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Conclusion: Enhancing the human rights culture beyond legal traditions in Africa

1 Introduction

In this chapter, I explore possible lessons from the case study that can strengthen the Court's ability to use their powers to boost a progressive human rights culture. Six ways forward are investigated and suggested: namely, strengthening courts' human rights protection mandate; learning from the decentralised and centralised models of human rights protection; fostering value-oriented and context sensitive approaches to the access to constitutional jurisdictions; liberalising approaches to international law; fostering interdisciplinary approaches to the teaching and application of the law; and reconceptualising the role of continental judicial engagements. These are not mutually exclusive. Considering all of them as a package for the enhancement of a human rights culture in Africa is conceivably the best approach one can adopt towards them. Whilst concrete examples from the three courts studied are used, these reforms may variably apply to other African constitutional jurisdictions that face similar problems.

2 Strengthening the courts' human rights protection mandate

An explicit power conferred on the DRC Constitutional Court to adjudicate fundamental rights can progressively unshackle judges' reluctance to apply realist and pragmatic reasoning when confronted with difficult human rights issues.[1] Several civil law constitutional jurisdictions have now been liberated to directly adjudicate matters

1 An explicit power conferred on constitutional jurisdictions on its own cannot prompt them to choose methods of constitutional interpretation that better the protection of fundamental rights and improve the quality of human rights protection. It, however, gives to them an opportunity to adjudicate any acts that may potentially violate human rights as opposed to instances when such abilities are curtailed by the rigidities of jurisdiction and admissibility norms where only a number of acts may be decided upon by the Court.

concerning human rights as a stand-alone competence.[2] This denotes some awareness of the fact that the classical conception of the Kelsenian model of constitutional jurisdiction must undergo reforms to better protect constitutional rights in Africa. Examples from the Benin Constitutional Court suggest how an explicit and robust human rights mandate enables the Court to avoid positivistic barriers, and to use human rights as enablers of political accountability.

There are, particularly, two cumulative mechanisms that can be used to strengthen the protection of human rights by the DRC Constitutional Court. A string of constitutional and legal provisions regulating the power of the Constitutional Court may be amended to reflect a firm commitment to reinforcing the mandate of the Court. Those provisions include article 150(1), 160, 161 and 162 of the DRC Constitution. Whilst article 150 in its amended form should include the explicit power of the Constitutional Court to decide over violations of the Bill of Rights, the same must be made unequivocal under articles 160 and 161. Article 162 must explicitly enable individuals to approach the Court concerning general matters regarding the violation of rights.

Furthermore, the Constitutional Court may be overtly empowered to decide on legislation, new and old, administrative acts, behaviours and acts of any nature that are inconsistent with the Bill of Rights in its own right, whether it is approached by individuals or not. In fact, article 121 of the Benin Constitution already does this. It enables the Constitutional Court to 'give its opinion automatically on the constitutionality of laws and any regulatory text deemed to infringe on the fundamental human rights and on the public liberties'.[3] Such a competence is pivotal for ensuring that legislation which cannot be challenged on temporal jurisdictional grounds is aptly adjudicated by the Court for it to enhance constitutional values. The DRC Constitutional Court's bold attempts to invoke articles 150 and 1 (human rights and democracy) to circumvent

2 Art 199 of the 2024 Gabon Constitution; art 99 of the 2019 Togo Constitution; art 85 of the 1992 Mali Constitution; art 75 of the 1992 Djibouti Constitution. art 121 of the 1990 Constitution of Benin is unequivocal in that regards: '[The Constitutional Court] shall decide more generally on the violations of the rights of the individual and its decision must be reached within a period of eight days'.

3 The December 2025 constitutional amendment in Benin revised this provision to deprive the Constitutional Court from its power to decide on its own volition on human rights violations.

rigid legal obstacles must be enhanced by an explicit ability to adjudicate human rights on its own accord.

The intrinsic relationship between powers of constitutional jurisdictions and constitutional culture – specifically the awareness by litigants that they can approach courts against human rights unfriendly legal acts – warrants that a general human rights competence be conferred on African constitutional jurisdictions. Powers of courts, their attitude towards the exercise of their powers (judicial courage), and whether they provide sufficient remedies, can shape and generate a strong constitutional culture. The filing of several petitions against resolutions of legislative assemblies before the DRC Constitutional Court is in part explained by the Court's earlier decisions to assert its competence over resolutions of legislative assemblies as a means of protecting fundamental rights. Equally, the rising number of petitions before the Benin Constitutional Court since its inception is arguably the result of the Court's power, and its ability to use these powers, to infuse a culture of human rights in Benin.[4]

The post-apartheid culture of constitutional (public interest) litigation, inherited from the strong litigation culture of pre-democratisation, is also influenced by the powers of courts, available constitutional remedies and the seriousness with which constitutional judges take their mandate. Conversely, a court's continuous rejection of human rights petitions based on jurisdiction and grounds of admissibility may send a strong message to average litigants that the Court is unenthusiastic about addressing their day-to-day realities through constitutional rights litigation. The existence of several petitions filed by individuals, educated or not, having a direct interest in the matter or not in Benin and South Africa,[5] contrasts with the DRC, where appearance before the Constitutional Court remains elitist and rare for the average citizen. Not only can such a situation illustrate a weak constitutional culture, but it can also indicate that, where the Court expands its jurisdiction, it is likely

4 'Cour constitutionnelle du Bénin' (2015) *Actes du 6e Congrès, Le citoyen et la justice constitutionnelle* 240 https://accf-francophonie.org/publication/actes-du-6e-congres/ (accessed 27 February 2021).

5 Recently, two citizens with no direct interest in a case approached the Constitutional Court against the government decision to withdraw its Declaration made pursuant to art 34(6) of the Protocol to the African Court on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights that allowed individuals and non-governmental organisations to directly access the African Court. See Decision DCC 21-047 of 21 January 2021.

to mould a strong constitutional culture and create confidence among litigants that their petitions may at least be decided on merits.[6]

Both substantive democracy and the right to an effective remedy can benefit from an explicit power to adjudicate fundamental rights.[7] Besides the settlement of judicial disputes, courts in new democracies are conceived as the supreme protector of the constitution, the rule of law, constitutionalism and democracy, fundamental rights being the glue that holds them together.[8] Rights and principles linked to the democratic process, including participation, transparency, accountability, and free and fair elections, are an integral part of the human rights corpus; and the activism of courts progressively enhances and protects them. The assertiveness of the Benin Court on deliberative democracy and the need to foster national consensus[9] has furthered the protection of fundamental rights in the political sphere.

Additionally, international conventions binding upon the state are eloquently precise on the need to ensure the availability of legal remedies; a process which may be hampered by the impossibility for individuals to challenge the constitutionality of old legislation or that cannot be challenged due to temporal jurisdiction grounds. In fact, under article 7(1)(a) of the African Charter, individuals have the 'right to an appeal to competent national organs against acts violating [their] fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force'.[10] Constitutional jurisdictions being 'competent national organs', the process towards rendering them fully-fledged

6 T Holo 'Handling of petitions by the Constitutional Court of Benin' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 317-318.

7 T Ginsburg *Judicial review in new democracies: Constitutional courts in Asian cases* (2003) 2.

8 H Nyane & T Maqakachane 'Standing to litigate in the public interest in Lesotho: The case for a liberal approach' (2020) 20 *African Human Rights Law Journal* 814.

9 See also art 10 of the African Democracy Charter; African Court on Human and Peoples' Rights *Noudehouenou v Benin* (provisional measures) (2020) 4 AfCLR 726 para 62.

10 African Commission on Human and Peoples' Rights 'Principles and guidelines on the right to a fair trial and legal assistance in Africa' (2003). See also TM Makunya 'Overcoming challenges to the adjudication of election-related disputes at the African Commission on Human and Peoples' Rights: Perspectives from the Ngandu case' (2022) 22 *African Human Rights Law Journal* 394; NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa focus: twenty years after the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 321-322.

judicial organs, as opposed to quasi-judicial and quasi-political, needs to start by strengthening their human rights mandate, based on which they can render decisions that have wide impact on the legal system.[11]

3 Learning from the decentralised and centralised review models

It is contended that the decentralised constitutional review model, as long as the furtherance of a culture for promoting human rights is concerned, offers better prospects for internal judicial dialogue on human rights, accessibility for litigants and possibility to appeal against constitutional jurisdictions' decisions. African civil law constitutional jurisdictions can fittingly learn from the decentralised model if they really intend to provide constitutional rights with the judicial consideration they deserve, and to infuse a culture for human rights litigation and dialogue from the bottom up.[12]

The plurality of constitutional interpreters helps sharpen arguments that courts provide. The lower courts' motivation and reasoning are formally and substantively assessed by the higher (apex) constitutional jurisdiction. The latter gets the opportunity to decide on the constitutional petitions for the second, third and probably last time, drawing some reasoning or fact-finding conclusion from the lower court's decision. The South African experience shows that this can reinforce the quality of the motivation and accountability of courts, since they know from the outset that their decisions can be reviewed. As Chaskalson argued, the correctness of the decision increases with the possibility to decide over constitutional petitions more than once, and the appeal process reassures litigants, including state organs, that they have additional opportunities to toughen or refine their arguments.[13] The involvement of inferior courts may also forestall instances where apex courts find themselves swamped

11 *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 230. See also Nyane and Maqakachane (n 8) 814.

12 See also art 165 of the Kenyan Constitution, the Constitutional and Human Rights Division at the High Court of Kenya.

13 *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) para 8; IM Rautenbach 'Constitutional Court 1995-2012: How did the cases reach the Court, why did the Court refuse to consider some of them, and how often did the Court invalidate laws and actions?' (2013) 16 *PER: Potchefstroomse Elektroniese Regsblad* 78; I Currie & J de Waal *The Bill of Rights handbook* (2016) 128.

with meritless cases,[14] and importantly, the existence of the second layer of judicial review may put pressure on lower judges to reason as accurately as possible to avoid their decisions being overturned.[15]

Practical advantages the decentralised adjudication of human rights carries include bringing constitutional justice closer to those who need it. In a centralised constitutional human rights adjudication, there is possibility that litigants geographically closer to the court find it practically easier to approach the Court than those situated far away. As stated previously, the decentralised model can also increase internal cooperation and collaboration within the judiciary.[16] The constitutional court, tribunal or council may cease to be regarded as an isolated jurisdiction placed outside the judiciary and 'imposing' its rulings on 'career judges', without the latter being offered an opportunity to interpret the bill of rights. Enabling the latter to adjudicate on first instance constitutional matters can create dialogues between the two types of jurisdictions and can reduce the possibility that they might view constitutional court decisions as not being binding on them.[17] Constitutional chambers within Court of Appeals can be created in the DRC and Benin with judges properly and appropriately trained in constitutional (human rights) questions.

There are evidently strong and valid arguments against the adoption of this model by civil law courts. For example, firstly, there already exist administrative courts that may protect human rights effectively and secondly, there is the need to avoid inflation of judicial institutions and the increase of 'unnecessary' chambers. Thirdly, there is the possibility of rather establishing an appeal chamber within constitutional jurisdictions, or, in the case of the DRC, re-establish the Supreme Court of Justice

14 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 6) 119.

15 M Troper 'A causal view of judicial interpretation' in P Chiassoni & B Spaić (eds) *Judges and adjudication in constitutional democracies: A view from legal realism* (2021) 116; G Christie *Philosopher Kings? The Adjudication of conflicting human rights and social values* (2011) 82.

16 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.

17 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* 124.

to serve as appellate jurisdiction against judgements delivered by the Constitutional Court.[18] Fourthly, there is the risk of contradictory decisions across courts of appeal. However, the benefits decentralised constitutional rights litigation accord in improving constitutional interpretation and furthering a culture of human rights (as the experience of the South African Constitutional Court together with high courts and the Supreme Court of Appeal suggests) outweigh arguments against the establishment of lower constitutional chambers.

The existence of the certified question of unconstitutionality procedure,[19] and the difficulties inferior courts encounter when litigants raise such exceptions, can warrant some forms of constitutional rights litigation at the Court of Appeal level to adjudicate, at first instance, constitutional petitions and decide over certified questions of unconstitutionality raised before them or inferior courts.[20] Constitutions do not confer any powers to inferior courts in matters of such exceptions.[21] This has created a number of issues. In accordance with constitutions, when a constitutionality exception is raised before inferior courts, they must stay the proceedings and approach the constitutional jurisdiction for determination.[22]

However, some inferior courts fail to do so for different reasons. First, litigants, knowing that the constitutional court can take so long to resolve the question, tend to abuse the procedure in order to unduly prolong judicial proceeding. Gbeha-afouda, in the context of Benin, laments how, although ordinarily conceived to ensure the protection of fundamental rights by preventing the application of unconstitutional or human rights unfriendly legislation, the exception of unconstitutionality has become 'a privileged instrument for slowing down procedures, dilatory measures and consequently failure to respect reasonable deadlines'.[23] Secondly,

18 B Kahombo 'Réformes des procédures applicables devant la Cour constitutionnelle', Paper presentation, Webinar on Nine Years of the DRC Constitutional Court organised on 24 April 2021 by the *Centre de Recherches et d'Etudes sur l'Etat de Droit en Afrique*.

19 P Avril & J Gicquel *Lexique de droit constitutionnel: «Que sais-je?»* (2020) 62; F Hamon & M Troper *Droit constitutionnel* (2015) 735; D Rousseau, P-Y Gahdoun & J Bonnet *Droit du contentieux constitutionnel* (2016) 5-96.

20 See examples in Art 177 of the 2010 Constitution of Angola.

21 See Decision DCC 96-009 of 23 January 1996.

22 1990 Benin Constitution, art 122; 2006 DRC Constitution, 162(4).

23 MC Gbeha-Afouda 'Exception d'inconstitutionnalité au Bénin: Organisation et procédures internes' 5 (on file with the author). In the context of Ghana, Bannerman CJ, arguing that lower courts do not always need to refer constitutional question

inferior courts wrongly argue that the question of unconstitutionality can only be raised at the beginning of the judicial process, not at the end or in the middle. In response to these two problems, certain inferior courts do the joinder of the procedural question of constitutionality with substantive issues that the case raises and address them together in the final decision. This is not envisaged by constitutions.[24] A constitutional review procedure at the Court of Appeal level may thus prevent these abuses of powers by inferior courts and of procedures by litigants, and permit a swift settlement of exceptions of unconstitutionality.

The Angolan legal system, a civil law system, empowers inferior courts to decide on the constitutionality of legislation.[25] This can prevent the debilitating effects of the exception of unconstitutionality procedure. It is a hybrid model from which other systems can learn.[26] The hybrid nature of its review stems first from the fact that ordinary Angolan courts review the conformity to the constitution of legislation, and are not 'directed to refer any issues of unconstitutionality to the Constitutional Court'.[27] Secondly, 'a special court is entrusted with the last instance jurisdiction over all issues of unconstitutionality', including to 'hear an "extraordinary" constitutionality appeal whenever the ordinary courts have refused to entertain an unconstitutionality appeal'.[28] The model thus offers, in theory, some benefits in the promotion of fundamental rights.

It is important to note that the centralised model of constitutional review likewise offers some benefits for the protection of human rights, primarily through the abstract pre-promulgation and pre-implementation review of legislation.[29] Many African common law countries can learn

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to the Supreme Court suggested that: 'To interpret the provisions [on reference] in any other way may entail and encourage references to the Supreme Court of frivolous submissions, some of which may be intended to stultify proceedings or the due process of law and may lead to delays such as may in fact amount to denial of justice'. See also Quashigah (n 14) 121.

24 1990 Benin Constitution, art 122; 2006 DRC Constitution, 162(4).

25 A Thomashausen 'The Constitutional Court of Angola: Judicial restraint in a dominant party state' in Fombad (n 6) 102.

26 Art 130(2) of the Constitution of Ghana also confers original jurisdiction on constitutional matters other than 'the enforcement of the fundamental human rights and freedoms' in the Supreme Court and whenever related questions arise before an inferior court, the latter shall stay its proceedings. See generally Quashigah (n 14) 118.

27 Thomashausen (n 25) 102.

28 As above.

29 See for example Décision DCC 10-117 of 8 September 2010.

from this procedure. The procedure enables constitutional jurisdictions to prevent the entry into force of legal instruments, such as international treaties that are inconsistent with the Constitution, including the Bill of Rights.[30] South Africa and Zimbabwe's Constitutions borrow from the centralised abstract review aspects. They can be used as examples for other common law countries. Both constitutions empower the President of the Republic to 'refer' a bill to the Constitutional Court for 'a decision on its constitutionality'[31] or 'an opinion or advice on its constitutionality'.[32] Furthermore, the Constitution of South Africa enables 'one third of the members of the National Assembly' to approach the Constitutional Court for a declaration of unconstitutionality of an Act 'within 30 days' following its promulgation by the President.[33]

In South Africa and Zimbabwe, constitutional courts have the last say on the constitutionality of an act or conduct as they are habilitated to confirm or not confirm an order of constitutional (in)validity made by other courts.[34] This procedure has strengthened the protection of rights and reinforced the dialogue among courts. By giving the final say in constitutional matter to the Constitutional Court, the South African and Zimbabwean constitutions certainly drew inspiration from the Kelsenian constitutional review system.[35]

4 Fostering value-oriented, context-sensitive approaches to access to constitutional jurisdictions

The adjudication of constitutional rights is far too important to be simply left accessible to certain type of individuals and institutions, while leaving behind a wide range of those affected by human rights unfriendly legislation and administrative acts.[36] In the South African context, the liberal nature of rules on access to courts is sufficiently robust to increase

30 As above.
31 Sec 79(4) of the 1996 South Africa Constitution.
32 Secs 110(1)(b) & 131(8)(b) of the 2013 Zimbabwe Constitution.
33 Sec 80 of the 1996 South Africa Constitution.
34 Sec 167(3) of the 2013 Constitution of Zimbabwe and sec 167(5) for orders made by the Supreme Court of Appeal, the High Court of South Africa or a court of equal status.
35 See generally CM Fombad 'An overview of contemporary models of constitutional review in Africa' in Fombad (n 6).
36 *Ferreira* (n 11) para 230. The Constitutional Court asserts that 'In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact'.

accountability for human rights violations, but the rejection of several direct access petitions before the apex courts may leave poor litigants with no effective remedies.[37] The chambers of judges that filter applications should provide litigants unable to approach inferior courts with the possibility of airing their grievances before it, and to settle matters at the first and last resort.

The formalism with which the constitutions of Benin and the DRC in particular, but African constitutional jurisdictions in general, approach admissibility and jurisdiction needs careful reconsideration taking account of the importance of according wider access to individuals challenging legislation that technically cannot be questioned due to the lapse of time.[38] This provides the Court with an opportunity to align old legislation with the Constitution and its values, re-ascertain its supremacy within the hierarchy of positive law, and increase judicial remedy.[39]

Further, numerous constitutional values may guide their result-oriented approaches so as not to give the impression that the court is extending its powers in an unconstitutional manner. For example, the right and principle of dignity and equality, and some practices of an open and democratic society, may be used to overcome these obstacles. These are objective constitutional standards that must be protected by individuals whether they have personal interests to protect or simply seek to uphold the supremacy of the Constitution.[40]

Decisions of the constitutional court have a wide impact on the legal system. In the DRC context, this should prompt the Court to expand its human rights activism to acts other than those emanating from legislative assemblies and judicial decisions which allegedly contravene procedural guarantees, through a value-oriented approach. As constitutional court decisions should primarily aim to pacify political space, strengthen democratic principles and promote core values of fundamental rights, in addition to upholding the supremacy of the Constitution, constitutional court judges must regularly question whether their rulings on

37 J Dugard 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *South African Journal on Human Rights* 261.

38 Art 50 of the 2013 DRC Constitutional Court Act.

39 S Butt *The Constitutional Court and democracy in Indonesia* (2015) 48-59.

40 *Ferreira* (n 11) para 230; L Favoreu and others *Droit constitutionnel* (2018) 936-937.

admissibility and merit allow them to achieve this vocation.[41] A good compromise between textual and extra-textual contexts gives courts the opportunity to prevent regression of constitutional ideals and further human rights. The broader historical context of exclusion of individuals from accessing apex constitutional jurisdictions[42] must remind judges of the necessity to broaden their rules on standing to prevent the denial of justice. Constitutional courts should thus consider themselves as 'not constrained by any self-imposed doctrine' in the adjudication of the Constitution because they exist 'for the very purpose of providing a final determination to any question of whether the provisions of the constitution are being respected or not'.[43]

Section 38 of the Constitution of South Africa offers one of the many ways in which constitutions can be designed to ensure greater access to constitutional jurisdictions for victims of human rights violations. This provision has traversed beyond South African borders to influence approaches adopted by the Zimbabwe[44] and Kenyan[45] constitutions. This suggests that its relevance for enhancing human rights protection cannot be underestimated.[46] The wider access it accords is illustrated by the five types of individuals empowered to enforce the Bill of Rights:

- anyone acting in their own interest;
- anyone acting on behalf of another person who cannot act in their own name;
- anyone acting as a member of, or in the interest of, a group or class of persons;
- anyone acting in the public interest; and
- an association acting in the interest of its members.[47]

Adopting this approach, for example in the DRC Constitution and the Constitutional Court Act, can provide the Constitutional Court with a robust positive law basis to flex its human-rights protection's muscles. It is also important for constitutional jurisdictions to approach international

41 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 author).
42 B Kanté 'La justice constitutionnelle face à l'épreuve de la transition démocratique' in O Narey (ed) *La justice constitutionnelle: Actes du colloque international de l'ANDC* (2016) 26-27.
43 Quashigah (n 14) 121.
44 Sec 85 of the 2013 Constitution of Zimbabwe.
45 Sec 22 of the 2010 Constitution of Kenya.
46 See also sec 34 of the 2020 Draft Constitution of The Gambia.
47 Sec 38 of the South African Constitution.

law norms with openness and pragmatism since they can enhance the quality of their interpretation.

5 Liberalising constitutional courts' approaches to international law

Despite the many virtues that the continental and sub-regional human rights standards[48] offer to domestic legal systems, examples from the three courts are very revealing of the fact that constitutional interpreters in general still find it difficult to meaningfully apply these standards in litigation.[49] The dearth of the use and application of international law standards is particularly pronounced in civil law apex courts, where the erratic resorts to international law lack proper methodological foundations to enhance the relevance of international law. In South Africa, where constitutional provisions call on judges to approach international law with the openness and flexibility it requires, judges apply international law on a case-by-case basis. The success of international law in South African litigation is widely recognised,[50] and so is the international law's ability to provide contextual background to many rights.[51]

It is important to reiterate and clarify, albeit briefly, first, the ethics (why), secondly, the mechanics (how and when) for the application of international law in constitutional (human rights) litigation as well as thirdly, the types of international (human rights) norms relevant to the advancement of a culture for promoting human rights in Africa.

Across legal systems, there are constitutional provisions that enhance judicial courage and some pragmatic approaches to international law standards in the interpretation of constitutional rights. They show that drafters of constitutions were aware that international law was important and relevant and should be harmoniously construed with domestic

48 F Viljoen *International human rights law in Africa* (2012) 9.

49 See also M Killander 'The effects of international law norms on constitutional adjudication in Africa' in Fombad (n 6) 222.

50 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA (30) (CC) para 4; 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.

51 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35; *Law Society of South Africa* (n 49) para 4.

norms. In this sense, the positivistic debate relating to which norm is legally higher and takes precedence between domestic constitutional norms and international (binding) human rights standards may rather be approached in a result-oriented way in constitutional interpretation. Concretely, the question should be how international law can help constitutional interpreters to construe constitutional rights in a manner that gives effect to their values and aspirations and make the Constitution better.

Some examples from the constitutions of Benin, the DRC and South Africa will suffice to demonstrate that drafters of constitutions may have been willing to ensure that the constitutions work hand in glove with international law. Article 147 of the Benin Constitution accords international law treaties a value superior to that of domestic legislation (*supra-legislative value*). The *a priori* conformity review of international law before ratification may entail that we view international law and constitutional law norms as mutually reinforcing.[52] The ratification of these treaties is not made in isolation. Parliaments, in relation to treaties on peace, international organisations, state finances, modification of domestic legislation, and transfer, exchange or acquisition of national territory, generally approve them.[53] The Constitution also provides the possibility for a country to enter into agreements on cooperation or association which have some effects on national sovereignty. The concept of 'African unity' is used in the Benin and DRC Constitutions as an enabler of regional and sub-regional integration.[54] It has been at the origin of the ratification of numerous treaties adopted under the aegis of the African Union/Organisation of African Unity.[55] The Constitution of South Africa has, equally, constitutional provisions which make the commitment to international law and its standards unequivocal.[56] So what needs to be dealt with now is why (ethics) and how (methodology)

52 Art 146 of the 1990 Benin Constitution and art 216 of the 2006 DRC Constitution.

53 Art 145 of the 1990 Benin Constitution and art 214(1) of the 2006 DRC Constitution.

54 Preamble and art 149 of the 1990 Benin Constitution and art 217 of the 2006 DRC Constitution.

55 The relevance of using African human rights instruments to enhance human rights protection is tackled later.

56 Secs 37(4)(b)(i); 39(1)(b); 198(c); 199(5); 200(2); 232 & 233 of the 1996 South African Constitution.

courts should apply international law norms in constitutional rights interpretation.

In the context of the Constitutional Court of South Africa, a number of cases have persuasively addressed the question of the ethics of the application of international law standards. The ethics can be four-fold: first, understanding context; secondly, conformity to international obligations; thirdly, furthering global rights dialogue; and fourthly, self-improvement. In relation to context-understanding, international law norms and standards have the ability to provide contextual background for understanding the bill of rights and certain rights.[57] The fact that certain constitutional rights provisions are drawn *verbatim* from international treaties also indicates that domestic courts have much to learn from these standards and from how international and regional bodies, established to interpret and apply them, have progressively construed these norms.[58] Recourse to international law is also a consideration of the 'universal' nature of rights.

When courts interpret rights at the domestic level, they are engaging in a global constitutional rights dialogue by learning from the successful application of human rights at the international level. In an increasingly globalised world, it may seem absurd to maintain a parochial interpretation of rights that disregards the burgeoning normative and jurisprudential developments in human rights protection at the regional and international level.

International law also helps courts improve domestic protection of rights. As the Solomonic wisdom, 'there is nothing new under the sun' goes, regional and international human rights bodies deal with practical issues related to equality, political rights and fair trial rights, among others, that have arisen in other countries. The reliance by the South African Constitutional Court on the *Tanganyika Law Society* case[59] decided by the African Court on Human and Peoples' Rights in the *New Nation Movement* case[60] shows how African countries can learn from the regional human rights system.

57 Killander (n 49) 213-214.
58 Killander (n 49) 218.
59 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2013) 1 AfCLR 53.
60 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) para 38.

Regarding conformity to international obligations, the use of international norms gives jurisprudential value to states' international human rights commitments. Under most treaties, states are obligated to adopt necessary legislative, judicial, administrative measures to give effect to rights and change human rights unfriendly practices.[61]

There is, however, the need to chart a methodological path on when courts may apply international human rights standards and when litigants can expect them to do so. The selective application of international law by courts warrants the importance of a theory on when to apply international law.

Five scenarios are identified. First, constitutional jurisdictions may use international law standards whenever they interpret constitutional rights that are narrow in scope. The example of the right to equality and non-discrimination, fair trial rights (particularly in Benin) and political rights under the Benin and DRC Constitutional Courts can be used as illustrations. Apart from rights covered in this book, the three bills of rights also contain a list of rights which are narrow in scope. Their interpretation can benefit from international law. In Benin, these rights include the right to life, liberty, security and the integrity of human person,[62] the sacred nature of the human person,[63] the right to culture,[64] children and youths' right to education,[65] rights of arrested individuals,[66] rights of accused persons,[67] prohibition against torture,[68] the right to secrecy of correspondence,[69] the right to property,[70] the right to freedom of the press,[71] and the right to freedom of movement.[72] In the DRC, they include equality in dignity,[73] the right to freedom of assembly,[74] the right

61 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 35-38.
62 Art 15 of the 1990 Benin Constitution.
63 Art 8 of the 1990 Benin Constitution.
64 Art 10 of the 1990 Benin Constitution.
65 Arts 12 & 13 of the 1990 Benin Constitution.
66 Art 16 of the 1990 Benin Constitution.
67 Art 17 of the 1990 Benin Constitution.
68 Art 18 of the 1990 Benin Constitution.
69 Art 21 of the 1990 Benin Constitution.
70 Art 22 of the 1990 Benin Constitution.
71 Art 24 of the 1990 Benin Constitution.
72 Art 25 of the 1990 Benin Constitution.
73 Art 11 of the 2006 DRC Constitution.
74 Art 25 of the 2006 DRC Constitution.

to freedom of expression,[75] the right to freedom of demonstration,[76] and the right to the inviolability of one's own domicile.[77] In South Africa, they include the right to human dignity,[78] the right to life,[79] the prohibition of slavery, servitude or forced labour,[80] the right to assembly, demonstration, picket and petition,[81] the freedom of association,[82] and citizenship rights.[83] Secondly, international law may be used as a contextual tool whenever the right being litigated is provided for under international treaties binding on the state. Thirdly, courts should invoke and discuss international law whenever litigants or parties rely on international norms and jurisprudence. Fourthly, international law can be used whenever the right being litigated has been developed in soft-law instruments by continental or (sub-)regional bodies. Lastly, international law standards may be useful whenever the interpretation of a right at the domestic level offers lower protection than that of international standards.

The substantive international standards courts can use may include binding and non-binding international law instruments, *jus cogens* and customary international law, and general principles of international law.[84] Most importantly they may use decisions, communications and findings by international, regional and sub-regional human rights bodies. It is particularly necessary for courts to give effect to and use African shared values translated in various treaties and other standards adopted under the auspices of the African Union/Organisation of African Unity in interpretation.[85] The adoption of these instruments by the AU/OAU is

75 Art 23 of the 2006 DRC Constitution.
76 Art 26 of the 2006 DRC Constitution.
77 Art 29 of the 2006 DRC Constitution.
78 Sec 10 of the 1996 Constitution of South Africa.
79 Sec 11 of the 1996 Constitution of South Africa.
80 Sec 13 of the 1996 Constitution of South Africa.
81 Sec 17 of the 1996 Constitution of South Africa.
82 Sec 18 of the 1996 Constitution of South Africa.
83 Sec 20 of the 1996 Constitution of South Africa.
84 J Crawford *Brownlie's principles of public international law* (2013) 22.
85 Under the AU/OAU, several treaties relevant to the protection of fundamental rights have been adopted: the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) the Convention on the Prevention and Combating of Terrorism (1999) the Constitutive Act of the AU (2000) the Protocol on the Pan-African Parliament (2001) the Protocol on the Peace and Security Council (2002) the Convention on the Conservation of Nature and Natural Resources (2003) the Convention on the Prevention and Combating Corruption (2003) the African Youth Charter (2006) the African Charter on Democracy, Elections and Governance (2007) the African Union Convention

guided by shared history, values and problems, and is aimed at curbing the wrongs of the past. These values may be enshrined in African human rights instruments.

The African Charter on Human and Peoples' Rights and its normative protocols contain values and norms that can guide constitutional jurisdictions in interpreting bills of rights.[86] The Charter is guided by virtues of the historical tradition of African countries and contains 'the value of African civilisation which should inspire and characterise [African countries'] reflection on the concept of human and peoples' rights'.[87] If construed in harmony with a bill of rights, the African Charter's main features may make it possible for courts to have some guiding philosophy and solid arguments when it comes to interpreting constitutional rights.[88] Five normative protocols on the rights of women in Africa,[89] the rights of persons with disabilities,[90] the rights of older persons,[91] social protection and social security[92] and the specific aspects of the right to a nationality and the eradication of statelessness in Africa[93] have subsequently been adopted.[94] The existence of these treaties demonstrates a rising African consciousness towards protecting the rights of persons at risk in our societies, and requires courts to take account of such a reality.

For their novelty and ground-breaking content, the African Charter on the Rights and Welfare of the Child,[95] the Protocol to the African

for the Protection and Assistance of Internally Displaced Persons (2009) see generally Centre for Human Rights *A Guide to the African Human Rights System: Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021* (2021) 12; Viljoen (n 48) 213.

86 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 2-17.

87 Preamble to the African Charter on Human and Peoples' Rights.

88 Viljoen (n 48) 214; F Ouguergouz *The African Charter of Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 55.

89 Viljoen (n 87) 11-46.

90 Adopted 29 January 2018 not yet in force.

91 Adopted 31 January 2016, not yet in force.

92 Adopted 6 February 2022, not yet in force.

93 Adopted 18 February 2024, not yet in force.

94 R Ben Achour 'Les protocoles normatifs à la Charte africaine des droits de l'homme et des peuples' (2020) 4 *Annuaire africain des droits de l'homme* 83-98.

95 N Murungi 'Editorial introduction to special focus: The African Children's Charter at 30: Reflections on its past and future contribution to the rights of children in Africa' (2020) 20 *African Human Rights Law Journal* 640; BD Memzur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Publiekreg/SA Public Law* 1.

Charter on Human and Peoples' Rights (the Maputo Protocol)[96] and the African Charter on Democracy, Elections and Governance (the African Governance Charter)[97] are essential for the improvement of the protection of various women's rights as well as general human rights related to the political and democratic process.

At the institutional level, one judicial and two quasi-judicial organs issue human rights-related decisions that can aid constitutional jurisdictions in understanding their bills of rights. First, the African Commission on Human and Peoples' Rights, established under the African Charter, inaugurated on 2 November 1987 and based in Banjul (The Gambia), had dealt with over 100 communications interpreting different aspects of rights provided thereunder. The African Commission is vested with a protective mandate through which it considers inter-state and individual communications filed respectively under articles 47, 55 and 56 of the African Charter, reports submitted by state parties to the Charter and the Maputo Protocol, and formulates concluding observations which can assist courts in construing constitutional rights. The African Commission develops soft-law instruments, which clarifies the Charter's rights and state obligations, in the form of thematic resolutions, guidelines, general comments and declarations that are pivotal for the enhancement of the quality of constitutional interpretation.[98]

96 Viljoen (n 87).

97 AM Mangu 'The role of the African Union and regional economic communities in the implementation of the African Charter on Democracy, Elections and Governance' (2018) 5 *African Journal of Democracy and Governance* 125; B Kioko 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument' (2019) 63 *Journal of African Law* 39.

98 See generally R Adeola, F Viljoen & TM Makunya 'A commentary on the African Commission's general comment on the right to freedom of movement and residence under art 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65 *Journal of African Law* 131-151; E Durojaye 'General Comment of the African Commission on Human and Peoples' Rights: A source of norms and standard setting on sexual and reproductive health and rights' in O Shyllon (ed) *The Model law on access to information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 216-223; M Geldenhuys and Others 'The African Women's Protocol and HIV: Delineating the African Commission's General comment art 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 681-704; E Durojaye 'The General Comments on HIV adopted by the African Commission on Human and Peoples' Rights as a tool to advance the sexual and reproductive rights of women in Africa' (2014) 127 *International Journal of Genecology and Obstetrics* 305; J Biegon 'The incorporation of the thematic resolutions of the African Commission into the domestic laws of African countries' in O Shyllon (ed) *The Model law on*

Secondly, the African Court on Human and Peoples' Rights (African Court) established under the Protocol to the African Charter on the Establishment of an African Court (1998/2004) issues binding decisions and authoritative interpretation of the Charter's rights on which constitutional jurisdictions may base their interpretation. The African Court's contentious jurisdiction concerns the 'interpretation and application of the [African] Charter, [its] Protocol and any other relevant human rights instrument ratified by the state concerned',[99] while its advisory jurisdiction empowers it to provide an 'opinion on any legal matter relating to the Charter or any other relevant human rights instruments'.[100] As the African Court issues decisions which have constitutional implications at the domestic level,[101] constitutional jurisdictions must be mindful of the African Court and other regional courts' jurisprudence to prevent them from being embarrassed at the continental level.[102] Beyond embarrassment, considering the African Court decisions may be a relevant way to achieve complementarity between domestic and regional human rights mechanisms, and further judicial dialogue between regional human rights bodies and constitutional jurisdictions.[103]

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access to information for Africa and other regional instruments: Soft law and human rights in Africa (2018) 193.

99 Art 3(1) of the African Court Protocol in C Heyns & M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2016) 42.

100 Art 4 of the African Court Protocol in C Heyns & M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2018) 42; TM Makunya 'Advisory opinion: African Court on Human and Peoples' Rights (ACtHPR)' (June 2023) *Max Planck Encyclopedias of International Law* 1-19; T Makunya & S Zigashane 'La compétence consultative de la Cour africaine des droits de l'homme et des peuples: Entre restrictions organiques et limitations matérielles' in EB Bakama & S Makaya (eds) *Droit international des droits de l'homme, justice transitionnelle et droit international pénal* (2020) 9-49.

101 *Noudehouenou v Benin* (provisional measures) (2020) 4 AfCLR 726.

102 CM Fombad 'Constitutional adjudication and constitutional justice in Africa's uncertain transition: Mapping the way forward' in Fombad (n 6) 363.

103 See broadly TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen and others (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 468; TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and lessons' (2021) 21(2) *African Human Rights Law Journal* 1230-1264.

Thirdly, the African Committee of Experts on the Rights and Welfare of the Child issues a wealth of decisions,[104] soft-law instruments[105] and concluding observations following the consideration of member states' initial and periodic reports[106] that can direct constitutional jurisdictions in dealing with specific child related-issues. The African Children's Charter's most indelible marks are the inscription of African specific issues that are not dealt with under the United Nations Convention on the Rights of the Child,[107] thus giving to it an African imprint worthy of being reflected in domestic constitutional jurisprudence.[108]

The use of these instruments by constitutional courts when interpreting human rights provisions can be legally supported for two reasons. First, Benin, the DRC and South Africa are parties to these instruments. Secondly, these instruments provide values that are emerging as common for African countries under the auspices of the African Union.

6 Fostering cross-systemic legal education in Africa

The teaching and the application of constitutional law in African universities must reflect the diversity of sources of law on the African continent. It must, importantly, shift its focus from a positivistic-formalistic orientation of the law to an interdisciplinary focus, with openness of sources that an effective interpretation of rights requires.[109] According to Fombad, '[g]enerally, law schools should not merely be a place where students are taught about the law as it is found in legislation and court decisions. An effective law programme should teach students about the past, the present, and importantly, try to anticipate the future and prepare them for it'.[110] In relation to most civil law legal systems'

104 Viljoen (n 87) 402-404.
105 NR Doya 'The ACHPR and ACERWC on ending child marriage: Revisiting the prohibition as a legislative measure' (2019) 20 *ESR Review: Economic and Social Rights in South Africa* 9.
106 R Miamingi *State party reporting and the realisation of children's rights in Africa* (2020).
107 Viljoen (n 87) 52.
108 *Bothma v Els and Others* 2010 (2) SA 622 (CC) para 56.
109 See generally F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012).
110 CM Fombad 'Africanisation of legal education programme: The need for comparative legal studies' in S Mancuso & CM Fombad (eds) *Comparative law in Africa: Methodologies and concepts* (2015) 16; CM Fombad 'Africanisation of legal

education curriculum, the teaching of jurisprudence (philosophy of law or legal theories) receives little attention, a symbolic course of 20 to 30 hours in the fourth year being given to students. This deprives them of the necessary grasp of the theoretical debates which underpin law, the constitution, and human rights.

The teaching system perpetuates a unidirectional thinking of law as a set of positive rigid norms separated from ideals of justice. Such a system imprisons students, legal practitioners and judges to remain formalistic in their thinking and perpetuates the colonial legal reasoning.[111] In most law faculties, particularly in Francophone Africa, various other schools of jurisprudence – legal realism, pragmatism, feminism and African approaches to jurisprudence[112] – are not taught. The same can be said in relation to the importance given to the teaching of other African legal systems.

Whilst students study legal history and the history of political ideas, much of the content reflects a colonised curriculum, where Western scholars and paradigms are at the centre-stage of law teaching in faculties which are African. In fact, 'it has been shown that most of the standard textbooks and even fairly recent ones barely mention Africa and African law, and even when they do so, this is often approached and treated from an essentially western prism as an incidental and unimportant issue'.[113] Courses such as legal anthropology, legal sociology and legal epistemology can widen the horizon of thinking and sources. This applies equally to numerous anglophone law faculties even though the teaching of jurisprudence has potentially and gradually untied students and legal practitioners from the shackles of legal reasoning oriented towards reciting sources and legal scholarship of and from former colonial powers embedded in a positivistic reasoning.[114]

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education programmes: The need for comparative African legal studies' (2014) 49 *Journal of Asian and African Studies* 391.

111 RO Badru & TRE Egunlusi 'Colonial legal reasoning in the post-colonial African state: A critique and a defense of the argument from African metaphysical epistemology' (2015) 7 *Thought and Practice: A Journal of the Philosophical Association of Kenya* 12.

112 D Johnson, S Pete & M du Plessis *Jurisprudence: A South African perspective* (2001) 199.

113 Fombad (n 102) 384.

114 AE Tshivhase, LG Mpedi & M Reddi *Decolonisation and Africanisation of legal education in South Africa* (2019).

Constitutional law in most French-speaking African countries is taught from French and Belgian perspectives. Students learn major theories and the case law of the French *Conseil constitutionnel* and French constitutional scholars and rarely try to ensure African paradigms (legal norms and institutions) are given the same attention as the French system. A typical student, who later becomes Professor and judge, simply lacks the understanding of the various approaches African countries have taken towards constitutionalism, and the burgeoning case law in neighbouring African countries. Equally marginalised is the teaching of the African Human Rights Systems, their case law and their normative and institutional features.[115] This is reflected in the extent to which lawyers and judges are unfamiliar with such continental institutions.[116] The dearth of the use of these systems in domestic litigations is generally attributed to the lack of knowledge about their contents, and institutions sometimes creating judges who are stubborn in applying them. To fill some of these gaps, the Economic Community of West African States' Chief Justice Forum proposed the institutionalisation of 'the study of the African Charter on Human and Peoples' Rights at law schools, the different judicial systems in the sub-region, as well as the study of other legal systems within the region'.[117]

Lastly, the place and role comparative law, its content, methods and techniques, has been given is illustrative of the ignorance of its virtues in enhancing African cross-fertilisation of constitutional and human rights ideas. Despite recent reforms in the education system at the university level in the DRC which led to the institutionalisation of the teaching of comparative constitutional law, this has tended to remain the

115 On recent progress in the DRC, TM Makunya 'Vers la décolonisation, la congolisation et la Pan-Africanisation de l'enseignement des droits de l'homme en République démocratique du Congo' (December 2023) https://www.researchgate.net/publication/378303840_Vers_la_decolonisation_la_congolisation_et_la_Pan-Africanisation_de_l'enseignement_des_droits_de_l'homme_en_Republique_democratique_du_Congo (accessed 2 July 2025).

116 NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 63.

117 'Conference of ECOWAS Chief Justices ends' 25 November 2005 in *Ghana Web* https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Conference-of-ECOWAS-Chief-Justices-Ends-95015 (accessed 01 December 2018).

exception.[118] A recent study on the teaching of comparative law in Africa provides the following results:[119]

> From the survey, only four of the ten Anglophone universities offer comparative law as a course. With the exception of the University of Botswana, it is only available as an elective course. In francophone Africa, only two of the six universities offer comparative law on their programme, and this is a compulsory course for all the students.

Where the course exists, it is limited to providing major differences between the common law and civil law as they evolved in Europe and America. Researchers who conduct comparisons at the African level (common law in Africa or civil law in Africa) to understand the operation of the law in other African countries limit themselves to the study of countries which belong to legal traditions similar to their own, thus missing an opportunity to grasp the complexity of law and legal institutions in other African civil law or common law countries, as the case might be. In Francophone faculties, modules such as statutory and constitutional interpretation are not taught despite their relevance in equipping legal practitioners with innovative skills and techniques to understand the content of the law.

This situation requires profound reforms of the teaching and understanding of constitutional law, comparative law, and human rights law by judges and students. It is necessary to gradually implement the teaching of statutory and constitutional interpretation at undergraduate and post-graduate levels, the introduction to theories of law and jurisprudence throughout the curriculum, as well as the teaching of African Union institutional law, and African approaches to international law.

Comparative law is generally neglected in legal curriculums. Thus, the teaching of its various components, its methods and techniques centred on African paradigms (comparative African constitutional law and case law, comparative African public law, African bills of rights in comparative perspectives, comparative customary law, the concept of law in African legal philosophy, and comparative African institutional law)

118 Makunya (n 115).

119 CM Fombad 'Fostering a constructive intra-African legal dialogue in post-colonial Africa' (2022) 66(1) *Journal of African Law* 1-22.

can be the starting point in ensuring that emerging African legal scholars are aware of the relevance of comparative law.

Other reforms can be proposed. For example, the revision of the human rights teaching curriculum can be conducted so that it reflects emerging scholarship and case law on the continent. Furthermore, the teaching of an introduction to social sciences research and methods, and the sociology of law and legal anthropology is an imperative to foster interdisciplinarity. It is hoped that implementing the proposed reforms will equip future and current constitutional judges with skills that are relevant to comprehending the immense constitutional interpretive role that they play.

7 Reconceptualising the role of continental judicial engagements

The preceding discussion reveals the existence of several practical and pragmatic means constitutional jurisdictions use to circumvent legal obstacles. These means enable constitutional jurisdictions to better their interpretation and the quality of human rights protection. The time is thus ripe that exchanges of constitutional and human rights ideas and interpretive techniques are intensified, refocused and coordinated.

The current framework within which these exchanges are taking place is not conducive to facilitating proper cross-fertilisation of judicial and interpretive practices. Their design may be flawed. The problem of design is linked to the establishment of some judicial networks along colonial and linguistic backgrounds, or regional bondage.[120] There is also the absence of proper policies for exchanging judicial practices, since most of them prioritise formal meetings over substantive discussions of constitutional issues. Efforts are hardly made to reconcile the divide between common and civil law, and the manner in which differences between the two – structure of courts, substantive issues related to legal education, legal and constitutional reasoning, sources of the law, and virtues of international law in human rights litigation or judicial

120 TG Daly 'Report: An African Judicial Network: Building Community, Delivering Justice' (*IACL-IADC Blog*, 6 May 2018) https://blog-iacl-aidc.org/blog/2018/5/10/report-an-african-judicial-network-building-community-delivering-justice (accessed 28 February 2021).

philosophy – manifest themselves and impact the work, the quality of interpretation and the protection offered.

Judicial collaboration must be increased at a more institutional level, as opposed to what seems to be a personified judicial dialogue where the same judges always represent constitutional jurisdictions. National elected representatives of the judiciary must institutionally own these dialogues and make sure all the judges within a legal system reap their benefits. Under the auspices of judicial service commissions, continental and regional judicial networks can develop and implement human rights education programs to equip constitutional and other judges with top-notch human rights training. Training can include a web of topics such as comparative (constitutional) law, international human rights law and jurisprudence in Africa, legal reasoning in African legal systems, jurisprudential approaches to constitutional interpretation, African approaches to law, human rights and constitutionalism, and possible dialogues between the law and social sciences. Such an approach remains a missing link in the current wave of institutionalisation of judicial dialogues on the continent and has potential to increase the capacity of continental judicial dialogues to bring real change on the 'day-to-day judicial work in the national courts'.[121]

Whilst the walls between judges from the two main legal traditions operating in Africa originate in the colonial legacy, the existence of courageous decisions from both sides indicates that exposing national judges to other courts' practices has profound virtues. It is important to ensure that judges are exposed to long term collaborations that may brace their courage and mould a judicial philosophy sensitive to constitutionalism. Established judicial networks should spearhead visits between judges from different legal systems in the form of long-period stays in sister jurisdictions, where they can learn *in situ*. The short-period judicial dialogues generally organised do not empower judges, some of whom have been used to judicial practices of their legal tradition for decades, to profoundly grapple with necessary changes that are required of them. Imagine having a member or two of the Constitutional Court of Benin spending six months at constitutional jurisdictions in South Africa and Kenya, and *vice-versa*, attending court sessions and deliberations.[122]

121 M Bobek *Comparative reasoning in European Supreme Courts* (2013) 49.

122 This proposition does not overrule the relevance of seminars. It complements and strengthens seminars that can be organised on African judicial dialogue. The

This would not only give them an opportunity to face the lived realities other judges are in, but also to learn from the manifold interactions among judges, legal professionals and academics.

Those placed in South Africa may also learn the benefits of some institutional practices which strengthen the bond between the Court and the public in general (such as opening court sessions to the public and writing press statement after every judgment) and the bond between judges and clerks. Judges today may be thousands of miles away from their jurisdiction and still participate in proceedings and deliver decisions; some amendments to rules of procedures may simply be needed. The short-period judicial dialogue does not allow judges to understand the context within which other courts adopt their decisions. Constitutional decisions are meant to address context-based problems which warrant a particular approach to be taken.

Institutional context is also worth being considered. The judicial prowess of courts is also the result of an enabling political environment[123] and supporting services at the Court level, such as research and so forth, which foreign judges must be equipped to understand before they can make sense of foreign decisions. It is said that 'in law, as in medicine, transplants carry the risk of rejection'.[124] In a nutshell, a *longue durée in situ* visit is but a panacea for providing other judges with such a holistic view.

Nonetheless, suggestions that aim to improve intra-African interactions among judges in Africa must first address criticisms levelled against judicial dialogues. According to Michael Bobek, arguing from a European perspective, 'most often, judges prefer to talk amongst themselves about anything other than their cases'.[125] For him, 'the information exchanged or obtained in various meetings, networks, or associations is rarely of any use for national judicial decision-making

main contribution of the *longue durée in situ* visit among constitutional courts' judges is that it is holistic and allows judges to learn and understand the context within which other judges operate and the dynamics that inform their progressive or regressive decisions. Additionally, during the visit, judges may learn relevant institutional practices within constitutional jurisdictions. As Bobek demonstrates, some exchanges among constitutional judges are simply formalistic.

123 R Hirschl 'The judicialisation of politics' in KE Whittington, DR Kelemen & GA Caldeira (eds) *The Oxford handbook of law and politics* (2008) 134-135.

124 Fombad (n 119) 364.

125 Bobek (n 121) 49.

once back home'.[126] He highlights two main issues. There is 'a *structural* problem with the type of knowledge gained through various networks or associations: it tends to be superficial, selective, and random',[127] and there is the 'problem of (internal) *translation* of the international knowledge and experience. Continental supreme jurisdictions are large institutions, composed of tens or even of hundreds of judges. Within these institutions, it tends to be always the same few members of the court who participate in the various international meetings'.[128] He adds that 'the vast majority of judges within a court in the respective member institution do not know of which networks or associations the respective court is in fact a member, not to speak of drawing any applicable knowledge from it'.

These criticisms, some of which may not be applicable to African constitutional jurisdictions, underscore the importance of moving from a tokenistic to a substantive constitutional continental engagement. Extant judicial networks must understand the relevance for shifting their focus to meaningful, institution-oriented and protracted exchanges.

8 Conclusion

Colonial legal traditions continue to influence the normative content of bills of rights and approaches of constitutional judges in the choice and application of methods to interpret human rights. However, there have been several other normative influences on African legal systems and bills of rights. The principle of *stare decisis* as the hallmark of the common law decision-making practice has equipped the South African Constitutional Court with necessary capability to rely on principles, solutions and benchmarks developed in previous cases. Its absence in the civil law legal tradition does not, nonetheless, deprive the Benin's and the DRC's Constitutional Courts of their ability to rely on principles and solutions developed in their previous decisions and distinguish them if needs be.

It would thus be an exaggeration to keep legal traditions as the sole explanatory factor of differences in the interpretation of the bill of rights mainly because the text and the context of bills of rights affect the interpretation of human rights beyond legal traditions. The impact of the

126 As above.
127 As above.
128 Bobek (n 121) 50.

status of the bill of rights, the nature, type and historical backgrounds of the bill of rights and human rights provisions, the nature of limitations clauses and the possibility for an interpretive clause is greater. At the same time, one should not underestimate the power of legal traditions to affect a number of elements which equally influence the interpretation of bills of rights; such as constitutional jurisdictions' jurisprudential approaches, judicial philosophy, the models of constitutional review and constitutional culture.

Over and above, the significant role that Benin's, the DRC's and South Africa's Constitutional Courts continue to play in enhancing the quality of human rights is visible through the type of interpretation they provide. Despite the major differences between the civil law and common law approaches to constitutional interpretation and the degree of human rights protection, Constitutional Courts have significant interpretive and argumentative tools which goes beyond formalism that can readily sharpen their 'mighty sword' and protect democratic and constitutionalism values. If judges take their role of midwifing transformation and human rights abiding societies and polity seriously, the differences between legal traditions and bills of rights seem not to be a major stumbling block. Benin's, the DRC's and South Africa's Constitutional Courts' approaches to interpretation demonstrate how the text and the context of their bills of rights are normatively and historically rich, complex and progressive. The Courts have pre-empted attempts to override human rights protection and forced both state and non-state actors to respect bills of rights.

From a comparative constitutional law in Africa standpoint, I note that comparing the interpretation of bills of rights in Africa has the potential to unravel the 'invisible forces' or 'legal formants' that drive the main differences among African legal systems, whether they belong to similar legal traditions or not.[129] Two important tricks should be noted here to reach a successful understanding of such 'invisibles forces'. The first trick relates to the combination of various methods of comparative constitutional law. For one to provide an in-depth explanation of the quality of interpretation obtained in various African legal systems, a

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

combination of several methods of comparative legal research are but an obligation that imposes itself on the comparatist.

The historical perspective primarily provides necessary information on the political and social backgrounds of Benin, the DRC and South Africa and enables the comparatist to understand the manner in which these three African countries share similar 'macro-dynamics' of slavery, colonialism and post-independence authoritarianism. As they are different on a number of other 'micro-dynamics', this makes each country unique and proper for comparative purposes. If the history of evolution of legal systems, bills of rights and constitutional jurisdictions is left aside, comparing interpretive approaches of Benin's, the DRC's and South Africa's Constitutional Courts could provide superficial information that may not be readily apt to facilitate a meaningful engagement with foreign constitutional traditions.

It also allows the comparatist to pay attention to peculiar needs, aspirations and hopes which emerged with the post-1990 wave of democratisation in African countries and how better African judiciaries are contextually equipped to give effect to the bills of rights aspirations. A number of scholars have noted the striking gap between textual constitutional promises and the lived realities; between the text of the Constitution and its full implementation that it might be self-defeating to simply compare texts without a historical perspective to provide context as I have attempted to do. One should thus be ready to review several non-strictly legal materials (political, social, historical and economic materials) to comprehend realities beneath certain norms and rights.

The second trick seems to be the level of comparison. A micro-comparison of specific institutions within a legal system; Constitutional Courts in this particular instance, of a singular legal phenomenon, constitutional interpretation, and of a specific legal subject, the bill of rights or human rights provides a detailed and in-depth account of the approach different legal traditions adopt and an African voice in comparative constitutional law. It should be noted at this stage that the legal subject has been divided into smaller units; the selection of specific rights, the analytical analysis of the scope of rights as provided under the Constitution and an examination of decisions by constitutional jurisdictions. The relevance of such a level of comparison can be seen through the explanation provided in relation to different approaches and

the quality of the protection of human rights. The specificity of rights, their normative contents and the extent to which particular rights are litigated before constitutional jurisdictions need to be understood and appropriately revised for significant results.

An important implication emerging from this book is that legal systems belonging to similar legal traditions in Africa have significant points of convergence, both in the text and the reasoning, but also have point of divergence. Consequently, the overgeneralisation of findings and results of comparison may require a careful scrutiny of each legal system. The need to grasp the dynamics that affect comparative constitutional law in Africa, especially the emerging African constitutional courts challenges one to look at constitutional courts operating in different linguistic environment and have different colonial history.

Although I have not examined Portuguese- or Arabic-speaking constitutional jurisdictions, the selection of French- and English-speaking jurisdictions, together with a detailed comparison of their interpretive approaches, provides a useful starting point for a robust cross-tradition analysis of constitutional courts and the multifaceted roles they play in strengthening a human rights culture in Africa. Such a comparison should extend beyond the formal powers, structures, and judicial appointments set out in constitutions and courts' acts. It remains vital to examine their concrete jurisprudence, the way in which they work in practice and the impact of existing legal texts on the protection Constitutional Courts offer.