantly adopted as an interpretive strategy.[158] Empirically, the DRC Constitutional Court's attitude of constitutional avoidance prevented it from deciding over certain fundamental rights cases that could at least ensure that old colonial laws are adjusted to the values of constitutionalism under the 2006 DRC Constitution.[159] Separate opinions that judges write provide few distinguishing features of individual judge's judicial philosophy, since they remain formalistic and do not appropriately discuss questions related to the necessity of respecting fundamental rights.[160] The Benin and DRC Constitutional Courts are minimalist, with a purportedly liberal but mostly 'conservative rule-oriented approach to their role', as opposed to a 'value-oriented' and progressive approach.[161] This constrains the discretion of judges and maintains, in some cases, the *status quo ante* in relation to the quality of interpretation and to human rights protection.

The above examples from the Benin, DRC and South African constitutional courts are suggestive that 'judicial courage' – which Justice Martineau proposes as a middle ground between judicial activism and judicial restraint – and judges' willingness to use constitutional norms as normative standards are legally possible and sound. They can contribute to promoting a human rights culture.[162] One cannot agree more with Justice Martineau when he claims that 'the true essence of justice lies in the judge's capacity to value persons in their humanity while keeping

158 On self-restraint, Waltman (n 153) 61.

159 Judgment R.Const. 0007 of 29 January 2016 and Judgment R.Const. 155 of 29 April 2016.

160 Three separate opinions have been written since 2015. See generally PP Kumakinga 'La promotion de la démocratie dans la fonction juridictionnelle de la Cour constitutionnelle: À propos de la pratique des opinions dissidentes et individuelles par les juges constitutionnels de la République démocratique du Congo' (2018) 3 *Annuaire congolais de justice constitutionnelle* 3; M Kirby 'Judicial dissent – common law and civil law traditions' (2007) *Law Quartely Review* https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_06.pdf (accessed 25 February 2021). On South Africa, see also J Froneman & Helen Taylor 'Judicial dissent and the sceptical scrutiny of power' in Ally & Boonzaier (n 158) 366.

161 Martineau (n 148) 2.

162 Martineau (n 148) 33; (he argues that Justices should not be commanded by formalism, but by the necessities imposed by values that give meaning and life to the law).

the rule of law at the centre of his or her judicial office'.[163] For judges to realise their vocation effectively, they must commit to constitutional values and principles, and have the courage to mould their decisions to reflect these values. Once this judicial courage towards furthering ideals of constitutionalism is established among constitutional courts' judges, the difference between constitutional review models may not prevent them from enhancing human rights on the continent.

3.1.2 The effect of constitutional review models on quality of human rights protection

The constitutional courts of Benin and DRC follow a centralised model of constitutional review and human rights litigation, while the South African Constitutional Court follows a decentralised model. The centralised and decentralised systems of constitutional review are the legacy of colonialism although, today, countries from both traditions have tended to borrow from each other.

There are a number of benefits the decentralised model of human rights adjudication offers to the promotion of a human rights culture and constitutional interpretation. The decentralised system enables the Constitutional Court to benefit from the interpretation, reasoning and factual considerations made by inferior courts, on which it can rely to improve its own interpretation and ability to promote a human rights culture. This can be referred to as the internal dialogical cross-pollination of constitutional rights ideas, from lower courts to the apex court and from the latter to the former.[164] The cross-pollination is dialogical because most cases examined by the Constitutional Court of South Africa reach it on appeal from lower courts or for confirmation of constitutional invalidity, while the Court may also refer to decisions of inferior courts when determining factual issues. The diversity of arguments on one constitutional issue improves the quality of the apex court's reasoning and decisions.[165] This is how one may interpret the South African Constitutional Court inclination to reject direct access petitions as they do not offer it the opportunity to rely on lower courts' pronouncements on

163 Martineau (n 148) 3.
164 See the litigation history of the *South African Police Service* (n 19) paras 18-27.
165 *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) 4 para 8.

matters.[166] As Chaskalson P noted, the correctness of a decision is greater in instances when courts consider cases more than once and the 'losing party' gets the opportunity to challenge the reasoning of the previous court.[167]

The decentralised model that the South African Constitutional Court follows also offers the opportunity to litigants to appeal against constitutional rights decisions.[168] The interpretations by the Benin and DRC Constitutional Courts, as they are first and last instance courts, does not provide litigants with the opportunity to challenge them, or to obtain second views by superior courts or appeal chambers.[169] Even though the centralised review was primarily conceived to ensure the normative supremacy of the constitution through objective litigation, and that this has some advantages,[170] the increasing importance of human rights and their normative positions in post-1990 African constitutions perhaps warrants the consideration of the possibility to appeal against constitutional courts' decisions.[171] Some common law countries that create constitutional courts as specialised jurisdictions to deal with constitutional matters also provide for an appeal procedure against their decisions.[172] The benefits of inferior courts findings, and the possibility of appeal, can explain some differences between the South African Constitutional Court, on the one hand, and the DRC and Benin constitutional courts on the other.

It can be counterargued that these benefits already exist in the Benin and DRC legal systems which apply a centralised system of constitutional

166 As above.
167 As above.
168 See also the Kenyan Constitutional and Human Rights Division at the High Court (sec 165 of the 2010 Kenyan Constitution).
169 See some problems emerging from the lack of appeal in B Kahombo 'La Cour constitutionnelle et la rectification d'erreur matérielle contenue dans ses arrêts relatifs au contentieux des résultats des élections législatives du 30 décembre 2018' (2019) 4 *Annuaire congolais de justice constitutionnelle* 183-206.
170 D Rousseau, P-Y Gahdoun & J Bonnet *Droit du contentieux constitutionnel* (2016) 23; L Favoreu and others *Droit constitutionnel 2019* (2018) 264-265; G Tusseau *Contre les modèles de justice constitutionnelle: Essai de critique méthodologique* (2008) 22-23.
171 B Mahoro & L Matte 'Uganda's Legal System and Legal Sector – GlobaLex' (October 2016) https://www.nyulawglobal.org/globalex/Uganda.html#_The_Judiciary (accessed 22 March 2020); RE Kapindu 'Malawi: Legal System and Research Resources – GlobaLex' (January 2019) https://www.nyulawglobal.org/globalex/Malawi1.html#e (accessed 22 March 2020).
172 Examples of the 1995 Constitution of Uganda, sec 137.

rights adjudication.[173] Civil and administrative courts resolve human rights-related petitions in the exercise of their competence.[174] Applications are filed in inferior courts and appeals can be brought up to the apex Supreme Court (Benin) or Court of Cassation and Council of State (DRC). Individuals whose rights are violated can approach lower courts and end up before apex courts. The latter can rely on findings of inferior courts and better the quality of human rights protection. As in South Africa, they can order lower courts to re-examine the matter and resolve some factual considerations since they do not deal with factual but legal issues.[175] They can also resolve issues of conflict of jurisdiction between inferior courts sitting in different regions. These elements may tend to suggest that the differences in models of constitutional review have less influence on the quality of the protection and interpretation of human rights.[176] Not only can other courts conduct internal dialogue and cross-fertilisation of human rights ideas, but litigants are also offered the opportunity to appeal against their decisions.[177]

However, the main problem with this line of thinking can be that these civil and administrative courts are not authoritative interpreters of the bill of rights,[178] they cannot review the constitutionality of new and older laws and declare them unconstitutional, they cannot decide over certain types

173 For the DRC, see Organic Law 13/011-B of 11 April 2013 Governing the Organisation, Functioning and Competences of Judicial Courts and Tribunals (chapter1, 2 and 3); Organic Law 16/027 of 15 October 2016 Governing the Organisation, Competence and Functioning of Administrative Courts and Tribunals (Title III); For Benin, see Act 2001/37 of 27 August 2002 of the Benin Judiciary; Act 2004/07 of 23 October 2007 on the Composition, Organisation, Functioning and Competence of the Supreme Court. See generally G Aïvo and others 'Introduction au système juridique et judiciaire du Bénin' (*GlobaLex*) https://www.nyulawglobal.org/globalex/Benin1.html#_3._L%E2%80%99organisation_Judiciaire (accessed 26 February 2021); T Kavundja Maneno *Droit judiciaire congolais: Organisation et compétence judiciaires* (2014).

174 As above.

175 For the DRC, see Organic Law 13/011-B of 11 April 2013 Governing the Organisation, Functioning and Competences of Judicial Courts and Tribunals, arts 37, 70, & 72. See generally N Mwene Songa *Interprétation, cassation et annulation en droit congolais* (2013) 31.

176 CM Fombad 'An overview of contemporary models of constitutional review in Africa' in Fombad (n 118) 45. See also Fombad (n 118) 366.

177 On the benefits of the dialogue, see M Simiyu & TM Makunya 'Citizens' collective action, constitutional changes, and constitutionalism: Lessons from the Building Bridges Initiative in Kenya' in CM Fombad & N Steytler (eds) *Constitutional change and constitutionalism in Africa* (2025) 383.

178 Sweet (n 15) 92.

of legal acts, and procedure,[179] and that the higher degree of technicalities they apply may exclude the consideration of a number of human rights petitions.[180] Their jurisdiction *vis-à-vis* matters pertaining to the violation and interpretation of the bill of rights is limited.

3.1.3 A strong versus weak constitutional culture

Historically and from a legal tradition standpoint, common law tradition has been associated with strong constitutional culture in comparison with the civil law legal tradition.[181] The argument is based on the assumption that the rise of the judiciary in the common law tradition aimed to strengthen the powers and the role of judges, while in the continental system, the goal was to limit and constrain powers of the judge.[182] The authoritarian nature of postcolonial African regimes perpetuated a weak constitutional culture particularly in many civil law African countries[183] as individuals could not access constitutional jurisdictions, in contrast to some common law countries.[184] For instance, despite apartheid in South Africa, individuals at least could file petitions against apartheid legislation.[185] Similar possibilities were availed to citizens in Nigeria under military rule.[186]

In the DRC, there is weak constitutional culture, epitomized by the

179 Mainly the so-called political acts including acts of legislative assemblies.
180 Adjolohoun (n 41) 119.
181 C Saunders & T Fleiner 'Constitutions embedded in different legal systems' in M Tushnet, T Fleiner & C Saunders (eds) *Routledge handbook of constitutional law* (2013) 43; Y Hasebe and C Pinelli 'Constitutions' in M Tushnet, T Fleiner & C Saunders (eds) *Routledge handbook of constitutional law* (2013) 33. SM Mitchell and others 'Domestic legal traditions and states' human rights practices' (2013) 50(2) *Journal of Peace Research* 190-192;196, 200.
182 P Legrand 'Adjudication as grammatication: The case of French judicial politics' in Coutinho, La Torre & Smith (n 152) 49; J Merryman *The civil law tradition: An introduction to the legal systems of Western Europe and Latin America* (1984) 27.
183 HM Rafsandjani 'La culture constitutionnelle dans les États d'Afrique francophone: Le paradoxe du peuple constituant' (2020) 123 *Revue francaise de droit constitutionnel* 615. .
184 See *Re Akoto* and *New Patriotic Party v Inspector General of Police* (1993) in Ghana; K Quashigah 'The Supreme Court of Ghana under the 1992 Constitution: Nature of jurisdiction as the apex Court and contribution to the promotion of constitutionalism' in Fombad (n 118) 113 & 124.
185 C Forsyth 'The judiciary under apartheid' in C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 38-49; E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 437; J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181.
186 Guobadia (n 118) 158.

poor quality of engagement between citizens, constitutional jurisdictions and judges.[187] It can be illustrated by judges' weak commitment to constitutionalism and its values, through argumentation and motivation. A constitutional petition challenging the validity of the amendment of the Constitution in 2011 was filed before the then constitutional chamber of the Supreme Court of Justice.[188] However, the Supreme Court of Justice did not table this petition although it was hoped that the petition was an opportunity for the Constitutional Court to protect against 'unconstitutional constitutional amendments', and strengthen constitutionalism in the DRC.[189] Quantitatively, the DRC Constitutional Court received fewer petitions than the constitutional courts of Benin and South Africa.[190] The number of petitions received and decisions delivered does not necessarily translate into the quality of decisions and engagement between the Court and litigants on human rights issues. Both parties must commit to values of constitutionalism.

Furthermore, with reference to the DRC, despite the possibility for judges to dissent or write separate opinions, they have thus far written three separate opinions[191] since the inception of the Court in 2015. These opinions do not properly elaborate on human rights issues raised by cases.[192] Dissenting, concurrent, and separate judgments can positively enhance lateral-internal dialogue within the Court over human rights issues, and provide the public with alternative reasoning on which they

187 TM Makunya & JK Sindani 'Leveraging constitutional review to combat retrogressive communication surveillance laws in Francophone Africa' (2025) 25 *African Human Rights Law Journal* 906-910.

188 'Révision de la constitution: Lisanga Boganga saisit la Cour suprême' 18 March 2011 in *Radio Okapi* https://www.radiookapi.net/emissions-2/linvite-du-jour/2011/03/18/revision-de-la-constitution-lisanga-bonganga-saisit-la-cour-supreme (accessed 24 May 2021).

189 See a different attitude by the High Court of Kenya at Nairobi, Constitutional and Human Rights Division in *David Ndii and Others v Attorney-General and Others* 13 May 2021 which annulled President Uhuru Kenyatta attempts to amend the Constitution and prolong his stay in power.

190 Registry of the Constitutional Court 'Registre des arrêts prononcés par la Cour Constitutionnelle de la République Démocratique du Congo en matière de contrôle de constitutionnalité entre le 29 mai 2015 et 27 août 2019'.

191 Kumakinga (n 160).

192 See generally M Wetsh'Okonda Koso Senga 'Brèves reflexions sur l'opinion dissidente émise en marge de l'arrêt R.Const. 624/630/631 du 30 mars 2018 relative à la constitutionnalité de la loi électorale révisée' (2018) 3 *Annuaire congolais de justice constitutionnelle* 457.

may rely in future litigations.[193] Conceived as pressures from within the Court, minority judgments can progressively enable judges to shift from habits of institutional legitimacy to habits of argumentative legitimacy.[194] The Court is unwilling to make its deliberations transparent by indicating, in the main decision, the voting pattern of judges (unanimous, dissent and separate opinions). Mampuya assumes that article 92(5) of the Court Act, which provides for the possibility of dissenting, attenuates the principle of the secrecy of deliberation and enables citizens to know how judges vote.[195] Additionally, and unlike any other civil law constitutional court in Africa, the existence of the office of the Prosecutor attached to the DRC Constitutional Court, and empowered to approach the court against legislation inconsistent with the Constitution,[196] has not led to a serious human-rights based engagement between the latter and the former.[197] This is an evident contradiction of the very meaning of the prosecutor's role as the protector of the society. The existence of anti-human-rights legislation, which the Prosecutor can start challenging,[198] is an affront to constitutionalism and is inconsistent with article 221 of the 2006 DRC Constitution.[199]

In South Africa, the culture of litigation is very much an integral part of its constitutionalism and courts are expected to resolve contested questions about lands, political powers, multiracialism and multiculturalism, socio-economic inequality, and the protection of minorities as

193 See broadly A Spies 'The importance of minority judgments in judicial decision-making: An analysis of *Minister of Justice and Constitutional Development v Prince*' (2019) 35 *South African Journal on Human Rights* 429-440; E Cameron 'Foreword' in D Moseneke (n 101) ix; D Bilchitz 'Humility, dissent and community: Exploring Chief Justice Langa's political and judicial philosophy' in A Price &M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 92-102.

194 Rousseau, Gahdoun & Bonnet (n 170) 831; M Lasser *Judicial deliberations: A comparative analysis of transparency and legitimacy* (2009) 20;22.

195 A Mampuya 'A propos du projet de loi organique sur la Cour constitutionnelle' (*La Constitution en Afrique*, 9 April 2008) http://la-constitution-en-afrique.over-blog.com/article-18785175.html (accessed 26 February 2021).

196 See art 49 of the 2013 Court Act. See B Kahombo 'Les modalités d'exercice du recours individuel en inconstitutionnalité en droit positif congolais entre ambiguïté et nécessité de réforme juridiques' (2017) 20 *Recht in Africa – Law in Africa – Droit en Afrique* 134.

197 Registry of the Constitutional Court (n 190).

198 See for example the Judgment R.Const. 0007(n 159)and the Judgment R.Const. 155 (n 159).

199 Kahombo (n 196) 143.

counter-majoritarian institutions.[200] There has been an increasing upsurge in public interest organisations which engage in thematic litigation (the protection of women, sexual minorities, rights of refugees), racial-oriented issues (Afrikaner-based organisations) and well equipped state institutions readily available to challenge or be challenged in courts. The dialectic between a robust civil society assisted by well-equipped legal professionals and firms, and an administration that can answer and present its submissions in court, improves the quality of engagement and dialogue around the import and value of rights in a democracy.[201]

The nature of constitutional jurisdictions in common law and civil law legal traditions in Africa can also influence attitudes, perceptions and habits of a society towards constitutional litigation, and affect the quality of human rights-based engagement. Constitutional jurisdictions in the continental legal tradition in Africa as influenced by France primarily have not been conceived as 'courts' to which individuals can resort to protect their subjective fundamental rights. In the very Kelsenian philosophy, these courts are aimed at safeguarding the supremacy of the constitution (objective litigation), while judicial courts engage in subjective civil, administrative and criminal litigations.[202] In some French-speaking African countries, the mandate of constitutional jurisdictions as electoral judges tends to supersede other mandates.[203] Further, as Kanté points out, the mindset of some constitutional judges has not shifted from legislative supremacy to constitutional supremacy. This renders them ill-equipped and not brave enough to formulate 'sound' principles that can consolidate the protection of the constitution.[204] The perception that these courts

200 JL Comaroff & J Comaroff 'Law and disorder in the postcolony: An introduction' in J Comaroff & JL Comaroff (eds) *Law and disorder in the postcolony* (2006) 30; H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 107-111; M le Roux & D Davis *Lawfare: Judging politics in South Africa* (2019) 5-6.

201 J Klaaren, J Dugard & J Handmaker 'Public interest litigation in South Africa: Special issue introduction' (2011) 27 *South African Journal on Human Rights* 1-7.

202 Rousseau, Gahdoun & Bonnet (n 170) 23; Favoreu and others (n 170) 264-265; A Mampuya 'Tribune: Alerte le gouvernement des juges est en route' [2020] *7sur7.cd* https://www.7sur7.cd/2020/06/13/tribune-alerte-le-gouvernement-des-juges-est-en-route-mampuya-pr-ordinaire-emerite (accessed 26 February 2021).

203 CM Fombad 'The Cameroonian Constitutional Council: Faithful servant of an unaccountable system' in Fombad (n 118) 87-88; B Kanté 'Models of constitutional jurisdiction in Francophone West Africa' (2008) 3 *Journal of Comparative Law* 160.

204 B Kanté 'Les droits fondamentaux constituent-ils une nouvelle catégorie juridique en Afrique? ' *L'homme et le droit, en hommage au Professeur Jean-François Flauss*

are quasi-judicial and quasi-political, and their status[205] as courts placed outside the hierarchy of the judiciary, and the presence of non-jurists as judges, are some of the factors which can arguably continue to shape the mind of individuals that these are not 'courts' in the classical sense.

Despite post-1990 'judicial transformations'[206] which progressively rendered them fully-fledged courts,[207] certain civil law scholars still maintain that constitutional courts should be spared from 'subjective' litigation.[208] The argument on the separation of 'subjective' and 'objective' litigations, where human rights adjudication is concerned can be flawed. Like any constitutional norm, by virtue of their constitutional status and position within the normative hierarchy, constitutional rights are also normative standards. They must objectively be protected whether by political organs authorised to approach the Constitutional Court in abstract review procedure, or by individuals.[209] This trajectory of constitutional jurisdictions in the civil law system may negatively affect the constitutional culture in these countries.

3.2 Factors related to the Bill of Rights

While African constitutions may recognise similar rights,[210] human rights provisions do not have the same breadth, meaning and significance in each country; even among countries that share the same legal tradition.[211] It has been demonstrated that the wording of the constitution is the point of departure for every interpretation. The more indeterminate and value-oriented the words are, the more expansive or value-laden will the interpretation likely be. Conversely, the more formalistic the provisions of a constitution are, the more formalistic their interpretation will

(2014) 426.

205 This does not apply to the Democratic Republic of Congo where the Constitutional Court is included in the judiciary.

206 D Sy 'Les fonctions de la justice constitutionnelle en Afrique' in N Oumarou (ed) *La justice constitutionnelle: Actes du colloque international de l'ANDC* (2016) 43. On judicial transformations, see M Lasser *Judicial transformations: The rights revolution in the courts of Europe* (2009) 29-31.

207 FJ Aïvo *Le juge constitutionnel et l'état de droit en Afrique: L'exemple du modèle béninois* (2006) 127-128.

208 Mampuya (n 202).

209 Favoreu and others (n 170) 936-937.

210 The Benin, DRC and South African Constitutions recognise equality and non-discrimination, fair trial and due process of the law and political rights.

211 CM Fombad 'African bills of rights in a comparative perspective' (2011) 17 *Fundamina: A Journal of Legal History* 47.

certainly be. This situation predisposes the approaches of constitutional courts to diverge.

In this section, I demonstrate that the status of bills of rights, the normative content of rights, and the existence of an interpretive clause can influence the interpretation of bills of rights. I further note how the nature, type and historical background of rights being litigated, and the value-laden nature of the limitation clause, influence the choice and the application of interpretive methods. This boils down to the necessity to design the bill of rights to confer on fundamental rights an important status within the hierarchy of constitutional norms, as shown below in relation to the Constitution of South Africa.

3.2.1 The influence of the status of the bill of rights on constitutional interpretation

Unlike the Benin and DRC constitutions, the South African Constitution clarifies the status of the Bill of Rights. This has been relied upon by the Constitutional Court to uphold the fundamental and central nature of rights during interpretation. Section 7 of the South African Constitution[212] does not have its explicit textual, normative or functional equivalent in Benin and DRC. Section 7 is directly linked to the very nature of the South African society.[213] It sets out the status of democratic values and the nature of obligations imposed on the state and its organs.

In a constitutional democracy, this provision serves multiple other purposes. As 'it embodies weighty assertions about the Bill of Rights as a cornerstone of democracy in South Africa … and the manner in which the state is required to make good on the promise of the specific substantive rights found in chapter 2 …' section 7 cannot be overlooked when courts interpret the substance, the application of and limitations of human

212 It provides: '(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in sec 36, or elsewhere in the Bill'.

213 S Terreblanche *A history of inequality in South Africa 1652-2002* (2002); J Laband *The land wars: The dispossession of the Khoisan and AmaXhosa in the Cape Colony* (2020).

rights.[214] The content of section 7 – value statements – exclude some formalistic reasoning when interpreting the meaning of such values as democracy,[215] human dignity, equality and freedom.

Section 7 was a vehicle for enhancing the quality of human rights interpretation and protection in some of the cases decided by the Constitutional Court of South Africa. Based on it, the Court reiterates several obligations contained therein; including the obligation of courts (judiciary) to ensure the protection of rights,[216] or to reaffirm the limitable nature of constitutional rights.[217] In *My Vote Counts,* it is recalled that[218]

> The consequence of all this is that political parties and independent candidates are constitutionally obliged to record, preserve and disclose information on private funding. But, because section 7(2) imposes the obligation on the State to facilitate the enjoyment of rights in the Bill of Rights, and section 32(2) requires the enactment of national legislation to essentially provide for the recordal or 'holding' and disclosure of required or needed information, it thus falls on the shoulders of the State to honour its section 7(2) obligations.

Equally, the progressive interpretation of the right to defence and legal remedy by the DRC Constitutional Court is, in part, due to the fact that the right is made non-derogable, along with other fundamental rights such as the right to life and the prevention of inhumane and degrading treatment.[219]

Based on the cases by the Benin Constitutional Court examined in this book, there is less evidence to suggest that the status of the bill of rights contributed to the progressive interpretation of human rights. Article 7 of the Benin Constitution, which gives constitutional status to the African Charter, improves the quality of protection of several rights not explicitly provided in the Benin Bill of Rights.

It is important to note, however, that the status of the bill of rights is but one factor related to the bill of rights since, within a constitutional tradition, the social, political and historical importance of a right can dictate the approach of constitutional courts to its interpretation. This

214 Du Plessis (n 33) 32-120.
215 T Roux 'Democracy' in Woolman & Bishop (n 33) 10-32/10-33.
216 *Bogaards v S* 2012 (12) BCLR 1261 (CC) para 51; *Van Heerden* (n 64) para 24.
217 *Bogaards* (n 219) para 162; *New Nation Movement* (n 18) para 190.
218 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) para 74.
219 Art 61(5) of the DRC Constitution. See also Judgment R.Const. 469 (n 38) 12 & 13.

issue is examined in the next section.

3.2.2 The nature, type and historical background of constitutional rights

Does the quality of human rights protection and interpretation vary with the nature of the right? Concretely, do the methods that courts use differ when it comes to equality, fair trial and due process of the law, as well as to political rights?

Different constitutional rights are worded differently across constitutions and are informed by different historical backgrounds.[220] The recognition of rights cannot be separated from the country's constitutional identity.[221] As Sajó and Uitz put it '[h]istorical crises not only lead to the formation of a new constitutional order, but also have a formative impact on national consciousness with lasting consequences for constitutional interpretation and constitutional identity'.[222]

The bill of rights responds to hopes, aspirations, desires and fears of the people, and addresses whatever unprecedented misuse of powers or violations of rights that have occurred in the past. In many respects, the choice and application of methods of constitutional interpretation follow this logic. For example, the historical significance of the right to equality and to non-discrimination, the way it is couched in constitutions, and judges' transformative or conservative philosophy,[223] sets its interpretation apart in South Africa as opposed to Benin and the DRC.

The equality clause of the South African Constitution has formal and substantive (justice oriented) characters which are pivotal to its interpretation.[224] The formal nature of equality leads the interpreter to ascertain whether individuals, within a social-political system, can enjoy rights and privileges without discrimination.[225] Individuals and situations that are alike are thus treated the same way. Section 9(1) of the South African Constitution epitomises this formal notion of equality in the same ways the constitutions of Benin (articles 25 and 26) and DRC (articles

220 Fombad (n 214) 36-38.
221 GJ Jacobsohn *Constitutional identity* (2010) 27; CM Fombad & N Steytler (eds) *Constitutional identity and constitutionalism in Africa* (2024).
222 A Sajó & R Uitz *The constitution of freedom: An introduction to legal constitutionalism* (2017) 64.
223 See the discussion in sec 7.3.1.2 below.
224 Ngcukaitobi (n 56) 213-214.
225 Fredman (n 44) 9.

11 and 12) do.

Formal and procedural justice are formalistic in nature and intrinsically linked to a conception of law disconnected from moral or other considerations. An interpreter in this sense is simply required to examine the formal or legal source of law to construe the meaning of the provision. Due to the formalistic nature of equality in their constitutional provisions, the analysis of equality cases before constitutional courts of Benin and DRC reflects such formalism. This provides a mixed result; the application of formal equality enhances the protection of rights in some cases while reducing the possibility for the equality clause to play a substantive role in increasing the protection of other rights. The Benin and DRC Constitutional Courts do not consider the need to address historical marginalisation of women in the political arena.[226]

The substantive (justice oriented) nature of equality, contrary to formal and procedural justice provided under the Benin and DRC constitutions,[227] aims to address inequities, marginalisation and unequal distribution of resources, wealth and powers resulting from historical or political policies of discrimination and exclusion.[228] Different from the judges' analysis in formal and procedural equality, substantive equality prompts interpreters to examine both the constitution, laws and social, political and economic data which can enable them to realise whether 'equality of outcome' and 'equal opportunities' have been realised and historical marginalisation has been addressed.[229]

The South African Constitution has explicit provisions guiding courts to achieve substantive social justice in its triple dimensions – recognition, representation and redistribution.[230] The equality litigation similarly serves as an opportunity for the Constitutional Court to participate in the broader post-apartheid societal mission of redistributing wealth and resources, mainly through upholding the relevance of affirmative action measures and nullifying those that undermine the very purpose of section 9(2) of the Constitution. The Constitutional Court goes the extra mile to

226 See Decision DCC 10-117 of 8 September 2010 (Benin) and Judgment R.Const. 624/630/631 (n 4) (DRC).

227 Art 12 of the 2006 DRC Constitution and arts 25 & 26 of the 1990 Benin Constitution.

228 *Van Heerden* (n 64) para 142.

229 Fredman (n 44) 18. The source and origin of these data or factors can be multiple. Equally, the source of validity for using them can at times be challenging if constitutional provisions do not provide any pointers to that effect.

230 Fraser (n 100)

delineate criteria for the validity of unfair discrimination and affirmative action through interpretive methods which reckon with the history of apartheid and racial segregation and the need for rapid socio-economic transformation in South Africa.[231]

The South African historical and social past clearly has influenced the recognition and the normative status of equality in the Constitution which subsequently affect how courts must interpret the right and the value of equality. As Sachs J notes in the *Van Heerden* case, formal equality, as the way the constitutions of DRC and Benin formulate the right to equality,[232] does not aim to transform societies but to maintain the situation as is.[233] Whilst one can argue that Benin and the DRC went through and continue to witness some forms of inequality between social groups and classes,[234] they differ from South Africa on the nature of such discrimination, its forms, manifestation and broader implications on the society.[235] To take the argument of Sachs J further, it can be suggested that countries that achieved equality, both in substance and in form, tend to adopt formal equality in their constitutional text, while those where groups of individuals still struggle with inequality and expect the state and its institutions to bridge gaps between the haves and the have-nots will surely provide for a substantive equality provision.[236]

Nonetheless, whether discrimination has been historically deep-rooted or not, the mere fact that there exist today inequality of wealth, resource and power to the detriment of women, vulnerable groups (children, persons with disabilities, persons with HIV/AIDS, sexual minorities), and minority political parties[237] in most African countries including Benin and the DRC, reiterates the relevance of striving for the achievement of substantive equality during constitutional interpretation. The question thus becomes one of the degrees to which courts, with due regards to their country's history and context, should go to in enforcing substantive equality, and not simply whether we need substantive equality.

The importance of the foregoing, from a comparative standpoint, is

231 *Van Heerden* (n 64) para 37.
232 *Van Heerden* (n 64) para 142.
233 As above.
234 For women, see M-O Attanasso *Femmes et pouvoirs politiques au Bénin: Des origines dahoméennes à nos jours* (2012) 157-158; Touché (n 86) 19-20.
235 Terreblanche (n 216).
236 *Van Heerden* (n 64) para 142; Fredman (n 44).
237 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (2016) 1 AfCLR 686, para 151.

evident. The fact that the constitutions of Benin and the DRC provide for formal equality, in contrast to a combination of formal and substantive equality, as is the case with section 9 of the Constitution of South Africa, means that the import and essence of equality vary not with legal tradition but with the constitutional system in place, the purpose equality aims to achieve, and the country's historical background. Consequently, the attitude of the interpreter facing a formal equality provision, compared to the one who faces both formal and substantive equality provisions, varies.[238] However, the examination of the internal legal context of the equality clause under the Benin Constitution indicates that there exist waymarks – resort to the African Charter and the jurisprudence of regional bodies interpreting it – that a courageous and herculean Constitutional Court can use to enhance substantive equality in Benin. Similarly, the DRC Constitutional Court can also read substantive equality in article 11, the principle of democracy and rule of law and the importance to protect fundamental rights.

3.2.3 A value-based and formalistic review of limitations of constitutional rights

The interpretation of limitations or restrictions to fundamental rights in Benin and DRC partly reflects the formalistic nature of internal limitation clauses contained in their national constitutions.[239] In South Africa where, an explicit constitutional limitation clause dictates a value-based discursive approach to the interpretation of limitation, the Court uses this occasion to engage in a two-pronged examination.[240] This clause adds a second layer to the interpretation of rights. It provides the South African Constitutional Court with the opportunity to review the lawfulness of limitations whenever there is a violation of a right. This is not the case in Benin and the DRC as emerges from cases this book analyses. The Benin Constitutional Court adopts two attitudes in relation to limitations of rights. It applies the proportionality review in the analysis of the extent to which the violation of equal treatment among candidates in the public administration is encroached upon by the necessity to advance

238 *Van Heerden* (n 64) para 142.
239 On limitations, see generally C Heyns & W Kaguongo 'Constitutional human rights law in Africa: Current developments' (2006) 22 *South African Journal on Human Rights* 681-682.
240 S Woolman & H Botha 'Limitations' in Woolman & Bishop (n 33) 3-18.

'regional equilibrium as a mean to ensure social peace' and increase the participation of regions in the public administration.[241] By invoking a policy argument as the 'legitimate purpose', the Court goes beyond the formalistic wording of the limitation clauses under the Constitution. Balancing competing values, rights and interests is an interpretive exercise which normally requires the Court to synchronise various cannons of interpretation and consider different extra-legal factors.[242] However, the Court does not delve into such a discursive practice on limitations.[243] Besides, the examination of limitations also offers an opportunity to nurture the dignity of marginalised persons who may find themselves excluded from mainstream social advantages because of their status. In one case presented before the Court, where the government justifies the exclusion of persons with disabilities from scholarships to study abroad by the necessity to promote the 'general interest' and the 'continuity of public service', the Court unjustifiably rubber-stamps reasons that the government invokes.[244] The evaluation of the soundness of reasons invoked for the violation of rights can enable individuals and duty-bearers to grasp the nature and scope of their rights and obligations. The two Benin examples clearly indicate that the formalistic ways in which internal limitation clauses are couched does not necessarily deprive the Court of its ability to engage in a more discursive analysis of limitations. The Court must be willing and courageous enough to do so.

The DRC Constitutional Court's approach to limitation clauses lacks substantive analysis of reasons the state generally advances to legitimise measures it adopts. The Court invokes the relevance for restrictive measures to be proportional to the legitimate purpose, particularly in some equality and political rights petitions, but does not consider two issues that are important to the evaluation of lawfulness of limitations. The analysis fails to consider whether the supposed 'legitimate governmental purpose' can be achieved through the adoption and implementation of means that are less intrusive to the rights.[245] Further, because the actual purpose can

241 Decision DCC 10-086 of 15 July 2010.

242 N Petersen *Proportionality and judicial activism* (2017) 38; A Barak *Proportionality: Constitutional rights and their limitations* (2012) 345-346; Woolman & Botha (n 248) 34-95/34-99.

243 Regional human rights bodies prescribe generally this test. See the *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 53, para 107(2).

244 Decision DCC 01-005 of 11 January 2001.

245 Judgment RCE 001/PRCR (n 4).

be legitimate but its consequences far too much infringe on a number of fundamental rights,[246] it is important to assess these consequences in order to prevent the violation of rights. Instead, in Judgment R.Const. 624/630/631 of 30 March 2018, the Court missed the opportunity to do so. The application of the proportionality test is of great relevance to ensure that institutions that violate fundamental rights offer rational and coherent justifications. It is important for the Court to test the soundness of these justifications against their direct and indirect potentials to violate rights. The absence of a value-laden limitation clause is perhaps not an excuse to adopt a more accountability-friendly test for the assessment of limitations.

In comparison to Benin and DRC, the South African Constitutional Court examines in detail reasons put forward to limit constitutional rights. The multiplicity of evaluative criteria – rationality, fairness, proportionality and dignity – within the South African legal system are factors which contribute to diminishing the likelihood of unfair discrimination.[247] They indicate that literalism is not fit for the assessment of limitations and that purposive and generous construction of rights is appropriate. Another apparent difference between the South African Constitutional Court's approach and its counterparts, is the existence of the two-stage construction imposed by the limitation clause and the creative role of the Court. Scholars believe that the first stage might require a generous interpretation based on the assumption that the state will adduce more reasons and evidence to prove the lawfulness of limitations at the second stage.[248] Underlying these two stages is the very quest for enhancing a culture of justification for the exercise of political powers mainly when they are (mis)used to unduly, unreasonably and unjustifiably encroach on rights.

3.2.4 The influence and impact of an interpretative clause

The existence of provisions specifying how to interpret the Bill of Rights and apply international law in the interpretation of legislation create a textual and strategic difference between the South African bill of rights,

246 Jayawickrama (n 7) 166.
247 *South African Police Service* (n 19) paras 95; 98; 100.
248 Currie & De Waal (n 56) 153.

on the one hand, and the Benin and DRC bills of rights, on the other.[249] The weight of this provision reflects in cases that interpret the right to equality, political rights and fair trial rights. The provision influences the attitude of judges towards their interpretive role, and epitomises the shift from a conservative to a transformative attitude towards interpretation, where the Bill of Rights plays an important role in infusing a culture of rights at all the levels of state and non-state actors.[250] Unlike the Benin and the DRC constitutions, the South African Constitutional Court uses the provision to promote 'the values that underlie an open and democratic society' including human dignity, equality and freedom. When interpreting the right to equality, one of the major concerns the Court tries to solve is to ensure that the quest for transformation, for example through affirmative action measures, does not encroach on the dignity of affected (racial) groups.[251] Similarly, the analysis of the extent to which legislation and other measures do not 'unfairly' discriminate against any individuals is properly carried out through the interpretive clause which emphasises the import of dignity as well as the limitation clause and section 9(5) itself.

The interpretation clause enhances the relevance of ensuring citizen's political participation and the need for the standards established by the legislature, the executive and democracy enhancing institutions[252] to be aligned with dignity requirements and practices in an open and democratic society.[253] Democracy[254] and dignity[255] as normative standards are enshrined in other constitutional provisions but their gist under the interpretation clause is that they reiterate the importance of judicial decisions to reflect the ideals of democracy, equality, freedom and dignity, and can be used as benchmarks for the assessment of the valid interpretation of the bill of rights by inferior courts. Unlike the DRC Constitution which does not make such a link or obligation, and where the Constitutional Court purposively used democracy as a normative standard, the South

249 X Philippe 'La démocratie constitutionnelle sud-africaine: Un modèle? ' (2009) 129 *Pouvoirs* 159.
250 Du Plessis (n 33) 32-5.
251 *South African Police Service* (n 19) para 174.
252 See chapter 9 of the 1996 Constitution of South Africa 'State institutions supporting constitutional democracy'.
253 *New Nation Movement* (n 18); *ACDP* (n 103); *Ramakatsa* (n 18); *My Vote Counts* (n 221).
254 Roux (n 218).
255 S Woolman 'Dignity' in Woolman & Bishop (n 33).

African Constitution makes this an explicit constitutional imperative to 'promote' during interpretation.[256] In cases examined, the Court indicated democratic elements one may consider assessing the consistency of acts and behaviours. This makes the interpretive clause an integral transformative tool.[257]

The express indication of an obligation to consider international law makes it possible for judges to obtain a variety of views, and practices from elsewhere and forestalls a conservative approach to international law. Coupled with the indication to use foreign law, the interpretive clause seems to suggest that drafters of the Constitution were aware of the globalised nature of rights. Such a nature requires of judges to situate their understanding of rights in the broader spectrum of the emerging globalisation of constitutional norms.[258] Not only has the drafting of the South African Bill of Rights benefited from the larger participation of constitutional experts from countries with progressive bills of rights, but an immersion in the global rights dialogue provides external context to many rights.[259]

One of the purposes of the interpretive clause is to incrementally transform the legal reasoning, and procedural and substantive laws inherited from apartheid.[260] These laws were racial, discriminatory, authoritarian and anti-democratic and contradicted the very ideals of a democratic state.[261] The process is said to be incremental because it could have been tedious to revise, through parliamentary processes, all the apartheid-era legislation. The judiciary was thus entrusted with an important mission within the legal system, and which goes beyond the classical understanding of the role of the judiciary in many legal traditions, particularly the continental system.[262] This is the background against which section 39(2) of the Bill of Rights, which imposes an obligation, on the one hand to develop the 'common law or customary law', and on the other hand, to 'promote the spirit, purports and objects of the Bill of Rights'

256 Sec 39(1)(a) of the 1996 South African Constitution.
257 Du Plessis (n 33) 32-79.
258 CM Fombad 'Internationalisation of constitutional law and constitutionalism in Africa' (2012) 60 *American Journal of Comparative Law* 440.
259 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35.
260 Du Plessis (n 33) 32-2.
261 TH Madala 'Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary' (2000) 26 *North Carolina Journal of International Law and Commercial Regulation* 743.
262 Roux (n 218) 162.

when doing so, must be understood. In this perspective, greater protection of the right of women, of sexual minorities and criminal offenders was achieved based on section 39(2) and certain legislation was quashed.

If the importance of the interpretation clause derives from the historical background of South Africa and the nature of its pre-apartheid laws, it seems fair to suggest that, in countries where a situation such as apartheid or significant discrimination through laws did not exist, drafters of the Constitution may be likely to avoid having an interpretive clause. However, the advantage of this provision to the promotion of a human rights culture through interpretation makes an interpretation clause germane to many African legal systems,[263] whether their past and laws resemble South Africa's or not. Most African countries have a dark history and past of their own that require an incremental correction through bills of rights.[264]

4 Conclusion

The interpretation of constitutional rights in Africa remains a significant vehicle for enhancing the quality of human rights protection and fostering human rights culture. This is due to the unprecedented powers constitutional jurisdictions increasingly assume, and to judges' ability to abandon the age-old practices of judicial deference in favour of fundamental rights. More than ever before, judges persistently use different interpretive approaches that are required by the nature of post-1990 constitutionalism to side with those whose rights are the most violated. Whilst it is generally suggested by civil law scholars that the subjective nature of constitutional rights litigation potentially threatens the integrity of constitutional jurisdictions, judges do not seem to bow to various calls that they should restrict their involvement to purely normative constitutional questions. Their attitudes are guided by the fact that human rights are not simply some sort of a list which confer subjective rights on individuals; they are, significantly, objective normative standards against which the behaviours of state and non-state organs must be assessed if the ideal of constitutionalism is to be taken seriously. There are increasing signs that judges across legal traditions resort to similar methods of constitutional interpretation to construe the

263 See sec 46 of the 2013 Constitution of Zimbabwe.

264 It is without no doubt why other drafters started to copy this provision; sec 46 of the 2013 Constitution of Zimbabwe.

meaning of the bill of rights, but the difference in the degree to which they use some methods as opposed to others demonstrates that legal traditions still diverge. For example, even though the three constitutional courts can apply a purposive approach to constitutional interpretation, the South African Constitutional Court is sufficiently liberal and unrestrained in the types of materials it can use to buffer its positions.

The limitations to purely positivistic argumentative practices within civilian constitutional jurisdictions seem to generally cause more harm than good to the promotion of constitutional human rights culture. From this perspective, the Benin and DRC Constitutional Courts often miss the opportunity to learn from the complex, multifaceted and enriching history that led their respective countries to recognise and protect human rights and the principles of constitutionalism, and to draw inspiration from indigenous African thoughts. This also seems to contradict the very ideas of human rights culture which seeks to ensure that individual litigants are provided with sufficient justifications in law and in fact that considers their ways of life and the context in which they live so that decisions will be implemented.

Looking at the substantive construction of rights across legal traditions, one cannot help but see glaring divergence between the two civilian jurisdictions and the single common law jurisdiction which affects the quality of human rights protection that they offer. The reluctance by civil law jurisdictions to explain the importance of rights and their fundamental nature not only leaves litigants perplexed about what rights seek to achieve in their respective countries, it also undermines the ability for the bill of rights to effectively tame the undemocratic practices of executive officials. This is in part since obligations of organs are rarely clarified and explained, and the implications of fundamental rights in the polity are not properly elaborated. This subsequently has some debilitating effects on the protection of certain fundamental rights, which are limited anyway. The South African Constitutional Court has thus offered numerous examples from which civilian jurisdictions could learn by drawing their inspiration from the *Mhlungu* case and the *ACDP* case. These are bold departures from strictly positivistic obstructions and broadly construe the content of rights in such a way that they can participate in the global rights dialogue.

Whilst acknowledging the existence of factors related to legal traditions, the Bill of Rights, constitutional courts, and procedures applicable before courts that may distinguish the interpretive practices of the three courts,

the existence of courageous decisions from all the courts shows that judges' agency in effecting change within their courts must not be underestimated. There is more potential in constitutions than there was before, so judges can find ways in which they can circumvent some rigid rules against a broader construction of constitutional rights.