

Preface

It required a measure of intellectual boldness to undertake a subject as captivating as it is demanding, the one Professor Trésor Muhindo Makunya chose to explore in his work, entitled *Between legal tradition and transformation: Constitutional interpretation of fundamental rights by the Constitutional Courts of Benin, the Democratic Republic of Congo and South Africa*. Not only did he have the audacity to confront such a complex and multifaceted topic, but he did so with admirable brilliance and scholarly precision.

In December 2021, Professor Makunya successfully passed his remarkable doctoral thesis examination in comparative constitutional law and human rights at the Centre for Human Rights within the Faculty of Law at the University of Pretoria, South Africa. The present book, a revised and updated version of that thesis, is the fruit of that academic achievement and offers a significant contribution to the field. Given the breadth of its geographical and thematic scope, the undertaking presented serious conceptual and methodological challenges. He, however, confronted and overcame these challenges with considerable skill and insight.

To navigate such a demanding terrain, he designed and applied a research design grounded in a solid evidentiary base and a methodologically rigorous approach, one might even say, at times, an almost excessive rigour. These elements enabled him to formulate conclusions that are not only attractive in their clarity but persuasive in their reasoning and well supported by comparative jurisprudential analysis. The coherence and depth of the work undoubtedly reflect the author's extensive legal erudition. This is no coincidence. His scholarly predisposition in this direction has been forged through years of academic teaching, research, and editorial work in the field of human rights. These activities, which he continues to pursue across the African continent and in some Western universities, are further enriched by his fluent command of English, the language in which this thesis was researched, written, and defended.

It scarcely needs to be stated that research into the case law of the Constitutional Courts of Benin, the Democratic Republic of Congo (DRC), and South Africa, with regard to three categories of human rights, namely, the right to equality and non-discrimination, the right to a fair trial, and political rights, is of considerable relevance. The

selection of these three jurisdictions is, in itself, a carefully considered decision, meriting reflection. What do Benin in West Africa, the DRC in Central Africa, and South Africa in southern Africa have in common that would justify a comparative analysis of their constitutional jurisprudence on fundamental rights?

Although geographical proximity is not a determining factor in comparative constitutional law, the presence of shared legal traditions, or, conversely, starkly contrasting ones, may provide an insightful basis for analysing convergences and divergences in judicial reasoning and constitutional interpretation. In this respect, the structural and normative differences between Benin and the DRC, on the one hand, and South Africa, on the other, are manifest. Yet, far from undermining the comparative value of the exercise, these very differences enhance it, inviting critical engagement with how distinct legal traditions grapple with universal principles of human rights within their respective constitutional orders. The analytical value of this comparison is self-evident and requires no further justification.

However, despite appearances arising from the shared use of the French language, the categorisation of the legal systems of Benin and the DRC within the same legal family raises legitimate questions, particularly in light of their distinct colonial histories. It is not easy to identify substantial areas of convergence between the judicial systems of these two countries, often described as imitations or derivatives of Western legal models, partially grounded in the Romano-Germanic legal tradition. This comparative study provided the author with an opportunity to examine and deconstruct the long-standing thesis of legal mimicry. It was a difficult and intellectually risky undertaking, given the persistence of preconceived ideas, yet it was a line of inquiry that clearly warranted pursuit. The analysis of the book's conclusions offers the appropriate occasion to return to this important point.

What the three countries – Benin, the DRC and South Africa – do share, however, is undeniably a political past marked by authoritarianism and upheaval. Their respective political trajectories provide not only an explanatory framework but also, arguably, a justificatory basis for the evolution of their constitutional jurisprudence on fundamental rights. The author rightly accords significant weight to this context in his examination of the interpretive methods employed by the Constitutional Courts of these jurisdictions in the adjudication of human rights. It was both timely and relevant to ask how, in the wake

of turbulent histories marked by prolonged autocratic rule – at times severe and enduring – these Constitutional Courts were to address the profound challenge of safeguarding the rule of law and fostering democratic governance.

Assessing the impact of this political backdrop on the development of human rights jurisprudence is a central concern of the author, and his analytical approach stands out for integrating a dimension too often neglected in constitutional commentary: the intersection between political history and judicial reasoning. The influence of political and institutional crises on the constitutional development of Benin and South Africa is relatively well acknowledged and traceable in both their legal structures and case law. In contrast, the situation of the DRC remains more ambiguous. The jurisprudence of its Constitutional Court, perhaps due to the Court's relative institutional youth, appears to be less systematised and less widely disseminated. Nonetheless, it was essential to attempt a rigorous examination of the current state of fundamental rights protection in the Congolese context, and to test a crucial hypothesis: has the DRC followed a similar jurisprudential trajectory to that of Benin and South Africa?

Periods of profound national crisis, while destabilising, can also open a window for the construction of a new legal and political order, one capable of addressing future challenges and avoiding a return to past authoritarian tendencies. The book's inquiry into this question is especially apt and lies at the very heart of Professor Makunya's research.

These political and legal concerns are not the only factors that render the author's study both compelling and original. One particularly important element is the determination of the legal framework applicable to the rights and freedoms selected for analysis. The first, equality and the prohibition of discrimination, is a right that has generated extensive case law in the mature democracies of Europe, where it has developed into a rich jurisprudence with numerous interpretive variations. It remains, in many respects, a key barometer of the robustness of the rule of law and the vitality of democratic institutions. The critical question raised by the author is whether such jurisprudential complexity and centrality are replicated in the African jurisdictions under study.

The second, the right to a fair trial, is increasingly invoked in many African legal systems, often in response to long-standing deficits in

procedural justice. Its growing prominence makes it an indispensable subject of inquiry.

The third, political rights, while less rigorously conceptualised in African jurisprudence, are nonetheless addressed by the author with methodological prudence. He makes the justified decision to narrow the scope of analysis to the right to vote, a choice that aligns with the proliferation of electoral disputes adjudication in contemporary African politics. The increasing juridification of electoral disputes since the early 1990s, frequently heralded as the dawn of democratic transition on the continent, makes this focus both timely and justified.

A notable strength of this work is its refusal to conflate electoral litigation with constitutional litigation. Instead, political rights are treated as a category of fundamental rights whose legal status and scope must be examined through the lens of constitutional case law. It is important to recall that the defining feature of a constitutional court is not merely its jurisdiction over electoral matters, but rather the extent to which it protects fundamental rights through mechanisms such as direct individual applications. In this regard, the author's decision to reframe the right to vote within the broader architecture of rights protection is both insightful and necessary.

Thus, each Constitutional Court, operating within its own legal tradition, is confronted with a common challenge: to chart a coherent and context-sensitive path toward the effective protection of fundamental rights. The comparative analysis of the case law produced by the three courts reveals the author's deep skill as a jurist and his meticulous attention to judicial reasoning. He employs a set of conceptual tools, each carefully defined throughout the work, in an approach that is both pedagogical and methodologically transparent. This is evident in his treatment of constitutional interpretation methods, which he explains with clarity and rigor.

Moreover, while Professor Makunya adheres faithfully to the core tenets of case commentary, he adopts a structure more typical of Anglo-American legal scholarship, which may be seen as unorthodox in the Francophone legal *milieu*. Rather than following the canonical bipartite structure (*plan binaire*), he organises his analysis into seven chapters, an approach that reflects both the thematic richness and the analytical depth of his study.

Thus, despite a conscious effort to align with Anglophone standards and academic norms, the study maintains a structured juxtaposition: it

examines the three jurisdictions in their respective contexts and analyses their case law separately before proceeding to draw comparisons and final conclusions. As a result, there is a tendency toward repetition of certain themes – undeniably important themes – either due to their explanatory relevance for the judicial decisions under discussion or their centrality to the reasoning process. This repetition, however, clearly serves a pedagogical purpose. The numerous judgments discussed are dissected with remarkable precision, demonstrating an impressive familiarity with the jurisprudence of the three Constitutional Courts under study, as well as that of other courts outside the immediate scope of the research, such as those of Ghana. In this respect, the author often invokes what may be called the ‘comfort argument’.

It is important to note that this in-depth knowledge is underpinned by exceptional documentation and supported by an extensive primary bibliography in both French and English. The author devotes many pages to referencing sources, which include legal doctrine, national and international case law, and legislative instruments, encompassing both domestic texts and international human rights instruments applied within the three countries studied.

This methodological framework has led the author to draw unprecedented conclusions, which one might initially attribute to the originality of the topic. In reality, however, it is the author’s approach – fortified by his solid legal culture and strong analytical capacity – that has enabled him to reach what may be termed a double paradox. On the one hand, the study demonstrates that the three Constitutional Courts apply, more or less, the same methods for interpreting human rights texts; on the other hand, the jurisprudence they generate remains markedly divergent.

The first major and unexpected conclusion arising from this comparative analysis of the principles of equality and non-discrimination, the right to a fair trial, and political rights – through the prism of the jurisprudence of the Constitutional Courts of Benin, the DRC and South Africa – is that, despite their differing legal traditions, these three jurisdictions tend to follow similar patterns of reasoning. This is a surprising conclusion. One might reasonably have expected that common law and civil law jurisdictions – especially given the formers’ adherence to precedent and the latter’s rejection of it – would adopt distinctly different interpretive methods. On the contrary, the study reveals that, despite the plurality and diversity of

interpretive techniques, there are noteworthy convergences, even if divergences persist in the frequency and intensity with which each method is employed.

The second key tendency identified is that, despite these convergences in interpretive technique, the application of such methods does not necessarily yield uniform results. The author proposes several explanations for this phenomenon, including the South African judge's emphasis on a 'reasonable' approach – particularly in the adjudication of voting rights – as opposed to the search for an abstractly 'correct' solution, which appears more characteristic of other courts.

Nevertheless, one must give due credit to the author's analytical finesse and subtlety. He demonstrates that the two tendencies which structure the book – the convergence in methods and divergence in outcomes – are in fact more nuanced than they might appear at first glance. Depending on the specific right in question, various explanatory factors come into play, which either attenuate or reinforce these trends.

One such explanatory factor is the historical and political context in which each Constitutional Court operates. Two examples help to illustrate this nuance. First, as the author has rightly highlighted in his discussion of the institutional models of constitutional review adopted in the three countries, individual access to the Constitutional Court – though available in all three – reveals variations in practice. In the Francophone jurisdictions, for instance, there appears to be a more flexible use of this mechanism, especially regarding the right to a fair trial in Benin.

A second explanatory factor is the invocation of constitutional values. From this perspective, the South African Constitutional Court appears to make more frequent and explicit use of value-based reasoning than its Francophone counterparts. This is hardly surprising given the uniqueness of South Africa's constitutional history and the Constitutional Court's willingness to draw the necessary consequences from that history in the field of human rights protection.

However, the most substantial contribution of this book arguably lies not only in its doctrinal conclusions, but also in its normative recommendations. Beyond his integration of historical and political context – already a rare achievement for a legal scholar – the author makes a compelling and difficult-to-ignore plea. Professor Makunya devotes some of his most eloquent pages to advocating for a rapprochement between the common law and civil law traditions

on the African continent. These two traditions are still divided by distinctions that, in many respects, now appear outdated – for instance, the prohibition on *arrêts de règlement*, or the absence of the concept of legal parties in constitutional litigation in the civil law tradition.

It is common knowledge that, despite the formal rejection of precedent in civil law jurisdictions, the rule is often circumvented in practice. Why, then, not formalise this principle – rather than silently applying or borrowing from it? Such recognition would eliminate a purely artificial distinction and do away with a rule that is more honoured in the breach than in the observance. Furthermore, the incorporation of precedent would only strengthen the coherence of constitutional reasoning in Francophone courts, whose judgments are at times criticised for their lack of clarity or explanatory depth.

The author's comparison of the interpretive methods employed by South African judges and those used by their Francophone counterparts reveals several latent similarities – similarities that merely await institutional affirmation. Likewise, while constitutional litigation is officially considered to be objective litigation in civil law systems – thereby excluding the notion of parties – the procedure of certified question of constitutionality (*exception d'inconstitutionnalité*), as enshrined in nearly all Francophone constitutions (including those of Benin and the DRC), is intended to protect subjective rights. It would therefore be coherent to recognise applicants as legal parties in such proceedings. Moreover, in some civil law countries, the procedural framework in this area is evolving toward a more adversarial structure, increasingly resembling common law models.

Beyond these formal convergences, the rapprochement advocated by the author offers a deeper benefit: it allows for the common law tradition to exert a constructive influence on civil law practices. The book clearly demonstrates that, in many respects, the South African Constitutional Court is more consistently oriented toward the genuine protection of citizens' fundamental rights than are its Francophone counterparts. A movement appears to be emerging in the Francophone world to treat comparative constitutional law as a legitimate source of domestic constitutional interpretation – reflecting a broader trend toward the convergence of institutional models. This initiative was pioneered by the High Constitutional Court of Madagascar. One can only hope that it will continue, though its development may be

threatened by the recent resurgence of unconstitutional changes of government in parts of West Africa.

One of the major obstacles to rapprochement between the common law and civil law traditions remains the language barrier, compounded by the entrenched strength of legal traditions that historically separate the two systems. In this regard, Professor Makunya's book makes a significant contribution. If it does not entirely eliminate this barrier, it certainly renders it more permeable. In this respect alone, the contribution of this work to the protection of human rights in Africa through comparative constitutional law is of inestimable value. This modest preface is far from a comprehensive or exhaustive account. Readers will quickly come to this realisation for themselves.

Babacar Kanté

Honorary Dean, Department of Legal and Political Sciences
Gaston Berger University of Saint-Louis, Senegal
Former Vice-President, Constitutional Council of Senegal