This publication is the result of research conducted for Central European University, Private University. It was made possible by the CEUOpen Access Fund.

4. Constitutional review in Africa

Markus Böckenförde

INTRODUCTION

After the fall of the Berlin Wall, the so-called 'third wave of democratization' (Huntington 1991) triggered considerable constitutional reforms in many countries around the globe. It also intertwined with another wave, the third wave of constitutional review (Ginsburg 2008: 87).[1] Africa has been no exception to this trend, and some form of constitutional review is now standard in African constitutions, after having either been fairly limited or near absent in the pre-1990s' era (Fombad 2017: 17). While the rapid and general proliferation of constitutional review across the continent can be understood as resulting from an amalgam of domestic, regional, and global dynamics that followed this so-called wind of change (Riley 1992: 116–119), such accounts fail to explain the considerable differences between the actual forms and institutional designs of constitutional review in African countries. This diversity can be attributed to two factors: an exogenous and endogenous one. The exogenous factor is that the different colonial legacies coupled with the continued influence of the previous colonial powers' legal culture of constitutional review have left strong imprints. Despite increasing international and regional influences and the diversification of educational sources, this factor is still a strong initial reference point (Stroh and Heyl 2015: 173; Ginsburg and Versteeg 2013: 597). The endogenous factor, which encompasses the extent to which the institutional design deviates from such a 'blueprint' and precisely how it does so, is determined by the configuration of political elites that were at the table during the drafting of new transformational constitutions (Stroh and Heyl 2015: 173). Some were able to remain in control by surfing these waves of change, some

[1] For the purpose of this contribution, constitutional review is defined as the formal power of a national institution to (a) set aside or strike legislation for incompatibility with the national constitution, or/and (b) arbiter on disputes related to vertical or horizontal fragmentation of power between different institutions, or/and (c) validate national elections. Constitutional review as understood here does not have to be exercised by courts.

were swept away by it, while others still made arrangements which allowed them to swim with the current.[2] By way of example, all Francophone West African countries designed separate constitutional review bodies in their post-1990 constitutions. Burkina Faso and Mauritania faithfully copied the French model of the time, with all its limitations in providing a viable basis for constraining the government and protecting constitutional rights. In both countries, the authoritarian presidents and their entourage remained in power for nearly another 15 years. In contrast, as part of a 'civil coup d'état', Benin's Constitution emerged from a National Conference in which all parts of society were represented. With creative borrowing and African innovations, the design of Benin's Constitutional Court went way beyond the French model (Stroh and Heyl 2015: 174). A similar variety, though with a different dynamic can be observed in Anglophone common law countries. As former British colonies there was no constitutional review template to copy. By and large the US model served as an initial inspiration, though Anglophone countries were much more experimental than the Francophone counterparts (see below). In part after several years of independence wars, Lusophone countries gained independence in the mid 1970s, interconnected with the Carnation Revolution in Portugal. Their current 'hybrid' approach to constitutional review has strong similarities with the one developed in Portugal. It might be more than sheer coincidence that the most unique model on the continent was created in Ethiopia, the only country in Africa that has never been colonized.

OVERVIEW

A brief mapping of the nature and the scope of models of constitutional review across the African continent ties in with the colonial imprint (Fombad 2017). Several Anglophone common law countries still adhere to the model in which constitutional review is exercised within the ordinary court hierarchy, with a Supreme Court at the top. Judges are qualified lawyers and serve in their position until retirement age. Constitutional review of laws happens as part of concrete disputes in normal proceedings. It is decentralized and each court can set aside a law it deems in violation of the constitution. Consistency is achieved through the possibility of appeal and the principle of *stare decisis* within the court hierarchy. Yet, even within this framework, there is considerable variation, some of which deviates significantly from common law tradition. For

[2] According to Ginsburg and Versteeg (2013), political elites influence the drafting of the constitution depending on their perceived future role in the system: when they foresee losing power after constitutional reform, they are more likely to institute a strong form of constitutional review to safeguard their future political interest ('political insurance').

example, while Ghana and The Gambia kept this decentralized approach for fundamental rights violations, they centralized constitutional review for all other questions of constitutionality (Arts 130 and 127 respectively). Sierra Leone went a step further, centralizing fundamental rights review too (Art. 28). If the question of the constitutionality of a law arises in any court proceeding, the respective court must pause the trial and refer it to the Supreme Court. Zambia not only introduced centralized constitutional review, but also redirected it to a new institution, a constitutional court (Art. 128) which is ranked equivalently with the Supreme Court (Art. 121). In Zimbabwe, decentralized review prima facie remained intact, but after adoption of a new Constitution in 2013 the order of constitutional invalidity made by another court must be confirmed by a specialized Constitutional Court (Art. 167). The same procedure applies in South Africa (Art. 167), with the exception that following its reform in 2012, the Constitutional Court has become, despite its name, an apex court of general jurisdiction (Fowke 2017: 162). A *sui generis* procedure is applied in Uganda. Courts may refer questions of constitutionality arising in proceedings to the Court of Appeal sitting as the Constitutional Court (though this is at the referring court's discretion unless a party to proceedings demands this) (Art. 137 para. 5). The Constitutional Court's decision on the question must then be respected (Art. 137). Yet, this decision can be further appealed to the Supreme Court by the aggrieved party (Art. 132).

The templates of former colonizers' constitutional review approaches are also visible in the civil law realm. To different extents, all five former Portuguese colonies[3] on the continent have incorporated aspects of Portugal's 'hybrid' system of constitutionally reviewing legislation, navigating between the decentralized and centralized models. Ordinary courts have the authority not to apply laws they deem unconstitutional while rendering their judgments (decentralized element). Yet, these judgments can be appealed to the Constitutional Court[4] (centralized element), which then has the power to invalidate the relevant law (or to confirm its constitutionality).[5] The most characteristic pattern of the French model of constitutional review is the a priori abstract review of laws prior to their promulgation. Constitutional pre-view is mandatory for organic laws, and this pre-view procedure may be initiated for other laws by selected officials (the president, prime minister, or president

[3] Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe. Equatorial Guinea, a Portuguese colony until 1778 is not considered here.

[4] A separate constitutional court or council exists in Angola, Cape Verde, Mozambique, and São Tomé and Príncipe. In Guinea-Bissau, the Superior Tribunal of Justice, the apex court within the judiciary is in charge (Art. 126(1)).

[5] Angola (Art. 180(2)(d) and (e)); Cape Verde (Arts 221 and 28); São Tomé and Príncipe (Art. 149).

of the National Assembly), or by a certain number of members of the legislature, and this latter option offers smaller opposition parties an opportunity to obstruct the legislative process on constitutional grounds. Francophone countries in Africa imitated this type of check but went further: long before France's 2008 constitutional reforms, many had instituted some form of *ex post* review in jurisdiction of the court or council, predominately as 'exception of constitutionality' (incidental control of the constitutionality of a law) (Ngenge 2016: 93).[6]

Constitutional courts and councils are the dominant institutional choice for constitutional review bodies in Africa. Almost all civil law countries have opted for this model (with the single exception of the Supreme Tribunal of Justice in Guinea-Bissau), and an increasing number of common law countries have also introduced it (South Africa, Sudan, Zambia, Zimbabwe).[7] In general, their members are selected for a distinct term which does not guarantee security of tenure until retirement age.[8] Term-lengths vary from four (subject to renewal)[9] to 15 years (e.g. Art. 186 Constitution of Zimbabwe). While members of these bodies must be trained lawyers in Anglophone and Lusophone countries, a considerable number of Francophone countries permit non-lawyers too.[10] Independently of which type of institution is chosen (whether a Constitutional Court, Constitutional Council, or Supreme Court), the method of selecting or appointing members remains very distinct between civil law and common law countries. Most Francophone and Lusophone countries follow the 'representative' method: different institutions or officials can pick nominees unimpeded (Ginsburg 2014: 53). Some do not limit themselves to the usual officials,[11] but have members nominated by a wide range of different institutions. By way of

---

[6] Yet, the proliferation of 'exception of constitutionality' in Francophone Africa was to a certain extent informed by an initiative of the Mitterrand administration in 1989–90 to introduce concrete review in France, but this failed (Stroh and Heyl 2015: 177).

[7] A special type of constitutional court was established in Tanzania: The 'Special Constitutional Court' operates only as the arbiter of potential disputes between Tanzania mainland and Zanzibar.

[8] Though Zimbabwe after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment (Art. 186).

[9] Four countries allow for the renewal of terms: Benin (five years/one renewal), Republic of Congo (four years/two renewals), Mozambique (five years/no limits on renewals), Togo (seven years/no limits on renewals).

[10] See Benin (Art. 115), Burkina Faso (Art. 153), Democratic Republic of Congo (Art. 159), Ivory Coast (Art. 128), Gabon (Art. 89), Togo (Art. 100), Tunisia (Art. 118).

[11] President of the Republic and president of the National Assembly (and if a second legislative chamber exists also occasionally the president of the Senate). It is noteworthy that France departed from this method as part of the 2008 constitutional

example, in Niger, six different bodies or officials select the seven judges of the Constitutional Court.[12] In contrast, common law countries predominately opt for a consensual approach: various institutions are involved in identifying candidates. Again here, some African countries do not limit themselves to two institutions (as in the US) but involve a greater number of actors. In Nigeria, the Judicial Service Commission provides a list of candidates from which the president appoints a judge who is then subject to approval by the Senate. In Ghana, the president appoints judges on the advice of the Judicial Council and in consultation with the Council of State, and these are then subject to approval by parliament.[13]

Intuitively, one would assume that in a more heterogeneously composed judicial body, individual judges enjoy greater leeway in expressing their own view. But again here, the respective common law or Francophone civil law conventions prevail. The French tradition of 'viewing the judiciary as a faceless collectivity dispensing justice' (Garoupa and Ginsburg 2008: 7) prevents judges from writing dissenting opinions and conceals their voting behavior from the public, while in common law Africa, dissenting opinions are a common feature of jurisprudence. The stark contrast in the style and character of constitutional review judgments between Francophone and Anglophone countries in Africa might best be illustrated by looking at decisions that go to the essence of constitutional theory and the core of a constitution's existence: the unconstitutional constitutional amendments doctrine. In both countries, Benin and Kenya, the point of departure is similar: How does one prevent opportunistic political elites amending the constitution in their favor? While the three most important decisions by the Constitutional Court in Benin on these matters do not exceed 40 pages taken together (DCC 06-74 of 8 July 2006; DCC 11-067 of 20 October 2011; DCC 14-199 of 20 November 2014), a corresponding consolidated High Court decision in Kenya covers 321 pages (*David Ndii and Ors v. The Attorney General and Others* (2021)), while the confirming decision of the Court of Appeal, as well as the subsequent partly overturning of these decisions by the Supreme Court each fill around 1,000 pages (1089/928 respectively). In Kenya, on top of the judgment authored by the respective presidents of the Court of Appeal and Supreme Court (SC), the six other judges in both courts each delivered separate opinions, partly concur-

reform as the French parliament can now veto an appointment by a super majority (see Art. 13).

[12] President of the Republic (1); Bureau of the National Assembly (1); collegium of magistrates (2); collegium of lawyers (1); collegium of law professors (1); association(s) of human rights defender (1); see Art. 121.

[13] See Art. 231 for Nigeria and Art. 144 for Ghana.

ring and partly dissenting, and most of these exceed 100 pages (Civil Appeal No. E291 of 2021/SC Petition No. 12 of 2021).

The Appendix to this chapter provides a table summarizing the main design features of constitutional review in African jurisdictions. The internal diversity is easily apparent there.

THREE CASE STUDIES: BENIN, KENYA, AND ETHIOPIA

The remaining section of this chapter aims to illustrate different dynamics, variations, and innovations of constitutional review in Africa by analyzing the fate of constitutional review in three countries. Reflecting upon the richness and diversity of constitutional review institutions and processes on the continent by focusing on three jurisdictions can hardly do justice to the continent's diversity of approaches. Yet, looking at Benin, Kenya, and Ethiopia in some detail offers a first valuable insight into the continent's manifoldness and creativity in their approaches to selecting appropriate design options. Benin represents Francophone Africa, civil law jurisdictions, centralized constitutional review; and Kenya is representative for Anglophone Africa, common law jurisdictions, and decentralized constitutional review. Beyond, both also serve as worthwhile case studies in their own right. The Constitutional Court of Benin is both the first and (formally) the most powerful Constitutional Court in Africa (if not the world) because of the design's inclusion of competences from both the French and German models of constitutional review as well as the addition of *sui generis* powers. For a long time, it was one of the most active courts on the continent. Kenya stands out for having largely succeeded in reforming a corrupt and executive-hijacked judiciary from scratch through their 2010 Constitution. Comparatively, both courts have in common that they have successfully limited opportunistic attempts by their respective political elites to enact constitutional amendments in their favor. Coming from two different legal cultures and navigating within these logics, they rendered judgments on the subject of unconstitutional constitutional amendments that have creatively enriched debates in constitutional theory. Ethiopia is the African complement to the group of countries (Finland, the Netherlands) that rely predominately on non-judicial constitutional review mechanisms. Unspoiled by colonial templates, Ethiopia's approach has been shaped by the historical experience and challenges at the time its Constitution was drafted in 1994.

BENIN: THE TRIPLE OUTLIER

The Constitutional Court of Benin (CCB) was not only the first constitutional court in sub-Saharan Africa, it was also one of the most powerful and active

ones. Though institutionally still strong, it lost its self-described role as the 'keystone of the entire politico-legal system' (see DCC 33-94 of 24 November 1994) after a re-shuffle of the bench in 2018. In the context of this chapter, three aspects of the court's trajectory are worth a more detailed reflection: (1) its constitutional design, which probably makes it, at least formally speaking, the most powerful court in the world; (2) invoking the need to safeguard the spirit of the National Conference it usurped the role of the constituent power and extended the constitution's eternity clause; and (3) its vulnerability due to the Constitution's provisions on judicial tenure.

Historical Context

The design of Benin's 1990 Constitution and the role their Constitutional Court played in the first 25 years of its existence was shaped by two important prior historical periods. In the 12 years after gaining independence in 1960, Benin was plagued with political turbulence; five successful and three failed *coups d'état*, five different constitutions and 14 changes of presidency led to the country becoming known as 'the sick child of Africa' (GriooCom 2010). After Major Mathieu Kérékou came to power through another military coup in 1972, the following 17 years saw a greater degree of political stability, albeit stability that came at the cost of the country being transformed into a Marxist-Leninist dictatorship which actively abused human rights and transformed the country into a police state (Adjolohoun 2012). In 1989, as the head of an effectively bankrupt state and confronted with nationwide public unrest, Kérékou accepted the establishment of an assembly of 'all the living forces of the nation, whatever their political sensibilities' (Rotman 2004: 283). It was meant to discuss structural reforms, but transformed itself from a consultative body into a sovereign *Conférence Nationale* (often referred to as civil *coup d'état*) (Nzouankeu 1993: 44)[14] that laid the foundation for a new constitution.

The Constitution of Benin, adopted in December 1990, became a true autobiography of the nation, directly addressing the history from which it emerged and the particularities it faced, drafting provisions that were aimed at preventing a resurgence of precisely those political dynamics that the country had suffered since independence. Next to other pertinent features in the Constitution (Rotman 2004: 285), the Constitutional Court was designed as *the* institution guaranteeing political stability, controlling other branches of government, and promoting human rights. Structurally, the CCB operates outside the ordinary

[14] The self-claimed sovereignty of the national conference meant that it was able to set its own agenda for the transformation and that its decisions were binding for the government, thereby becoming the supreme political organ of the state.

judicial system, which is manifested in the Constitution through its functions being described under its own title (i.e. it is independent of the executive power, the legislative power, and the judicial power).

1 Powers and access

The uniqueness of Benin's Constitutional Court stems from two aspects of its design. Firstly, its subject matter jurisdiction surpasses the jurisdictional boundaries traditionally associated with constitutional courts (e.g. Germany's) and constitutional councils (e.g. France's), not just the combination of competences possessed by those institutions, but also through innovating and adding further powers to the Court's toolkit; powers which partially resemble those normally vested in national human rights commissions (Rotman 2004: 294). Secondly, the accessibility of the CCB is unparalleled elsewhere.

One part of the Court's broad jurisdiction was informed by the competences vested in the French *Conseil Constitutionel* at that time: the constitutional a priori review of (organic) laws, the legislature's internal code of procedures before their promulgation, and international agreements before their ratification as well as the oversight that ensured the proper conduct of presidential and parliamentary elections and referendum proceedings (Art. 117 of the Constitution of Benin). In addition, like the German Constitutional Court, the CCB is competent to adjudicate any dispute between state institutions, possessing the authority to review laws *ex post*, either by way of 'exception of constitutionality' (concrete judicial review or incidental control of the constitutionality of a law) or by a petition for constitutional review if a law (or any other act committed by a public authority) is alleged to be in violation of a fundamental right (this includes rights addressed in the African Charter for Human and Peoples' Rights, which Article 7 provides 'shall be an integral part of the present constitution') or with issues dealing with the respect for the constitutional order. On top of all this, the CCB is granted the authority to assume jurisdiction on its own initiative (*auto-saisine*) in human rights related issues by, for example, extending the scope of referral, accepting applications that would be otherwise inadmissible, or taking up withdrawn cases (Holo 2017: 315, 318).

Besides its broad jurisdiction, the CCB's accessibility is unmatched, not only within Africa but globally (Adjolohoun 2017: 56). The Constitution empowers a variety of actors to participate in the maintenance of the constitutional order and the defense of human rights by calling the CCB. By way of comparison, while in most Francophone states in Africa (and in France), referrals of bills for a priori constitutional review by the legislature requires consensus among a specified percentage of the legislative assembly's members, in Benin a bill can be referred by a single member of parliament. And unlike in Germany, citizens need not exhaust other legal remedies before claiming a violation of their fundamental rights at the CCB. Yet, the Court's

power does not end there. Through an *actio popularis*, without any standing requirements of individual interest, any citizen, association, or human rights non-governmental organization has competence to seize the CCB with regard to any alleged unconstitutional laws, texts, and acts (Art. 120 and Art. 22; Holo 2017: 317). Moreover, hardly any formal requirements exist; no lawyer is required, and '[b]esides the price of a stamp for those outside of Contenou, filing is free' (Rotman 2004: 294).

Over the years and until recently, the CCB fulfilled its mandate as the guarantor of human rights and the guardian of checks and balances in a remarkable manner, becoming the showpiece for a constitution with constitutionalism in Africa. From its inception until 2018, the CCB issued 5,951 decisions, some 2,600 related to human rights, and 830 related to electoral matters. Almost half of the decisions handled the abstract review of laws (Bado 2018: 227).

On the human rights front, prominent decisions of the CCB concerned equality and non-discrimination (DCC 96-067 of 21 October 1996; FCC 02-144 of 23 December 2002; DCC 09-081 of 30 July 2009), freedom of association (DCC 16-94 of 27 May 1994; DCC 33-94 of 24 November 1994), police practices (DCC 98-065 of 5 August 1998; DCC 99-011 of 4 February 1999; DCC03-088 of 28 May 2003), the duration of judicial proceedings (DCC03-119 of 28 August 2003), and the unconstitutionality of the death penalty (DCC 12-153 of 4 August 2012). Besides dealing with substantive matters, the CCB has progressively enlarged the scope of remedies available for identified human rights violations. While in the early years of its existence its decisions were limited to declaratory orders and finding violations, from 2002 onwards the CCB also began awarding compensation and reparations (though initially on a rather unprincipled basis) (DCC 02 of 4 June 2002; Adjolohoun 2013: 255).

Within an executive-heavy constitutional framework following the French model that is still found throughout most Francophone African constitutions (Fombad 2017: 65), the CCB was also active in the maintenance of the separation of powers and the system of checks and balances, shaping the functioning of state organs as well as the political landscape (Adjolohoun 2013: 262). It protected the judiciary against some executive interference,[15] clarified its

[15] By way of examples, it declared a presidential decree suspending court orders (DCC 07-175 of 27 December 2007) or an order of the minister of justice to release a detainee (DCC 01-018 of 9 May 2001) unconstitutional as encroaching into the sphere of the judiciary; it also required certain minimum standards to be respected when re-posting a judge even in the exercise of appointment prerogatives by the executive (DCC 06-063 of 20 June 2006); it specified the limited role of the President in the appointment procedure of judges (DCC 00-054 of 2 October 2000).

own position vis-à-vis ordinary courts,[16] settled intra-parliamentary dissent,[17] sorted out the procedural interplay between the executive and the legislature in cases of urgency (DCC 27-94 of August 1994), etc. Similarly to human rights related decisions, the CCB was confronted with the question to what extent it may issue specific orders or make injunctions when state organs acted unconstitutionally or did not comply with their decisions. Initially, the CCB was hesitant when making orders pertaining to the government, as it assumed doing so would amount to disrespecting the concept of separation of powers (DCC 95-024 of 6 July 1995). Over time this view changed, and the CCB began issuing orders for the performance of specific actions within specific time frames (DCC 06-067 of 12 January 2005; Adjolohoun 2013: 268), going further still by adding sanctions (such as removing non-compliant MPs from prominent parliamentary positions) when the CCB's deadlines were not kept (DCC 03-077 of 7 May 2003).

2 Judicial activism: between constitutional guardian and constituent power

Besides serving as an active guardian of the Constitution as illustrated in the previous section, the CCB went further in two ways: (1) deriving '*principes à valeur constitutionelle*' (constitutional principles) from extensive interpretations of parts of the preamble that were held to reflect the spirit of the National Conference and were then utilized as unwritten complements to the constitution; and (2) re-drafting the existing constitutional text. Comparative constitutional law scholars may notice two parallels here: firstly, with the French Constitutional Council's invention of the 'bloc de constitutionalité' through a decision in the early 1970s (Stone Sweet 2007: 80), and secondly with the judicial activism of the Supreme Court of India that led to the creation of the basic structure doctrine and the re-drafting of certain constitutional provisions of the Indian Constitution (e.g. Article 124 [appointment of Supreme Court judges] (Abeyratne 2016)). After having suffered from military coups in the 1960s and being freed by a civil coup in 1990, citizens of Benin may have thereby witnessed a judicial coup in the new millennium. While done with the best intentions (i.e. to protect democracy), these innovations might have come at the expense of constitutionalism. We discuss each in turn.

---

[16] It clarified that all judgments of ordinary courts that are based on a piece of legislation that had been declared unconstitutional are also automatically invalid (DCC 09-087 of 13 August 2009).

[17] Unconstitutional suspension of several members elected for the new bureau of parliament by the dean (DCC 03-077 of 7 May 2003).

2.a Constitutional principles

Two unwritten constitutional principles gained prominence in the jurisprudence of the CCB. One relates to certain rights possessed by political minorities in parliament (DCC 09-002 of 8 January 2009),[18] and the other, which deserves specific scrutiny in the context of this chapter, to (unwritten) requirements for constitutional amendments.

As with other constitutions, the Constitution of Benin provides the mechanism for its own amendment. Articles 154–155 offer a clear two-step procedure with two different options for the passage of amendment bills. After being introduced either by the president or by members of parliament, three-quarters (3/4) of parliament must vote for the bill's further consideration and subsequent deliberation. The second step, the approval of the amendment bill, requires either an approval by a four-fifths (4/5) majority in parliament, or a popular referendum. In essence, the Constitution can be amended by parliament alone. This is what happened in June 2006 with the proposed constitutional amendment bill No. 2006/13 that was approved by 71 out of 83 members of parliament. The bill sought to extend the length of parliamentary terms of the Constitution from four to five years with immediate effect, nominally for the purpose of grouping parliamentary and local elections so as to save money.[19]

The bill was challenged, and the CCB found procedural irregularities that violated both parliament's internal rules of procedure (that turned the bill unconstitutional as the CCB considered these rules to be part of the 'constitutional bloc') and the constitutional requirements of Articles 154–155 (DCC 06-74 of 8 July 2006). Yet the CCB went further still. It identified a violation of the constitutional principle of 'national consensus'. According to the CCB, this requires any amendment of the Constitution to follow the public and open process of the National Conference described in the preamble, but the CCB declined to define the specifics of what such a process requires. Later decisions described this principle further, stating 'far from signifying unanimity, [it] is first and foremost a process of choice or decision without going through a vote; … it allows, on a given question, to find, through an appropriate path, the solution that satisfies

[18] The CCB held that the preambular commitment to 'pluralistic democracy' implies that 'the winner takes all' principle does not apply to the representation of political parties in the Bureau of Parliament and its committees, in which also the party or the coalition of parties with the lowest number of members need to be represented.

[19] While the official reasoning bears some validity, this attempt caused civil resistance as many citizens feared a return of the personalization of power through what was called 'opportunistic amendments'; the process also fueled the '*ne touch pas ma constitution*' ('hands off my constitution') campaign further, born in 2005 based on rumors that the incumbent president may intend to overstay his mandate through constitutional amendment.

the greatest number of people' (see DCC 10-49 of 5 April 2010 and DCC 10–117 of 8 September 2010). Such descriptions still fail to properly articulate any substantive definition of the 'national consensus' concept.

The next opportunity came only after the Court's re-shuffle in 2018. In a judgment reviewing a 2019 constitutional amendment bill, the CCB did not mention the principle anywhere. As if the 'national consensus' principle had never existed, the CCB formalistically stuck to a straightforward interpretation of Articles 154–155 (DCC 19-504 of 6 November 2019). Yet, this was not the end of the principle, as the African Court on Human and Peoples' Rights (ACHPR) revived it while assessing whether Benin's constitutional amendment process disrespected the African Charter on Democracy, Elections and Good Governance (ACDEG). Article 10(2) of ACDEG stipulates that 'State Parties must ensure that the process of amending or revising their Constitution is based on a national consensus including, where appropriate, recourse to a referendum'. In interpreting the meaning of 'national consensus' in the Charter, the ACHPR borrowed heavily from the CCB's previous explanations of the principle of national consensus in the Beninois context to find that Law No. 2019-40 violated Article 10(2) (*The Matter of XYZ v. Republic of Benin Application* No. 010/2020, 27 November 2020, para. 105).

2.b Rewriting text

As part of its judicial activism, the CCB also took liberties to extend the constitution's eternity clause. Eternity clauses introduce a normative hierarchy within the constitution, drawing an explicit distinction between amendable and immutable constitutional norms or principles. From the perspective of the institutions that are authorized to amend the Constitution (like parliament or the people in a referendum in Benin), the latter are unamendable. The constitution-making power binds the constituted powers in the constitution, including those with amendment power by setting a frame of basic principles and features which determine the totality of the constitutional order and the 'spirit of the constitution'. These form the constitution's identity and its basic structure. Eternity clauses are common in African constitutions, albeit only in civil law countries. While almost all civil law countries (except for Mozambique) do have an immutable clause (including Benin), hardly any common law countries included them in the constitution (with the exception of Namibia).[20] In some countries without an explicit eternity clause, courts with the authority of constitutional review have developed a doctrine that draws a distinction between amending and replacing the constitution. While the former task is delegated to various institutions in the constitution, most constitutions are silent about their replacement, an authority implicitly vested

[20] Constitutional indemnity clauses for persons acting under the authority of previous regimes are not counted. See e.g. Art. 37 of Schedule 2 of the Constitution of Ghana.

in the people's primary constituent power. Yet, due to the lack of an explicit textual distinction, the courts use this distinction to empower themselves to determine what belongs to a constitution's basic structure or identity and is thus unamendable.

To the knowledge of the author, the CCB is currently the only court in the world that has empowered itself to 're-draft' and extend an explicit and existing frame provided by the constitution-making power (for the more ambiguous Kenyan *BBI* case, see below). This happened in 2011. Organic Law No. 2011/27 was meant to regulate the organization of a constitutional referendum. Its Article 6 recapitulated the Constitution's eternity clause (Art. 156), listing issues that could not be subject to a referendum on constitutional amendments: the integrity of the country, the republican form of government, and the secularity of the State. The CCB declared Article 6 unconstitutional as it failed to include three additional items to the list: the presidential system of government, the presidential age limit for re-election, and the presidential term limit (DCC 11-067 of 20 October 2011). The Court justified this extension by referring to the 'fundamental options' of the National Conference. And indeed, when the people (exercising their constitution-making power) had to approve the constitutional draft by referendum on the 2 December 1990, they were not left with a binary yes/no option, but had to decide whether the Constitution (if approved) would have a presidential system of government rather than a semi-presidential one, and whether there should be an age limit for presidential elections (Gisselquist 2008: 797). As manifested in Articles 44 and 54, the people decided in favor of both. While DCC 11-067 referred to the constitutional deficits of an organic law related to constitutional referenda and therefore made reference to one mode of constitutional amendment only (referendum track), the CCB clarified in a decision three years later in August 2014 that the substantive limitations were meant to apply for constitutional revisions in general (DCC 14-156 of 19 August 2014).

Conceptually, one may interpret these 'fundamental options' as constitutionally privileged since the constitution-making power (the people) were directly consulted on these questions, rather than simply being asked to approve the drafters' text. Yet, this line of argument does not justify the inclusion of the presidential term limit clause. Nonetheless, the CCB's mission to prevent opportunistic amendments went another step further still. As eternity clauses are eternal for the constituted powers in a constitution, but not for the original constituent power, the only way to overcome immutable clauses is by drafting an entirely new constitution or, to use the French terminology, by creating a 'New Republic' (*nouvelle république*). Such a strategy was chosen by Denis Sassou Nguesso, president of the neighboring Republic of Congo, to overcome the immutable term limit provision that barred him from re-running in the 2016 elections. To prevent a similar dynamic in Benin, the CCB in its decision DCC 14-199 emphasized that the creation of a New Republic cannot

be initiated by a constituted power (i.e. the president), but must emerge from the original constituent power. This precluded the possibility of initiating a top-down replacement of the 1990 Constitution, although the Court declined to clarify how an 'emergence' of a new constitution from the people might happen (DCC 14-199 at 10).

3 The CCB's Achilles heel: the judges' tenure

Constitutional review is the most political activity of the third branch of government. It equips judges with politically charged powers, making such institutions a target for interference and control by the other branches. Constitutional provisions on their independence aim to insulate courts from these interventions by reducing the number of instruments at the disposal of their potential adversaries (Melton and Ginsburg 2014: 191). Again, the Constitution of Benin is remarkable in its design, though in this respect its uniqueness is less admirable. Of lesser concern is the appointment procedure for the seven judges, which is a rather conventional copy of the French model: three members are appointed by the president and four by the Office of the National Assembly. Of course, one might question whether a full-fledged Constitutional Court should opt for the same selection procedure that was designed for a different kind of institution, since the French *Conseil* was originally limited to *ex ante* constitutional review. Some scholars characterize this as a mechanism of 'political appointment', but the political impact does not differ substantially from the German or US models. It is commonly accepted that political actors should have some say in selecting judges in order to increase their commitment to obeying judgments that are not in their favor (Böckenförde and Ngenge 2016: 59). The fact that when the incumbent president's party enjoys a majority parliament he or she is offered a virtually free hand to appoint all members of the Court is not peculiar to the Benin model either.

More worrisome is the combination of three other elements which all relate to the judges' tenure: their term is short (only five years), renewable (once), and the judges are not appointed in a staggered manner, but all at once as a cohort. Each single element can be found in other constitutions, but having all three together is unique to Benin, which has been the CCB's Achilles heel and a ticking time-bomb.

According to the ACHPR, having renewable terms without any provision stipulating the criteria for renewal already amounts to a violation of the individual independence of judges pursuant to Article 26 ACHPR (ACHPR Application 010/2020 *XYZ v. Republic of Benin*, para. 69). The non-staggered short terms are similarly problematic: as presidential election cycles are also five years long, any president in his second year in office has the opportunity to appoint three judges (with a National Assembly appointing four). A re-elected

president then has the choice either to keep the current judges or appoint new ones in their second term.

A recent study (Stroh 2018: 600–615) analyzed to what extent Benin's presidents have used their nomination power between 1993 and 2013 to 'streamline' the Constitutional Court. Yet, the identified closeness between the presidential camp and the judges in office did not prevent the CCB from rendering remarkable and occasionally even executive-hostile judgments (Kohnert and Preuss 2019). The bomb exploded in 2018, two years after Patrice Talon was elected the new president, and after the implementation of his campaign pledges and reform efforts had been thwarted; partially by the legislature and partially by the court. The new cohort of judges is now headed by the president's former personal lawyer, Joseph Djogbénou, who had been his Minister of Justice over the two preceding years.[21] Subsequent reversals of case law, including the validation of laws previously rejected as unconstitutional, introduced a rapid change that was accelerated by the new judges' disregard for the judge-made 'principles of constitutional value' previously utilized.

CONSTITUTIONAL REVIEW IN KENYA: A PROMISING U-TURN

Kenya's judicial system is one of Africa's few remaining adherents of the 'American' decentralized model of constitutional review. All superior courts[22] have the authority to review the constitutionality of laws and decide on their validity in cases before them. An assessment of Kenya's constitutional review set-up and its trajectory thus cannot be limited to an analysis of the apex court but must instead cover the entire judiciary.

Historical Context

The current structure of the judiciary is based on the 2010 Constitution. Kenya's second constitution after independence marks the end of a long and troubled constitutional reform process whose beginning may be dated back to 1991, when the wind of change after the fall of the Iron Curtain

[21] Joseph Djogbénou resigned from the Constitutional Court in July 2022, one year before the end of his first term. He became the President of a new political party, emerging from the fusion of the Progressive Union (UP), a party of the presidential majority, and the Party of Democratic Renewal (PRD).

[22] Superior Courts are High Court (including the Land and Environment Court and the Industrial Court), Court of Appeal, and the Supreme Court. Subordinate courts are Magistrate Courts, Kadhi Courts, Martial Courts, and local Tribunals established by an Act of Parliament.

initiated pro-democratic dynamics across Africa which did not leave Kenya untouched (Murray 2013: 2020). One of the constitution's major tasks was to fundamentally reorganize Kenya's judiciary to restore public confidence in it. The loss of trust resulted from a culmination of factors over several decades which thus required different sets of responses. The independence constitution of 1963, negotiated under British auspices at Lancaster House, had been amended significantly over time, progressively stripped of most of its initial democratic protections and power sharing architecture (Ghai and Ghai 2011: 10). By the end of the 1980s, Kenya was *de jure* a one-party state governed by an authoritarian regime with a judiciary subordinated to the executive.[23] The judiciary had been deliberately underfunded and judicial independence curtailed by, *inter alia*, removing judicial security of tenure and procedural safeguards. Next, the judiciary was complicit in the government's abuse of power, making sure that 'executive wishes were executed by both superior and subordinate courts without deviation' (Mutua 2001: 113). Courts occasionally used their contempt jurisdiction to penalize journalists and newspapers for reporting about state corruption (Van Zyl Smit 2013: 4). Aside from the sort of executive capture and complicity that has been witnessed in many countries under authoritarian rule, Kenya's judicial system suffered from an inherent 'culture of corruption'. A 2003 report estimated that 50 percent of the judges and 30 percent of the magistrates were implicated in corruption[24] and even gave estimates of the average price tags for securing favorable judgments in various types of cases (Van Zyl Smit 2013: 4).[25] Transparency International's 2010 Global Corruption Barometer indicated that 43 percent of Kenyans who sought services from the judiciary reported paying bribes (Gainer 2015: 3). The slogan 'Why hire a lawyer if you can buy a judge?' mirrored many Kenyans' views of judicial integrity (Murray 2020: 208).

Thus, (re-)building confidence in Kenya's judiciary required not only a re-structuring of the institutional set-up in line with international standards of judicial independence, but also a strategy to tackle systemic judicial corruption.[26]

---

[23] The president appointed the Chief Justice and controlled the membership of the small Judicial Service Commission that was in charge of the other judicial appointments.

[24] Report of the Integrity and Anti-corruption Committee of the Judiciary of Kenya (Nairobi, Kenya, September 2003), 31.

[25] As an immediate result of the report, a so-called 'radical surgery' process followed, but it was widely criticized as the entire process was in the hands of the government that hand-picked judges sitting in tribunals to assess their judicial colleagues (ibid., pages 6, 11).

[26] In addition to addressing the existing corruption in a narrow sense, the general transition of an inherited judiciary under authoritarian rule to one that serves the new

The latter was addressed predominately by the Constitution's requirement to establish a process for individually screening all judges and magistrates for their 'suitability' to continue to serve in accordance with the new constitutional values and principles (Schedule 6, Section 23(1)).[27] The Act to implement these requirements (Vetting of Judges and Magistrates Act 2011) was partially informed by the preceding national debate and the lessons learned from previous initiatives. As the process was intended to overhaul a corrupt judiciary, the relevant constitutional clause explicitly exempted this screening process from the new constitutional provisions related to judicial independence and protection of tenure of judges (Murray 2013: 782). The vetting board carrying out the judicial screenings consisted of six Kenyans, of whom three were lawyers and three foreign Commonwealth judges (see Vetting of Judges and Magistrates Act 2011, Section 7 and 9.) It vetted 53 judges and 298 magistrates, determining that 11 judges and 14 magistrates were unsuitable for judicial office, which led to their removal from the judiciary.[28] By and large, this 'vetting process' secured public support and was central to the founding of a 'new' judiciary under the new constitutional order, as it also indirectly created space for building a reform culture (Gainer 2015: 9). It was complemented by the explicit constitutional command to remove the former Chief Justice and Attorney General from their respective offices (Schedule 6, Sections 24 and 31(7)). The Kenyan model adds fresh aspects to the pool of global experiences from countries in the process of transitioning to constitutional democracy and their struggles and searches for effective ways of ensuring the integrity of an inherited judiciary.

Institutional Design

The High Court is the primary constitutional review institution. It has jurisdiction to hear any question regarding constitutional interpretation, including whether a right or fundamental freedom has been denied, violated, infringed, or threatened.[29] Its decisions can be appealed to the Appellate Court. Access

idea of constitutional democracy had to be handled. This was not addressed separately but fell under the wide grounds of scrutiny of the Judges and Magistrates Vetting Board.

[27] The 'values' and 'principles' were further specified through reference to Arts 10 and 159 of the Constitution.

[28] Judges and Magistrates Vetting Board, Vetting of Judges and Magistrates in Kenya: Final Report 2016.

[29] Art. 165(3); Art. 165(3)(i)–(iv) specify that this includes (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any

to the High Court had been facilitated through the explicit inclusion of public interest litigation. As part of the institutional reform, a new Supreme Court was established as the new apex court of the judiciary, above the existing Court of Appeal and High Courts. Besides being the court of last resort, it has exclusive jurisdiction over presidential election disputes and the authority to issue advisory opinions about any matter concerning county governments (Art. 163(6)). Decentralized review on matters related to the interpretation or application of the Constitution is coordinated by a guaranteed right to appeal from the Court of Appeal to the Supreme Court (Art. 163(4)(a)), and the explicit confirmation of *stare decisis*; i.e. all other courts are constitutionally bound to abide by Supreme Court decisions (Art. 163(7)).

To strengthen judicial independence, the 2010 Constitution profoundly reduces the institutional influence of the executive over the judiciary. It ends direct executive control over judicial appointments and removals by re-designing the composition of the Judicial Service Commission as an independent and inclusive body (Art. 171).[30] Furthermore, it provides for greater budgetary autonomy, providing for the judiciary to submit its annual budget directly to the National Assembly rather than incorporating it into the executive-prepared annual national budget (Art. 173). To fulfill its aspirations towards making the judiciary a driving force for political and societal transformation, the Constitution provides explicit guidelines which encourage courts to take a progressive and purposeful approach rather than limiting themselves to formalistic interpretations (see Art. 20(4)).[31]

Innovatively, the new judiciary has not only been granted necessary powers for it to act as a viable guardian of the Constitution and participate in the march towards constitutionalism, but has also become a key actor in the transitional phase between the Constitution's promulgation and its full implementation

---

matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Art. 191 (current legislation between national and county level).

[30] The Commission consists of 11 members. Next to the Chief Justice (Chair) and the Attorney General, members are four other judges elected from their peers, two lawyers chosen by the association of lawyers, a person nominated by the Public Service Commission and two members of the public nominated by the president and confirmed by the National Assembly.

[31] Art. 20(4) explicitly states the following: 'In interpreting the Bill of Rights, a court … shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights.' And Art. 259(2): 'This Constitution shall be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.'

(i.e. by taking the necessary actions to make the Constitution operational by, *inter alia*, enacting enabling legislation, creating new institutions, and re-structuring remaining ones) (Böckenförde 2017: 5). Constitutions, especially those reshaping the sphere of governance, are not self-executing but must be implemented, and their faithful operationalization is often resisted by the entrenched interests of the previous order. In anticipation of these political elites' lack of will to support such judicial transformation, the 2010 Constitution specified the means of its own implementation, setting up a timetable for the enactment of certain statutes and establishing a Commission for the Implementation of the Constitution (CIC), which assisted and oversaw the process (Schedule 5; Waiganjo 2016; Serwanga 2016). To strengthen legislative compliance, any person was able to petition the High Court when deadlines were not met, and the High Court was empowered to either make declaratory orders on the matter 'or transmit an order directing parliament and the Attorney General to take steps to ensure that the required legislation is enacted, within the period specified in the order' (Art. 261(6)(b)). If parliament failed to respond to such an order, the law required the Chief Justice to advise the president to dissolve parliament.

To sum up, despite the predominately negative experience Kenya had with their judiciary over an almost half-century period following independence, the 2010 Constitution put a lot of trust into the third branch of government by freeing it institutionally from executive shackles and equipping it with considerable constitutional review powers.

The 'New' Judiciary in Practice[32]

Deciding disputes over presidential elections

The culture of ethnic partisanship in Kenya combined with the winner-takes-all logic of presidential elections mean that electoral results are widely contested on a regular basis, thus necessitating resolution by an arbiter widely accepted as impartial. One immediate driver of 2007's post-election ethnic violence was the opposition's refusal to settle the electoral dispute in a court that was perceived to be under executive control. Three presidential electoral results under the new constitution (2013, 2017, and 2022) were again disputed, and petitions were filed to the newly established Supreme Court. In all three cases, the Supreme Court's rulings were respected as final, despite widespread dissatisfaction. The Supreme Court's confirmation of the regularity and integrity of the 2013 presidential election received criticism for its lack of sound legal

[32] Thanks to Patriciah Joseph, Emily Kinama, and Walter Ochieng for their valuable input.

analysis (Harrington and Manji 2015; Wachira 2013). In 2017, in contrast to 2013, the Court did not focus on the correctness of the outcome, but on the process that led to the declaration of the results (*Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others* [2017], para. 224). By identifying flawed transmission processes and the electoral commission's unwillingness to comply with a court order, the Court found reasonable doubts about the integrity of the elections which led to the nullification of results and an order mandating fresh elections to take place within 60 days. In 2022 the Supreme Court unanimously upheld the result of the presidential election.

Ensuring constitutional implementation

The constitutional implementation scheme and its compliance mechanism had been tested to its limits in the context of the ongoing struggle to implement the constitutional requirement that 'not more than two-thirds of the members of elective or appointive bodies shall be of the same gender' (Art. 27(8)). After Schedule 5's regular compliance period + one year exceptional extension[33] expired, the High Court responded to a petition with an order of mandamus directing the Attorney General and the CIC to 'prepare the relevant bills for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution within 40 days'. Both institutions complied and presented implementation bills. Parliament's passivity prompted the filing of another petition in 2016, on the basis of which the High Court issued another order of mandamus 'directing Parliament … to take steps to ensure that the required legislation is enacted within a period of sixty (60) days'. Parliament took action only by appealing the decision, and although the appeal was dismissed by the Court of Appeal in April 2019, parliament remained inactive with regard to enacting the requisite legislation. In September 2020, the Chief Justice had to initiate the ultimate enforcement mechanism as stipulated in Article 261(7): he advised the president to dissolve parliament. Though the Constitution is explicit in granting no discretion to the president in the execution of the advice, the 12th Parliament remained in operation till the end of its term in 2022.

[33] In an advisory opinion on the request of the Attorney General, the Supreme Court explained Art. 81's stipulation that: 'The electoral system shall comply with the following principles [including the two-thirds clause]' does not demand for an immediate implementation prior to the 2013 elections. See: *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

Promoting fundamental rights

In the view of human rights protagonists, the judiciary's track record in promoting the Constitution's Bill of Rights is mixed, though promising judgments outweigh retrogressive ones for all three generations of human rights.

In *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR, Petition 15 and 16 of 2015, the Supreme Court declared mandatory death penalty for the crime of murder unconstitutional, affirming that sentencing is a judicial rather than a legislative function. In *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) [2021] eKLR, the Supreme Court affirmed that socio-economic rights (here, the right to housing) were judicially enforceable, and ensured compliance by ordering that structural interdict are remedies available to courts in Kenya in the context of human rights adjudication. It also classified international 'soft law' including General Comments and General Recommendations by various International Human Rights Enforcement Bodies (Committees) as valid interpretive aids in interpreting the Bill of Rights. In *Mohamed Ali Baadi and others v. Attorney General & 11 others* [2018] eKLR, the High Court affirmed the right to a clean and healthy environment as a fundamental right, a right which in that instant was violated as a result of a large infrastructure project. Beyond the substantive aspect of this right, the Court also stressed the procedural aspect, including the importance of public participation in environmental impact assessments.

In the area of public morals, the courts have a less liberal attitude, be it with regard to upholding the constitutionality of the criminalization of homosexuality (*EG & 7 others v. Attorney General; DKM & 9 others* (2016)) or with regard to reconfirming the constitutionality of challenged bans imposed by the Kenya Film Classification Board (*Wanuri Kahiu & another v. CEO – Kenya Film Classification Board Ezekiel Mutua & 2 others* [2020] eKLR (High Court)).

Settling institutional disputes and maintaining separation of powers

Nor have Kenyan courts shied away from preventing political institutions exceeding their constitutional roles or encroaching upon the court's power at the expense of others.

In *Matter of the Speaker of the Senate & another* [2013] eKLR, Advisory Opinion Reference 2 of 2013, the Supreme Court issued an advisory opinion regarding the Senate's place in the operation of the bicameral legislative system. The Court affirmed that attempts by the National Assembly and the National Executive to bypass the Senate in the enactment of the Division of Revenue Act (DORA) (which is the legislation that determines the allocation of funds between the national and county governments) were unconstitutional. This opinion was reconfirmed in *Senate of the Republic of Kenya & 4*

others v. Speaker of the National Assembly & another; Attorney General & 7 others [2020] eKLR, in which the High Court declared 23 laws passed by the National Assembly as unconstitutional as they failed to consult the Senate as the Constitution requires.

In *Law Society of Kenya* (2016) the High Court invalidated parliament's amendment of Section 30(3) of the Judicial Service Act 2011, as it violated the principle of judicial independence (*Law Society of Kenya v. Attorney General & another* [2016] eKLR, Constitutional Petition 3 of 2016). The Act had allowed the president to pick one of three nominees for the appointment as Chief Justice, rather than having only one nominee nominated by the Judicial Service Commission (JSC) that the president must then appoint. The High Court also defended judicial independence in *Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR, by reminding the president that according to Article 166 he is bound to appoint the 41 nominee judges presented him by the JSC without review, negotiation, or unreasonable delay, though President Kenyatta refused to follow this order for almost two years despite several court orders. In June 2021, he finally gazetted 34, but left out six (one had passed away in the meantime).

A recent landmark case was appealed up the judicial hierarchy through all three superior courts,[34] attracting a great deal of international acclaim. It allowed the High Court (HC), the Court of Appeal, and the Supreme Court to make full use of the Constitution's instruction that constitutional interpretation should be done in a manner that promotes the Constitution's purposes, values, and principles, so as to effectively prevent opportunistic amendments by a self-centered political elite that would dismantle this people-driven document's integrity. By doing so, they delved into constitutional theory and contributed pragmatically to the further development of the doctrine of 'unconstitutional constitutional amendments'. Here, the point of departure was a 'political handshake' between President Kenyatta and his rival Raila Odinga in 2018, followed by an executive-driven Building Bridge Initiative (BBI). This initiative was widely perceived as an attempt to capture the political system by an incumbent cartel. Based on suggestions of an executive-appointed BBI taskforce, the executive-selected BBI steering committee prepared recommendations for a far-reaching constitutional overhaul that morphed into an amendment bill. This bill was meant to be introduced via the popular initiative track of Article 257(1), which requires the gathering of 1 million signatures in a citizen-driven and citizen-centered process. All three courts held that

[34] *David Ndii & Others v. Attorney General & Others* [2021] KEHC 9746 (KLR); Civil Appeal No. E291 of 2021; Petition No. 12 of 2021.

this procedure was foreclosed for an initiative that clearly emanated from the executive rather than the people, thereby rendering this particular amendment initiative unconstitutional. One could have stopped here. But the High Court did not.

It continued to address a more fundamental question: Was there any part of the Kenyan constitution that could not be amended through the tiered procedures set forth under Chapter 16 of the Constitution (Arts 255–257)? Before delving into the High Court's analysis, it is worth noting that the constitutions of common law countries do not generally include any 'eternity clause' that would render certain constitutional provisions explicitly immutable, and Kenya is no exception. But it is also noteworthy that in contrast to the Indian Constitution, Chapter 16 of the Kenyan Constitution divides the constitutional provisions into two sets: those that can only be amended following a referendum and those that do not require a referendum. The first group lists ten different matters in Article 255(1) lit. (a)–(j):

> (a) supremacy of Constitution; (b) territory of Kenya; (c) sovereignty of the people; (d) national values and principles of governance as referred to in Art 10(2);[35] (e) Bill of Rights; (f) term of office of the President; (g) independence of the judiciary and the commissions and independent offices to which Chapter Fifteen applies; (h) the functions of Parliament; (i) the objects, principles and structure of devolved government; (j) or the provisions of this Chapter.

This list includes the Constitution's core commitments (and it is indeed difficult to think of any more basic or essential matters).[36] Unmistakably, by approving this provision of the 2010 Constitution, the *pouvoir constituant* empowered a special amending authority (including the people via referendum) to pass fundamental transformations of the Constitution including, in the words of Richard Albert, constitutional dismemberment (Albert 2021).[37] Yet, this did not prevent the High Court from finding that some matters listed in Article 255 (and others as to be determined by superior courts on a case-by-case basis) actually form part of the basic structure, and are thereby unamendable (HC, para. 474).

---

[35] Art. 10(2) includes: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

[36] They also correspond very much to what the Indian Supreme Court identified as elements of the basic structure of the Indian Constitution.

[37] http://www.iconnectblog.com/2021/08/constitutional-amendment-and-dismemberment-in-kenya/.

The High Court justified this inventive reading of the Kenyan Constitution by reference to the country's trajectory: it looked at both the past suffering under despotic political elites who amended the independence constitution according to and in the service of their own interests (the 'culture of hyper-amendment', HC, para. 406), and at the decades-long struggle for public participation in the building of a new constitution. And as the 2010 Constitution could not be passed without a substantial buy-in by political elites, the constitutional text could not always be explicit about what the people were actually seeking: a second independence, and a new social, economic, cultural, and political order for themselves (HC, para. 402). What the High Court's basic structure doctrine aimed to do was to go beyond the tiered procedures stipulated in Articles 255–257. The High Court's concept of the basic structure is not in opposition to constitutional amendments as such. Elements of the basic structure can be changed by recalling the 'primary constituent power', which according to the High Court can be activated through four sequential steps (HC, para. 474).[38] In essence, the High Court created a 'fourth pathway' for constitutional amendments, seemingly under the assumption that the enumerated bulwarks against opportunistic amendments to essential elements of the Constitution (Art. 255) were insufficient. This was despite 21 unsuccessful attempts to amend the 2010 Constitution over the past ten years (SC, paras 198, 201).[39] While the High Court's position was affirmed by the Court of Appeal, albeit with several dissenters, the majority view of the Supreme Court rejected this constitutional interpretation as tantamount to an explicit amendment to the Constitution via judicial means (SC, para. 208).

As this brief survey of pertinent cases illustrates, the evolutionary march of the judiciary in the past decade has not always been straightforward, but it has found its footing and earned a measure of confidence from Kenyans, especially over more recent years. Indeed, as observed by Yash Ghai, 'judges have demonstrated genuine impartiality and written well researched judgments that have earned respect for the judiciary' (Ghai 2020: 217). The recurrent hostile comments of highest governmental officials and their indirect threats

---

[38] (i) Civic education to equip people with sufficient information to meaningfully participate in the constitution-making process; (ii) Public participation in which the people – after civic education – give their views about the issues; (iii) Debate, consultations and public discourse to channel and shape the issues through representatives elected specifically for purposes of constitution-making in a Constituent Assembly; and (iv) Referendum to endorse or ratify the Draft Constitution.

[39] According to the Supreme Court, the first pathway is a constitutional amendment under the parliamentary initiative route (Art. 256); the second is an amendment by popular initiative (Art. 257); and the third is the amendment procedures for specially entrenched provisions in the Constitution (Art. 255) (SC, paras 192–193). This third pathway can either be initiated by parliament or by popular initiative (SC, para. 208).

against the judiciary are a testimony that the judiciary is no longer 'little more than a department in the attorney general's office' (Gathara 2021). At the same time, the current frequency of other branches' non-compliance with certain judgments is indicative of the judiciary remaining the weakest branch, lacking the proverbial power of the purse or the sword to enforce its decisions. While the effects of their declaratory orders unfold, orders directed against other political institutions which purport to be forcing them to act in accordance with the Constitution are often ignored.

Comparatively, the High Court's and Court of Appeal's decisions on the Constitution's basic structure are strikingly similar to decisions on comparable matters by Benin's CCB. Though both courts are embedded in different constitutional settings within different legal cultures, their objective was the same: the preservation of the achievements of a people-driven constitution that ended a decades-long period of political despotism against opportunistic amendments by a self-serving political elite. In both countries the courts set new limits for constitutional amendments, limits justified through the invocation of these countries' respective constitutional moments of inclusive participatory processes. Entering new terrains of constitutional theory by putting themselves in the shoes of the *pouvoir constituant*, they re-wrote their constitutions' core: in Benin, the CCB extended the eternity clause; in Kenya, the High Court and Court of Appeal made it more difficult to amend the catalog of Article 255(1) by entrenching additional restrictions against the amendment of provisions listed in this catalog. While the concentrated constitutional review mechanism in Benin left the CCB's institutional self-promotion unchallenged, the Supreme Court of Kenya rejected the analogous positions of the High Court and Court of Appeal as *ultra vires* assertions of judicial authority.

ETHIOPIA: UNIQUE, BUT DORMANT

Introduction

The demands and motivations for establishing constitutional review mechanisms and corresponding institutions differ, and this is reflected in the variety of constitutional design options; the origin of constitutional review was built on the fragmentation of vertical powers in the context of US federalism, while the French's Fifth Republic relied on it to settle constitutional contentions at the horizontal level between the legislature and the executive (Ginsburg 2008: 90). As France's 1958 Constitution illustrates, the institution that is constitutionally authorized to resolve inter-organ disputes does not have to be a court. With the end of WWII and again with the advent of the third wave of democratization, constitutional review was seen as an important tool against arbitrary government and an instrument for the protection of rights (Ginsburg 2008:

87). While the rights rationale was the predominant driver for the adoption of constitutional review in Benin and Kenya, the federalism rationale dominated when Ethiopia's was designed. The outcome is a unique approach to non-judicial constitutional review, unspoiled by colonial templates. Its design corresponds with Ethiopians' historical experiences and future expectations. Its relative ineffectiveness currently, in the author's view, does not stem from its design, but from the decades-long power matrix in the country.

Context

Ethiopia was never colonized, and its territory expanded over centuries by migration, association, imperial annexations, and assimilation into a conglomerate of different ethnic and religious communities. For most of the twentieth century, Ethiopia was governed by a powerful emperor (Haile Selassie, 1916–1974) and then Military Government (1974–1991), both of which virtually abolished regional autonomy and established a 'prison house of nationalities' (Fiseha 2007: 2).[40] Various ethnically based opposition movements joined forces and took over in 1991, convened a National Conference, and formed a Transitional Government that was charged with, *inter alia*, drafting a new constitution adopted and ratified by an elected Constituent Assembly in 1994 (Hessebon 2013: 220). That constitution entered into force one year later. The Constitution emerged as a mutual commitment of different ethnic groups and reflected the political compact between them.[41] It is thus unsurprising that Ethiopia's Constitution, in contrast to most others, vests sovereignty not in the (Ethiopian) people at large, but in the various ethnic groups referred to as 'Nation, Nationalities and Peoples' (NNP) (see the Preamble and Art. 8 of the Ethiopian Constitution).[42]

While looking for an institution to interpret the Constitution, the drafters created a unique non-judicial body, the House of Federation (HoF), in which the sovereign power itself, the ethnic groups, are represented. Each ethnic group has one seat in the HoF. An additional seat is added for each 1 million

---

[40] There are different and contested theses about the Ethiopian histography of that time: others consider this period as an element of nation building.

[41] This compact was not a comprehensive one, including all segments or parts of Ethiopian society. Political groups that advocated for a more integrationist pan-Ethiopian option were excluded from the deliberations (Hessebon 2013: 219).

[42] See Preamble and Art. 8 of the Ethiopian Constitution. 'Nation, Nationalities and Peoples of Ethiopia' is defined in Art. 39(5) as 'a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory'.

of its population. Members of the HoF are either selected by the legislatures at the regional level or directly by the people (Art. 61(2)). Yet, it is not the 11 constituent territorial regions of the federation (though predominately also drawn along ethnic lines) that are represented in the HoF, but the ethnic groups themselves (whose members may live anywhere in the country). Thus, the authors of the Constitution and its sovereign have also become its guardian. In its fifth tenure (2015–2020), 76 ethnic groups were represented in the HoF, which boasted a total membership of 153 (Fiseha 2019: 159).

Its uniqueness is often mischaracterized. Many erroneously describe the HoF as a 'second legislative house' (Abebe 2017: 181) or 'second chamber of parliament' (Bihonegn 2014/2015: 394). Yet, the legislative or parliamentarian connotations this gives are supported neither by the HoF's function (no involvement in the legislative process) nor by the Constitution, which nowhere uses the umbrella term 'Legislature', 'parliament' or 'Congress', instead naming Chapter 6 with the distinctive heading: 'The Federal Houses'. For this reason, and also to better understand the Ethiopian approach's constitutional architecture, it is more accurate to classify Ethiopia's legislature as unicameral (rather than a bicameral legislature in which the second chamber does not possess any law-making function) and to characterize the other house as a non-judicial constitutional review institution. Noteworthily, this configuration means that Ethiopia's federalism lacks the common 'shared rule' element of federalism at the national level.

The special design resulted from two converging parameters: the need for an adequate federal umpire and the poor reputation and irrelevance of Ethiopia's judiciary. For years, the judiciary operated as an extension of the administration (Fiseha 2007: 12), and even after certain reforms, judicial review was limited to the review of administrative decisions (Abebe 2017: 183). Beyond this, as highlighted by Fiseha, 'the judiciary never survived the regime it established … [and] every new regime set up its own version of the judiciary that suits its mission' (Fiseha 2007: 13). As a result, the judiciary was seen to be complicit in the various atrocities of successive regimes. Due to the general lack of trust in judges among the people and the political elites, (see Abebe 2017: 185) drafters of the Constitution also declined to set up any specialized courts outside of the judicial branch, be they constitutional courts with general constitutional review power or (as in neighboring Tanzania[43])

[43] The Specialized Constitutional Court of Tanzania's sole function 'is to hear and give a conciliatory decision over a matter referred to it concerning the interpretation of this Constitution where such interpretation or its application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar' (Art. 126(1)). Operating on an ad hoc basis, each government appoints half of its members.

specialized constitutional courts serving only as federal umpire. As well as being the prime authority in the country's constitutional review system,[44] the HoF has broad powers as federal umpire, whether it regards general disputes between the national and regional level or among the regions, the division of revenues derived from joint taxes, or the authorization of federal intervention if a region endangers the constitutional order (see Art. 62, paras (6), (7), (8)).

Institutional Set-up

Despite the political nature of the HoF, constitutional review in Ethiopia is not without legal expertise; while the HoF operates as the final interpreter of the Constitution, it is neither the only nor the initial one. The Council of Constitutional Inquiry (CCI), listed under Chapter 9 in the Constitution (Structure and Powers of the Courts), serves as a kind of judicial antechamber to the HoF. This 11-member body consists of the president and the vice-president of the Federal Supreme Court (serving simultaneously as the CCI's president and vice-president), six additional legal experts with proven professional competence and high moral standing (appointed by the president on the recommendation of the House of Peoples' Representatives for six years), and three persons designated by the HoF from among its members (for five years) (Art. 82(2)).

Constitutional review is channeled through the CCI (though if the HoF is occasionally directly addressed, it may refer the issue to the CCI), which then submits a recommendation to the HoF if it considers constitutional interpretation necessary (e.g. if a violation of the Constitution was identified).[45] The CCI can be accessed in several different ways, similar to other centralized constitutional review systems: by judicial referral, whenever the clarification of a constitutional issue is necessary in a pending case;[46] by direct individual complaint related to constitutional issues concerning the Bill of Rights against decisions of administrative agencies (though only after the exhaustion of all available remedies (Section 5 CCI Proclamation)); or by the request of one-third of the members of a national or regional legislature or by a national or regional executive body on constitutional issues that may not be handled by

---

[44] Additional powers of the HoF include participating in the process of amending the Constitution (Art. 105) and of electing the president of the Republic (Art. 70).

[45] If the CCI finds that a constitutional interpretation is not necessary, the dissatisfied party may appeal to the HoF (Section 5(2) CCI Proclamation).

[46] A court may refer the constitutional issue on its own motion or at the request of any of the parties to the dispute. If the court rejects a request from a party, the party – upon finalization of the court procedure – may submit the constitutional issue to the CCI (Section 4(5) CCI Proclamation). See also Abebe 2017: 184.

courts (Section 3(2) CCI Proclamation).[47] With the proposed introduction of a *suo muto* authority of the HoF, it may become active on its own initiative to fulfill its constitutional mandate of finding 'solutions to disputes or misunderstandings' thereby also broadening the CCI's scope of activity.[48]

Decisions by the CCI are made by majority vote and individual members may write dissenting opinions. Though not binding upon the HoF, they regularly follow the CCI's findings.[49] Since its inception, the CCI received over 6,000 cases out of which 79 recommendations were transferred to the HoF. Of these, 11 have been rejected (Mengie 2021: 69).

Dormant

Ethiopia's decision not to vest the authority of constitutional review in the courts reflects the historical experiences and specific needs that had to be accommodated during the process of drafting the Constitution. Endowing the sovereign of the country – the ethnic groups – with the power to interpret and review their compact is a valid design option. Relying on their own historical contexts and specific logics, Switzerland, the Netherlands, and Finland have proven that judicial constitutional review is not an indispensable requirement for fostering constitutionalism.

Looking at Ethiopia's constitutional review in practice over more than two decades, its contribution to enhancing constitutional vitality (Hessebon 2013: 223) or strengthening constitutionalism has been limited (Abebe 2017: 202–204). Yet, in the author's view, it is not the 'constitutional adjudication system' to blame for this ineffectiveness and the lack of constitutional integrity as is claimed by some scholars (Abebe 2017), but rather the power matrix of an authoritarian system under one-party dominance,[50] which has controlled both the national and regional levels of government since 1991 (Fiseha 2017: 308). Based on the assessments of Freedom House over the decades, during no period between the Constitution's birth in 1995 and 2018 was there ever any fertile ground for the institutional set-up to thrive and to

[47] In addition, based on Section 4(2) CCI Proclamation, it is in the discretion of the CCI to render advisory opinions (see Abebe 2017: 190).

[48] Proclamation to Define the Powers and Functions of the House of Federation, Proclamation No 1261/2021.

[49] In line with Section 18 CCI Proclamation, the HoF established a Standing Committee in charge of reviewing the CCI recommendation and reporting to the full HoF for a final decision.

[50] A similar one-party dominance in the US or in Germany at the national and regional level would equally result in a supreme or constitutional court 'selected mainly from members or sympathizers of the ruling party or its affiliates' (Abebe 2017: 202).

consolidate. While political rights and civil liberties slightly improved in 1995 after the Constitution entered into force ('partly free'), they remained stagnant or decreased ever since, with a rating of 'not free' from 2010 onwards. In 2017, Ethiopia was ranked behind Rwanda, Burundi, Chad, and Cameroon (Freedom House 2003, 2007, 2015, 2016, 2017, 2020). Comparing Ethiopia's constitutional review performance with similarly ranked countries in the Freedom House index, the institutional set-up of constitutional review does not seem to be the pertinent variable here. Under the political pressure and constraints persisting throughout this Constitution's lifetime, it is unlikely that any Constitutional or Supreme Court vested with the power of constitutional review could have made a big difference. As Mark Tushnet has stated: 'courts in nations where a single political party dominates the system for an extended period rarely find national legislation unconstitutional' (Tushnet 2014: 41).

It remains to be seen whether the recent reforms in Ethiopia and the current crisis in the region of Tigray will offer the system opportunities to awaken from a decade long passivity to test this unique institutional set-up under more favorable conditions. Until 2018, Ethiopia's political elite was dominated by high-ranking officials from Tigray who operationalized the governmental system to render constitutional review more notional than real. After having lost their dominance nationally, the same Tigray elites – now from a regional perspective – may contribute to making the system work. A precondition for upcoming peace talks aiming to settle the violent conflict that erupted in 2020 between the national and Tigray governments is the demand that the Ethiopian Constitution, including the autonomous rights of the NNPs and the regional governments is respected (AllAfrica 2021).

CONCLUSION

The three case studies above offer an insight into the variety of ways that constitutional review has been designed in Africa. They also exemplify that the effects of a given type of constitutional review design can change over time, for better or for worse. In Benin, the CCB went on from being a viable constitutional watchdog to becoming an agent of the executive overnight and without any constitutional amendment. Kenya's new constitution laid the foundation for the emergence of a strong new judiciary from what was once an executive subordinated, corrupt branch of government. Ethiopia still awaits a political environment that would allow its review institutions to be tested under conducive conditions.

In a dissenting opinion Lord Denning once classified judges into two categories: 'bold spirits' and 'timorous souls' (*Candler v. Crane, Christmas & Co*. [1951] 2 KB 164, 178). There are plenty of actions of African courts and judges in practicing constitutional review that fall in either category, though

a more nuanced assessment beyond this binary classification is apt, as it does not encompass the range of approaches exemplified by African judges practicing constitutional review. In many judicial decisions, judges from Benin and Kenya (but also from Niger, South Africa, Nigeria, and other countries) proved themselves to be bold spirits. It remains an open debate whether there are limits to the boldness of judicial activism, for example if judges turn to act as constituent power. And here again, the African continent can contribute meaningfully to the comparative debate. To oversimplify somewhat, in Benin, the CCB extended the eternity clause; and in Kenya, the High Court and Court of Appeal made the procedural requirements for constitutional amendments regarding matters listed in Article 255(1) more onerous than the Constitution demanded.[51] In putting themselves above the explicit wording of the Constitution, these bold spirits may be acting as philosopher kings for a just cause rather than limiting themselves to their roles as the constituted guardians of the Constitution.[52] Or, to put it in the words of the Kenyan Supreme Court that partly reversed these judgments: 'we, Judges should be vigilant lest we are accused of usurping the sovereign power vested in the people by introducing a constitutional amendment through judicial fiat' (SC, para. 201).

On the other end of the spectrum, courts have often been criticized for offering constitutional interpretations on presidential term limits provisions favorable to the incumbent president either by extending their current term (Congo 2016) or running for another term (Senegal 2012, Burundi 2015, Zambia 2018). Yet, in all these cases, inconsistent or ambiguous constitutional provisions left constitutional loopholes that permitted various plausible readings of the constitutional text.[53] Though a more 'courageous' interpretation of the texts (i.e. ones leading to decisions against the incumbents) were persuasive in all four cases, the interpretations of these seemingly 'timorous souls' were plausible and by no means 'unconstitutional' (but see Reyntjens 2016: 61). In all these cases, more diligent constitutional drafting would have supported the judiciary in performing its function of keeping the executive in check; that is, if keeping the executive in check was ever the intended purpose of those provisions.

---

[51] Another example from the continent is the 'bold' interpretation of the High Court in Malawi reading the term limit provision that permits 'a maximum of two consecutive terms' as an absolute limitation of terms (*State v. Ex Parte Muluzi and Another*, 2009).

[52] This is particularly striking in the Kenyan *BBI* case, where the High Court had already nullified the constitutional amendment process on procedural grounds.

[53] Democratic Republic of Congo: Art. 70(2), see also: Radujko 2020: 18–20; Burundi: Art. 96 and Art. 302, see also: Vandeginste 2016; Senegal: Art. 27 and Art. 104, see also: Schoepffer 2014: 27–30; Zambia: Art. 106(1) and Art. 106(3)/(6), see also: Daka 2021.

REFERENCES

Abebe, Adem K. 2017. 'Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia.' In C.M. Fombad (ed.) *Constitutional Adjudication in Africa*. Oxford: Oxford University Press, 181–204.

Abeyratne, Rehan. 2016. 'Upholding judicial supremacy in India: the NJAC judgment in comparative perspective.' 49 *Geo. Wash. Int'l L. Rev*. 49: 569–613.

Adjolohoun, Horace Sègnonna. 2012. *The Republic of Bénin: Introductory Note.* Oxford: Oxford University Press.

Adjolohoun, Horace Sègnonna. 2013. 'Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemma of Revising the 1990 Constitution of Benin.' In M.K. Mbondenyi and T. Ojienda (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa.* Pretoria: Pretoria University Law Press, 245–290.

Adjolohoun, Horace Sègnonna. 2017. 'Centralized Model of Constitutional Adjudication: The Constitutional Court of Benin.' In C.M. Fombad (ed.) *Constitutional Adjudication in Africa.* Oxford: Oxford University Press, 51–77.

Albert, Richard. 2021. 'Constitutional Amendment and Dismemberment in Kenya.' ICONnect, accessible at http://www.iconnectblog.com/2021/08/constitutional-amendment-and-dismemberment-in-kenya/.

AllAfrica. 2021. 'Ethiopia: TPLF Issues Statement Outlining Conditions for a Ceasefire in Tigray', 4 July 2021, available at https://allafrica.com/stories/202107040087.html.

Bado, Kangnikoé. 2018. 'Judicial Review and Democratization in Francophone West Africa: The Case of Benin.' *Verfassung und Recht in Übersee VRÜ* 51: 216–239, 227.

Bihonegn, Tesfa. 2014/2015. 'The House of Federation: The Practice and Limits of Federalism in Ethiopia's Second Federal Chamber.' *Journal of Eastern African Studies* 9(3): 394–411, 394.

Böckenförde, Markus. 2017. 'From Words to Deeds – The Implementation of Constitutions.' DRI-Briefing Paper 81, 5.

Böckenförde, Markus and Yuhniwo Ngenge. 2016. 'Constitutional Framework for the Independence of Constitutional Review Institutions.' In *Judicial Review Systems in West Africa – A Comparative Analysis.* Stockholm: International Idea, 57–66.

Daka, Mwai. 2021. 'Edgar Lungu, Zambia's Third Term Controversy, and the 2021 Elections.' *Democracy in Africa*, accessible at https://democracyinafrica.org/edgar-lungu-and-zambias-third-term-controversy/ accessed 25 October 2021.

Fiseha, Assefa. 2007. 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF).' *Mizan Law Review* 1: 1–32.

Fiseha, Assefa. 2017. 'Constitutional Adjudication through Second Chamber in Ethiopia.' *Ethnopolitics* 16(3): 295–313.

Fiseha, Assefa. 2019. 'Federalism, Development and the Changing Political Dynamics in Ethiopia.' *International Journal of Constitutional Law* 17(1): 151–176.

Fombad, Charles M. 2017. 'An Overview of Contemporary Models of Constitutional Review in Africa.' In C.M. Fombad (ed.) *Constitutional Adjudication in Africa.* Oxford: Oxford University Press, 17–47.

Fowke, James. 2017. 'Constitutional Review in South Africa: Features, Changes, and Controversies.' In C.M. Fombad (ed.) *Constitutional Adjudication in Africa.* Oxford: Oxford University Press, 162–178, 162.
Freedom House. *Annual Reports of 2003, 2007, 2015, 2016, 2017, 2020*, accessible at https://freedomhouse.org/reports/publication-archives.
Gainer, Maya. 2015. 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015.' Innovations for Successful Societies; Princeton University, 3.
Garoupa, Nun and Tom Ginsburg. 2008. 'Guarding the Guardians: Judicial Councils and Judicial Independence.' Public Law and Legal Theory Working Paper No. 250, 7.
Gathara, Patrick. 2021. 'The judiciary and the long fight to defend Kenya's constitution.' Aljazeera Opinions, accessible at https://www.aljazeera.com/opinions/2021/6/12/the-kenyans.
Ghai, Yash P. 2020. 'Constitutions and Constitutionalism.' In Nic Cheesman et al. (eds) *The Oxford Handbook on Kenyan Politics*. Oxford: Oxford University Press, 207–219.
Ghai, Yash P. and Jill Cotrell Ghai. 2011. *Kenya's Constitution: An Instrument for Change*. Nairobi: Clarion.
Ginsburg, Tom. 2008. 'The Global Spread of Constitutional Review.' In K. Whittington and D. Keleman (eds) *Oxford Handbook of Law and Politics.* Oxford: Oxford University Press, 81–98, 90.
Ginsburg, Tom. 2014. 'Constitutional Courts in Asia.' In R. Dixon and T. Ginsburg (eds) *Comparative Constitutional Law in Asia.* Cheltenham: Edward Elgar Publishing, 53.
Ginsburg, Tom and Mia Versteeg. 2013. 'Why Do Countries Adopt Constitutional Review?' *Journal of Law, Economics & Organizations* 30(3): 587–622, 597.
Gisselquist, Rachel M. 2008. 'Democratic Transition and Democratic Survival in Benin.' *Democratization* 15(4): 789–814, 797.
GriooCom. 2010. 'Bénin: de l'enfant malade au modèle démocratique,' accessible at http://www.grioo.com/ar,benindelenfantmaladeaumodeledemocratique,19522.html.
Harrington, John and Ambreena Manji. 2015. 'Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013.' *Journal of Eastern African Studies* 9(2): 175–192.
Hessebon, Gedion T. 2013. 'The Precarious Future of the Ethiopian Constitution.' *Journal of African Law* 57(2): 215–233.
Holo, Theodore. 2017. 'Handling of Petitions by the Constitutional Court of Benin.' In C.M. Fombad (ed.) *Constitutional Adjudication in Africa.* Oxford: Oxford University Press, 315, 318.
Huntington, Samuel P. 1991. *The Third Wave: Democratization in the Late Twentieth Century.* Norman, OK, and London: University of Oklahoma Press.
Kohnert, Dirk and Hans-Joachim Preuss. 2019. 'Benin's Stealthy Democracide: How Africa's Model Democracy Kills Itself Bit by Bit.' ZBW – Leibniz Information Centre for Economics, Kiel, Hamburg.
Melton, James and Tom Ginsburg. 2014. 'Does De Jure Judicial Independence Really Matter? – A Reevaluation of Explanations for Judicial Independence.' *Journal of Law and Courts* Fall: 187–217.
Mengie, Legesse Tigabu. 2021. 'COVID-19 and Elections in Ethiopia: Exploring Constitutional Interpretation by the House of the Federation as an Exit Strategy.' *Law, Democracy and Development* 25: 64–89.
Murray, Christina. 2013. 'Kenya's 2010 Constitution.' *Jahrbuch des Öffentlichen Rechts* 747–788.

Murray, Christina. 2020. 'Political Elites and the People: Kenya's Decade-Long Constitution-Making Process.' In G.L. Negretto (ed.) *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives.* Cambridge: Cambridge University Press, 190–216.

Mutua, Makau W. 2001. 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya.' *HRQ* 23(9): 113.

Ngenge, Yuhniwo. 2016. 'Reviewing the Constitutionality of Laws.' In Markus Böckenförde, Babacar Kante, Yuhniwo Ngenge and H. Kwasi Prempeh (eds) *Judicial Review Systems in West Africa – A Comparative Analysis.* Stockholm: International Idea, 89–99.

Nzouankeu, Jacques Mariel. 1993. 'The Role of the National Conference in the Transition to Democracy in Africa: The Cases of Benin and Mali.' *A Journal of Opinion* 21(1-2): 44–50, 44.

Radujko, Dušan. 2020. *The Effect of Unamendable Presidential Term Limits in Africa.* CEU eTD Collection.

Reyntjens, Filip. 2016. 'The Struggle over Term Limits in Africa: A New Look at the Evidence.' *Journal of Democracy* 27(3): 61–68.

Riley, Stephen. 1992. 'Africa's "New Wind of Change".' *The World Today* 48(7): 116–199.

Rotman, Anna. 2004. 'Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights.' *Harvard Human Rights Journal* 17: 281–314, 283.

Schoepffer, Chadidscha. 2014. Verfassungsgerichtsbar-keit und Demokratisierung im frankophonen Westafrika. Franz von Liszt Institute Working Paper No. 3, Länderstudie Senegal, accessible at https://www.uni-giessen.de/fbz/fb01/fakultaet-institutionen/franzliszt/mediathek/dateien/forschung/working-papers/draft-wp-2014-senegal.pdf accessed 25 October 2021.

Serwanga, Jane R. 2016. 'The Use of Specialised Commissions for Constitutional Implementation: An Outsider View of the Kenyan CIC.' In C.M. Fombad (ed.) *The Implementation of Modern African Constitutions – Prospects and Challenges.* Pretoria: Pretoria University Law Press, 197–215.

Stone Sweet, Alec. 2007. 'The Politics of Constitutional Review in France and Europe.' *International Journal of Constitutional Law* 5: 69–92.

Stroh, Alexander. 2018. 'Sustaining and Jeopardising a Credible Arbiter: Judicial Networks in Benin's Consolidating Democracy.' *International Political Science Review* 39(5): 600–615.

Stroh, Alexander and Charlotte Heyl. 2015. 'Institutional Diffusion, Strategic Insurance, and the Creation of West African Constitutional Courts.' *Comparative Politics* 47(2): 169–187.

Tushnet, Mark. 2014. *Advanced Introduction to Comparative Constitutional Law.* Cheltenham: Edward Elgar, 41.

Van Zyl Smit, Jan. 2013. '"Restoring Confidence in the Judiciary": Kenya's Judicial Vetting Process, Constitutional Implementation and the Rule of Law,' accessible at: https://constitutionnet.org/sites/default/files/kenyas_judicial_vetting_process.pdf.

Vandeginste, Stef. 2016. 'Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi.' *Africa Spectrum* 51(2): 39–63.

Wachira, Maina. 2013. 'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal Test.' *The East African*, 20 April 2013, accessible at https://www.theeastafrican.co.ke/tea/oped/comment/verdict-on-kenya-s-presidential-election-petition-five-reasons-the-judgment-fails-the-legal-test--1315998.

Waiganjo, Kamotho. 2016. 'The Use of Specialised Commissions for Constitutional Implementation: An Insider View of the Kenyan CIC.' In C.M. Fombad (ed.) *The Implementation of Modern African Constitutions – Prospects and Challenges*. Pretoria: Pretoria University Law Press, 177–195.

APPENDIX

Co-authored by Marie Laur (SJD student at the Central European University) and Markus Böckenförde.

Table 4.1 Institutional design of constitutional review in Africa

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Algeria	Centralized	Const. Court	President (4), Supreme Court (2), Council of State (2), National Assembly (2), Council of the Nation (2)	6 years/no	*Ex-ante*/ *ex-post*/ opinions	Indirect	Organic laws,[4] laws, decrees, regulations, treaties, ordinances, elections, referenda, parliamentary rules of procedures	Reviews conventionality
Angola	Hybrid	Const. Court	President (4), National Assembly (4), Supreme Judicial Council (2), election (1)	7 years/no	*Ex-ante*/ *ex-post*		Statutes, treaties, referenda, constitutional revision, impeachment	
Benin	Centralized	Const. Court	National Assembly (4), President (3)	5 years/ renewable once	*Ex-post*/ *ex-ante*	Direct and indirect	Organic laws, laws, regulations, treaties, ordinances, elections, referenda, parliamentary rules of procedures, conflicts of competence	Self-referral (*d'office*), all 7 judges selected as a cohort
Botswana	Centralized	High Court/ Court of Appeal	President (Judicial Service Commission)	Until retirement	*Ex-post*	Indirect		

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Burkina Faso	Centralized	Const. Council	President (7), National Assembly (3)	9 years/no	*Ex-ante*/ *ex-post*/ opinions	Direct and indirect	Organic laws, laws, treaties, ordinances, elections, referenda, parliamentary rules of procedures, conflict of competence	Self-referral
Burundi	Centralized	Const. Court	President + Senate (7)	8 years/no	*Ex-ante*/ *ex-post*/ opinions	Direct and indirect	Organic laws, laws, treaties, regulations, ordinances, elections, referenda, parliamentary rules of procedures, conflict of competence	
Cabo Verde	Hybrid	Supreme Court	President (1), National Assembly (1), Superior Council of the Magistrature (3)	5 years	*Ex-ante*/ *ex-post*	Direct (amparo)	Any norm and resolution, referenda, treaties, elections, tries the President and members of governments	
Cameroon	Centralized	Const. Council	President (3), National Assembly (3), Senate (2), High Council of the Judiciary (2) (+ automatically former President)	6 years/yes	*Ex-ante*/ opinions	None	Laws, treaties, elections, referenda, parliamentary rules of procedures	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Central African Republic (CAR)	Centralized	Const. Court	Elected by peers (2 magistrates, 2 attorneys, 2 law faculty), President (1), National Assembly (1), Senate (1)	7 years/no	*Ex-ante*/ *ex-post*/ opinions	Direct and indirect	Organic laws, laws, regulations, treaties, elections, referenda, parliamentary rules of procedures, conflict of competence, internal regulations of parliament	At least 4 women out of 9 judges
Chad	Centralized	Supreme Court (const. chamber)	Constitutional law specialists: President (4), National Assembly (3)	7 years/yes	*Ex-ante*/ *ex-post*	Indirect	Organic laws, laws, ordinances, elections, referenda, treaties, conflict of competence, internal regulations of parliament, tries the President and members of governments	
Comoros	Centralized	Supreme Court (constitutional chamber)	President (following opinion of Supreme Court's bureau)	5 years/yes	*Ex-ante*/ *ex-post*	Indirect	Organic laws, laws, ordinances, human rights, elections, treaties, conflict of competence, internal regulations of parliament, tries the President	Investigation powers in matters of human rights

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Democratic Republic of the Congo	Centralized	Const. Court	President (3), President on opinion of Congress (3), Superior Council of the Magistrature (3)	9 years/no	*Ex-ante*/ opinions	Direct and indirect	Organic laws, laws, ordinances, treaties, elections, conflict of competence, internal regulations of parliament, tries the President and Prime Minister	
Republic of the Congo	Centralized	Const. Court	President (3), National Assembly (2), Senate (2), Supreme Court (2)	4 years/yes, two times	*Ex-ante*/ *ex-post*	Direct and indirect	Organic laws, laws, ordinances, elections, referenda, treaties, conflict of competence, internal regulations of parliament	
Côte d'Ivoire	Centralized	Const. Council	President (4), National Assembly (2), Senate (1) + former presidents	6 years/no	*Ex-ante*/ *ex-post*/ opinions	Indirect	Organic laws, laws, ordinances, elections, referenda, treaties, conflicts of competence, internal regulations of parliament	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Djibouti	Centralized	Const. Council	President (2), National Assembly (2), Superior Council of the Magistrature (2) + former presidents	8 years/no	*Ex-ante/ ex-post*	Indirect (2 filters)	Organic laws, laws, elections, referenda, conflicts of competence, internal regulations of parliament	
Egypt	Centralized	Supreme Const. Court	President (number of judges not fixed)	Until retirement	*Ex-post*	Indirect	Laws, regulations, conflicts of competence (judicial only)	
Equatorial Guinea	Centralized	Const. Tribunal	President + President upon proposal of Chamber of Deputies (2) and Senate (2)	7 years	*Ex-post*	Direct (amparo)	Organic laws, laws, regulations, elections, treaties, internal regulations of parliament, conflicts of competence	
Eritrea	Centralized	Supreme Court	President upon proposal of Judicial Service Commission + approval of National Assembly	Art. 49 (4)	*Ex-post*	Direct	Tries the President	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Eswatini	Semi-centralized (High Court + Supreme Court)	Supreme Court	King on advice of Judicial Service Commission	Until retirement age	*Ex-post*	Direct		
Ethiopia	Centralized	*Sui generis* (House of Federation)	Either assembly at the sub-national level or by election	5 or 6 years/ yes	*Ex-post*/ advisory opinion	Indirect	Organizes the Council of Constitutional inquiry, constitutional amendments, protect const. order (order federal intervention)	
Gabon	Centralized	Const. Court	President of the Republic (3), National Assembly (3), Senate (3) + former presidents	7 years/yes	*Ex-ante*/ *ex-post*	Indirect	Organic laws, laws, regulations, elections, referenda, treaties, conflicts of competence, internal regulations of parliament	Declares the state of emergency (with regards to electoral matters)
Gambia	Centralized (except for human rights)	Supreme Court	President on advice of Judicial Service Commission, after confirmation by National Assembly	Life tenure	*Ex-post*	Direct	Validity of state of emergency, elections	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Ghana	Centralized	Supreme Court	President (on advice of the Judicial Council) in consultation with Council of State and with approval of Parliament	Life tenure	*Ex-post*	Direct and indirect	Elections	
Guinea	Centralized	Const. Court	President (3), National Assembly (2), Superior Council of the Magistrature (2), Bar association (1), Law faculty (1)	9 years/no	*Ex-ante*	None	Organic laws, laws, ordinances, treaties, elections, referenda, conflicts of competence	
Guinea-Bissau	Hybrid	Supreme Tribunal of Justice	Superior Council of Magistrates (appoints), President (confirms)	Life tenure	*Ex-post*	Direct and indirect	Writ of *habeas corpus*, tries the President	
Kenya	Decentralized	Supreme Court	President on recommendation of Judicial Service Commission (CJ & Dep CJ: additional approval of Nat Ass).	Until retirement age	*Ex-post*/ advisory opinion	Direct	Elections (President)	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Lesotho	Centralized	High Court	King + Prime Minister/King + Judicial Service Commission	Until retirement age	*Ex-post*	Indirect and direct (fundamental rights)	Succession of the King, elections	
Liberia	Decentralized	Supreme Court	President with consent of Senate	Life tenure	*Ex-post*	Direct	Elections	
Libya[5]	Centralized	Supreme Court (Const. chamber)	Parliament	Until retirement age	*Ex-post*	Direct and indirect		
Madagascar	Centralized	High Const. Court	President (3), National Assembly (2), Senate (2), Supreme Council of the Magistrature (2)	7 years/no	*Ex-ante*/ *ex-post*/ opinions	Indirect	Organic laws, laws, ordinances, regulations, treaties, elections, referenda, conflicts of competence	
Malawi	Semi-centralized (High Court + Supreme Court of Appeal)	Supreme Court of Appeal	President + confirmation by National Assembly/ on recommendation of Judicial Service Commission		*Ex-post*	Direct	State of emergency	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Mali	Centralized	Const. Court	President of the Republic (3), National Assembly (3), Superior Council of the Judiciary (3)	7 years/yes (once)	*Ex-ante*	None	Organic laws, laws, treaties, elections, referenda, parliamentary rules of procedures, conflicts of competence	
Mauritania[6]	Centralized	Const. Council	President (4), National Assembly (3), Senate (2)	9 years/no	*Ex-ante*/ *ex-post* (only for laws prior to Constitution)	Direct (only for laws prior to Constitution)	Organic laws, treaties, elections, referenda, conflicts of competence	
Mauritius	Centralized	Supreme Court	President + consultation of Prime Minister/on advice of Chief Justice	Until retirement age	*Ex-post*	Direct and indirect	Elections, reviews dissolution of parliament	
Morocco	Centralized	Const. Court	King (6), both chambers of parliament (3 and 3)	9 years/yes	*Ex-ante*/ *ex-post*	Indirect (adoption of organic law no. 15686 pending)	Organic laws, treaties, elections, referenda, parliamentary rules of procedures, conflicts of competence	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Mozambique[7]	Hybrid	Const. Council	President (1), Assembly of the Republic (5), Superior Council of the Judiciary (1)	5 years/yes	*Ex-ante*/ *ex-post*	None	Laws, referenda, elections, conflicts of competence	Assess the legality (not only constitutionality) of norms, 2000 citizens can request constitutionality review
Namibia	Semi-centralized (High Court + Supreme Court)	Supreme Court	President on recommendation of the Judicial Service Commission	Until retirement age	*Ex-post*	Direct		Acting judges may be appointed because of their expertise in constitutional or fundamental rights cases
Niger	Centralized	Const. Court	President (1), National Assembly (1), magistrates (2), lawyers (1), law professors (1), civil society (1)	6 years/no	*Ex-ante*/ *ex-post*/ opinions	Indirect	Organic laws, laws, ordinances, treaties, elections, referenda, parliamentary rules of procedures, conflicts of competence	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Nigeria[8]	Decentralized	Supreme Court	President on recommendation of National Judicial Council + confirmation by the Senate	Until retirement age	*Ex-post*	Direct	Elections	
Rwanda	Centralized	Supreme Court	President (Cabinet's approval) + Senate confirmation	Until retirement age/President and VP: 5 years/yes (once)	*Ex-post*	Direct	Consultative powers, tries the President	Competent to hear constitutional petition
São Tomé and Príncipe	Hybrid	Const. Court	National Assembly	5 years	*Ex-ante*, *ex-post*	Indirect	Organic laws, 'reinforced laws', elections, referenda, treaties	
Senegal	Centralized	Const. Council	President of the Republic	6 years/no	*Ex-ante*/ *ex-post*/ advisory opinion	Indirect (1 filter)	Organic laws, treaties, elections, referenda, parliamentary rules of procedures, conflicts of competence	

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Seychelles[9]	Semi-centralized (Supreme Court (sitting as Const. Court) + Court of Appeal) (except for fundamental rights)	Court of Appeal	President of proposal of the Constitutional Appointments Authority	Until retirement age (citizens of the Seychelles)/ 7 year/yes (once)	*Ex-post*	Direct and indirect		
Sierra Leone[10]	Centralized	Supreme Court	President + approval by Parliament	For life	*Ex-post*	Direct and indirect	Parliamentary excess of power	
Somalia[11]	Centralized	Const. Court	House of the People on proposal of Judicial Service Commission + presidential appointment	5 years/yes (once)	*Ex-ante/ ex-post*	Direct and indirect	Conflicts of competence (states/federal), tries the President	10.000 citizens can request constitutionality review. At the time of publishing, the Constitutional Court had not yet been established
South Africa	Decentralized (with confirmation by the Const. Court)	Const. Court	President after consultations and from a list by Judicial Service Commission	12 years or until retirement age/no	*Ex-ante/ ex-post*	Direct	Conflicts of competence, certification of provincial constitutions, constitutional amendments	Court of general competence, 'interest of justice' litigation
South Sudan	Centralized	Supreme Court	President + confirmation by National Legislative Assembly	Until retirement age	*Ex-ante/ ex-post*	Direct	Tries highest authorities, conflicts of competences (states/ federal), review death sentences	Minimum of 9 members for const. panel

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Sudan[12]	Centralized	Const. Court	Supreme Judicial Council + confirmation by Sovereignty Council	7 years/yes	*Ex-post*	Direct	Conflicts of competence	
Tanzania	Decentralized	Court of Appeal[13]	President	Until retirement age (Chief Justice can be removed from this function)	*Ex-post*	Direct	Elections	
Togo	Centralized	Const. Court	President (2), National Assembly (2), Senate (2), magistrates (1), lawyers (1), law professors (1)	6 years/yes (once)	*Ex-ante*/ *ex-post*/ opinions	Indirect	Organic laws, laws, ordinances, treaties, elections, referenda, conflicts of competence	
Tunisia[14]	Centralized	Const. Court	President of the Republic (4), Assembly of the Representatives of the People (4), Supreme Judicial Council (4)	9 years/no	*Ex-ante*/ *ex-post*	Indirect	Constitutional laws, laws, treaties, parliamentary rules of procedures, conflicts of competence, tries the President, conditions of state of emergency	At the time of publishing, the Constitutional Court had not yet been established despite art. 148 § 5

Country	Organization of the review system[1]	Type of apex court for Const Review	Method of appointment	Term's length and renewability	Type of review[2]/ opinion	Type of individual access[3]	Other important powers	Relevant peculiarities
Uganda	Semi-centralized (Const. Court (bench of Court of Appeal) + Supreme Court)	Supreme Court	President on advice of Judicial Service Commission + approval of Parliament	Until retirement age	*Ex-post*	Direct and indirect		
Zambia	Centralized	Const. Court	President on recommendation of Judicial Service Commission + ratification by National Assembly	Until retirement age (President: 10 years)	*Ex-post*	Direct and indirect	Elections, dissolution of Parliament, approval by National Assembly	
Zimbabwe	Decentralized (with confirmation by the Const. Court)	Const. Court	Judicial Service Commission/President in consultation with Judicial Service Commission	15 years maximum/no	*Ex-ante*/ *ex-post*/ opinions	Direct and indirect	Constitutional bills, elections, state of emergency, dissolution of Parliament	'Interest of justice' litigation

Notes:

[1] The term 'hybrid' refers to systems combining decentralized elements (lower courts can decide to not apply laws they deem unconstitutional) and centralized elements (this decision can be directly challenged in front of the const. court / apex court for const. review). The term 'semi-centralized' refers to systems which are essentially centralized but where constitutional review is performed at two levels of jurisdictions with a possibility of appeal to the highest of the two courts.

[2] *Ex-ante* review refers to the *in abstracto* control of bills before they are definitely adopted by the parliament/promulgated by the president. In most systems, this review can be initiated by various authorities (president, prime minister, etc.) as well as by a minority of parliamentarians.

[3] For the purpose of this table, is considered direct a recourse where the unconstitutionality claim is part of the principal procedure, even if a lower level of instances have to be exhausted before reaching the highest court.

[4] Organic laws are a common trait of Francophone African constitutional systems. The Constitution indicates when an organic law is required to further specify the organization and functioning of public powers. They rank above ordinary statutes in the hierarchy of norms and are adopted according to specific procedural rules, e.g. their *ex-ante* review by the constitutional jurisdiction is usually mandatory. In many systems, the organization and procedure in front of the constitutional jurisdiction as well as the individual indirect access procedure, when it exists, are set by organic laws.

[5] Based on Libya's 2011 Constitution.

[6] Based on the Constitution as amended in 2012. Does not take into account the 2017 amendments.

[7] Based on the Constitution as amended in 2007.

[8] Based on the Constitution as amended in 2011.

[9] Based on the Constitution as amended in 2017.

[10] Based on the Constitution as amended in 2013.

[11] Based on the provisional Constitution of 2012.

[12] Based on the Constitution as adopted in 2019. Information on term length/renewability is taken from Constitutional Court Bill 2005 that is officially still in force.

[13] A Special Constitutional Court gives conciliatory decisions when the interpretation or application of the Constitution is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

[14] Based on the 2014 Constitution. At the time of publishing, the Constitutional Court had not yet been established.