



West Africa Office
Benin, Burkina Faso,
Ghana, Mali, Niger,
Togo

Judicial Review Systems in West Africa

A Comparative Analysis





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Lead writers

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International IDEA resources on constitution-building processes

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Graphic design by Turbo Design

ISBN: 978-91-7671-052-4

Contents



| | |
|---|-----|
| Preface | 9 |
| Foreword | 12 |
| Acknowledgements | 14 |
| 1. Introduction | 17 |
| <i>Markus Böckenförde</i> | |
| 2. Traditional and historical antecedents of constitutional justice in West Africa | 29 |
| <i>Yuhniwo Ngege</i> | |
| 3. Institutional models for constitutional justice in contemporary West Africa | 45 |
| <i>Yuhniwo Ngege</i> | |
| 4. Constitutional framework for the independence of constitutional review institutions | 57 |
| <i>Markus Böckenförde and Yuhniwo Ngege</i> | |
| 5. Judicial service commissions | 67 |
| <i>Babacar Kante and H. Kwasi Prempeh</i> | |
| 6. The composition of constitutional justice institutions | 75 |
| <i>Markus Böckenförde</i> | |
| 7. Reviewing the constitutionality of laws | 89 |
| <i>Yuhniwo Ngege</i> | |
| 8. Other competences of constitutional review institutions | 101 |
| <i>Babacar Kante and H. Kwasi Prempeh</i> | |
| 9. Access to constitutional review institutions | 117 |
| <i>Babacar Kante and H. Kwasi Prempeh</i> | |
| 10. Authority of the decisions of constitutional review institutions | 125 |
| <i>Babacar Kante and H. Kwasi Prempeh</i> | |



| | |
|---|------------|
| 11. Watching the watchdogs | 137 |
| <i>Markus Böckenförde</i> | |
| 12. Conclusion and outlook | 145 |
| <i>Markus Böckenförde and Yuhniwo Ngege</i> | |
| Annex: Questionnaire template | 151 |
| Glossary | 160 |
| References and further reading | 166 |
| About the authors | 175 |
| About International IDEA | 178 |
| About the Hanns Seidel Foundation | 179 |
| More International IDEA resources on constitution-building processes | 180 |

List of tables and figures

| | |
|---|------------|
| Table 1.1. West African legal systems, institutional types and terms of judicial tenure | 18 |
| Table 1.2. Index values, deviations from France and indicator congruence of former French colonies with the French model | 22 |
| Table 1.3. Integration of customary and religious law in West African constitutions and judicial systems | 25 |
| Table 2.1. Historical evolution of constitutional justice systems in West Africa | 41 |
| Table 4.1. Budget autonomy and insulation of salaries of constitutional judges in West Africa | 63 |
| Table 5.1. Judicial service commissions in West Africa | 67 |
| Table 6.1. Overview of the composition and dismissal process for members of constitutional justice institutions in West Africa | 84 |
| Table 7.1. Types of constitutional review and normative instruments subject to control: francophone and lusophone West Africa | 93 |
| Table 7.2. Types of constitutional review and normative instruments subject to control: anglophone West Africa | 99 |
| Table 8.1. Other competences of constitutional justice institutions in West Africa | 113 |
| Table 10.1. Judgements of constitutional review institutions in West Africa | 133 |



| | |
|--|-----------|
| Figure 3.1. West Africa in the global distribution of the judicial model of constitutional review | 47 |
| Figure 3.2. Distribution of the judicial model of constitutional review in West Africa | 48 |
| Figure 3.3. Distribution of Kelsenian-type institutions in West Africa | 49 |
| Figure 3.4. Pure and non-pure models of Kelsenian-type institutions in West Africa | 50 |
| Figure 6.1. Selection by the legislature through a supermajority | 78 |
| Figure 6.2. Selection through a consecutive process | 79 |
| Figure 6.3. Selection by different ‘recruiting authorities’ | 80 |
| Figure 6.4. Selection by the head of state | 81 |

Preface



In recent decades, African countries have opted for greater integration within the continent to protect and promote common interests in a globalized but highly competitive society. This shift has encouraged the creation of subregional organizations across the continent to promote greater cooperation—initially on trade and economic issues, but increasingly on questions of political governance and development as well—among member states. For example, the Economic Community of West African States (ECOWAS) was founded in 1975 and has since made significant progress, particularly in trade, economic and social development in the subregion.

In response to persistent challenges to democracy in Africa, ECOWAS has also expanded its mandate to include promoting the rule of law. This expansion allowed for greater cooperation and action between member states, for instance in sanctioning those that fail to comply with its values. This cooperation has led to improved standards in the rule of law in the region. The establishment of a subregional Community Court of Justice in 1991, which has jurisdiction over human rights violations in member states, emphasizes this interest in the rule of law as well as the invaluable role of judicial institutions in safeguarding it.

This concern with the rule of law is not surprising. It remains an important element in building, strengthening, and consolidating democratic and constitutional governance. It also provides a framework for accountability, checks and balances, and respect for fundamental human rights. In many countries in West Africa, however, ensuring that these values take root remains a key challenge, despite the establishment of supreme and constitutional courts (or constitutional councils) responsible for ensuring respect for the rule of law through judicial review.




While the Community Court provides an important platform that encourages cooperation on issues within its mandate, broad regional judicial dialogue and cooperation among the states of the region is lacking. The need for cooperation between these countries of diverse legal and cultural heritage cannot be overemphasized, as it strengthens the culture of rule of law, democracy and human rights through the cross-pollination of best practices, experiences and ideas among countries with judicial systems that operate in silos. Understanding the constitutional and legal framework of the institutions in these different legal cultures is a prerequisite to achieving this goal.

This comparative study by International IDEA and the Hanns Seidel Foundation, in cooperation with the Centre for Global Cooperation Research, aims to facilitate this first step. Its chapters offer, among others, insights into the historical evolution of constitutional justice systems in the region as well as trends in the contemporary design, structure and mandates of institutions responsible for judicial review and constitutional justice in 16 West African countries. West Africa provides a unique context for such a study, as it encompasses the two main legal traditions and cultures—common law and civil law (the latter with both French and Portuguese forms)—practiced across the rest of sub-Saharan Africa.

This book, which has benefited from the intellectual contributions of many researchers—drawn from anglophone, francophone and lusophone West Africa—with extensive knowledge of the subject and the region, will serve diverse audiences in the region in a number of important ways. For national policymaking communities, it illuminates gaps in the design of constitutional justice systems, thereby highlighting the need for reforms to improve the effectiveness of the institutions and enhance the promotion of the rule of law.

For the academic community, it makes an important contribution to the potential development of comparative constitutional law in an area with a clear gap in academic scholarship. In addition, completed questionnaires developed during the primary research for the publication (hosted on International IDEA's website www.constitutionnet.org) provide valuable information for researchers. For the practitioner community, which includes constitutional lawyers, judges and legal officers, it provides a medium for mutual learning and exchange about different systems of constitutional justice design in the region.



However, as judicial review institutions—through their constitutional oversight role—continue to have an important bearing on how countries deal with challenges to democracy, this publication provides the foundational basis for additional initiatives to enhance the rule of law by promoting dialogue and cooperation among such institutions in the region. It is our hope and belief that further dialogue in this area on best practices and design issues will help foster the rule of law and constitutionalism—and, ultimately, democracy—across the region.

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Chairwoman
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Foreword

This book, published by the International Institute for Democracy and Electoral Assistance (International IDEA) and the Hanns Seidel Foundation, with the collaboration of other institutions, is the result, initially, of a gamble. It would never have been completed without the commendable tenacity of the project's initiators and the steely resolve of the book's authors. The idea of (or attempts at conducting) a comparative analysis of the organization and operation of constitutional justice institutions—notably, constitutional courts/councils and supreme courts—which are today a cornerstone of African political systems, is not novel. Since the beginning of Africa's democratic transition and the emergence of these institutions, many research institutes and individual researchers have entertained the idea and introduced initiatives in this direction. This publication, however, is the first of its kind to comprehensively engage the subject.

The increasingly important role that constitutional justice institutions play in anchoring the rule of law and democracy in African countries, particularly in West Africa, makes the book a timely and welcome resource. It covers 16 countries with very diverse legal and political systems; they belong to three linguistic groupings (francophone, anglophone and lusophone) and two legal traditions (Anglo-American common law and civil law), and all have different political systems. Some are cited, rightly or wrongly, as models on the continent, while others are in crisis.

This diversity informed the composition of the research team, which was comprised of experts with profiles cutting across the different legal systems. This team adopted a particularly rigorous methodology involving the extensive comparative and quantitative analysis of constitutional texts and organic laws on constitutional justice institutions. The book's tables and graphics make digesting its contents easier and more enjoyable. This work has didactic value: it produces knowledge about the organization and functioning of constitutional justice institutions, taking into account the legal texts that create and govern them. Its practical utility in facilitating dialogue between

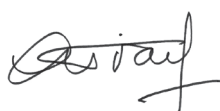


judges, in view of a possible reform of the organization of constitutional justice systems, which Africa still needs, also gives it pedagogic significance.

The authors analyse a broad spectrum of issues related to constitutional justice institutions in West Africa. While navigating technical issues such as competence, composition, access, the status of judges, the authoritative power of these institutions and their relationship with other institutions, they also take a novel look at analogous institutions in pre-colonial Africa with similar functions, as well as the often-taboo subject of the control and accountability of these institutions themselves.

The authors highlight points of convergence and divergence between the various institutions across the different systems. The treatment of the issues raised in this publication should facilitate judicial dialogue and—hopefully, in the long term—the integration and harmonization of a subregional comparative constitutional law in West Africa. Constitutional law is becoming increasingly internationalized, and West African countries need to embrace and lead—rather than be led by—the process. Furthermore, this work could serve as a resource for renewed training and research in constitutional law in higher education institutions both within and outside Africa. In the subregion, this training remains traditional and largely centred on the analysis of political regimes.

This book is only the first step in a larger project to strengthen the rule of law in West Africa. Its objective is to provide a descriptive analysis of the law as found in the normative texts governing the establishment and organization of constitutional justice institutions in West Africa. Its conclusions, however, set the stage for reflections on how these institutions execute their constitutional mandates in practice. This next step requires a study of the record of constitutional justice institutions by analysing their respective case law to understand their impact and scope. This is an ambitious and commendable project, and we can only wish it (and its promoters) the success they deserve.



Abdou Diouf

Former President of the Republic of Senegal
Former Secretary General, Francophonie




Acknowledgements

This publication is the result of the invaluable contributions and support of many individuals and institutions.

International IDEA and the Hanns Seidel Foundation gratefully acknowledge the contributions of the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School). We also acknowledge the central role of Yuhniwo Ngege (International IDEA), who, in addition to authoring several chapters of this publication, demonstrated remarkable dedication and patience as the focal person for coordinating the different substantive phases of its development, including the initial reviews and edits of various chapters, as well as liaising with other authors.

We extend our gratitude to the country researchers, whose country reports provided invaluable country-specific data for the analysis—Kangnikoe Bado (University of Giessen, Germany), Omar Hamady (Max Planck Institute for Comparative Public and International Law), Lisa Heemann (University of Giessen, Germany), Abou Jeng (United Nations African Union Mission in Darfur), Emilio Kafft Kosta (University of Lisbon), Joseph Hindogbae Kposowa (Sierra Leone), Christiane Roth (Hanns Seidel Foundation), Anne Winter (University of Munster) and Larba Yarga (University of Ouagadougou, Burkina Faso). Additional thanks are due to the Centre for Global Cooperation Research for facilitating the development of the questionnaire used for drafting the country reports, as well as Christina Murray (University of Cape Town), Xavier Philippe (Institut Louis Favoreu-GERJC) and Cheryl Saunders (University of Melbourne) for their comments on the design of the questionnaire. We also acknowledge the role of the African Network of Constitutional Lawyers for helping to identify suitable individuals and resource persons who were instrumental to the research process.

Our sincere appreciation also goes to the participants of the review workshop held in Saint Louis, Senegal, in October 2014 and the peer reviewers who



offered fresh insights and ideas that helped shape and strengthen thinking around the drafts. These are Joel Frédéric Aivo (University of Abomey, Benin), Kangnikoe Bado (University of Giessen), Ould Boubott (University of Nouakchott, Mauritania), Janneh Semega Ebironkeh (Semega Chambers, Banjul, the Gambia), Ameze Guobadia (Nigerian Institute of Advanced Legal Studies), Omar Hamady (Max Planck Institute for Comparative Public and International Law), Lisa Heemann (University of Giessen), Sébastien Lath (University of Abidjan, Côte d'Ivoire), Aristide Lima (Constitutional Court of Cape Verde), André Mangu (University of Pretoria), Oumarou Narey (Constitutional Court Niger), Isaac Ndiaye (Constitutional Court Senegal), Milton Paiva (University of Cape Verde) and Larba Yarga (University of Ouagadougou, Burkina Faso). We also thank the Gaston Berger University of Saint Louis in Senegal for facilitating the organization of this workshop.

Significant logistical, administrative and research assistance from different individuals, both within International IDEA and the Hanns Seidel Foundation as well as other partner institutions, was also invested in making this publication possible. In this regard, we gratefully acknowledge the contributions of Katalin Dobias and Izabela Rybarczyk (International IDEA); Liana Lücke, Demian Regehr, Christiane Roth and Uta Staschewski (Hanns Seidel Foundation); and Eric Sutton (William and Mary Law School)

We recognize and thank the Publications team of International IDEA for managing the entire production process from draft to print. While it is difficult to name all the numerous individuals who contributed in different ways to the realization of this project, mention must be made of Thilo Marauhn and his research team at Giessen University (Germany), whose research project on judicial review and democratization in francophone West Africa, and workshops organized around it, provided a constant source of inspiration for this project.

Finally, we acknowledge the general supervisory roles of Ralf Wittek, Head of the Hanns Seidel Foundation's West Africa Regional Programme, and Sumit Bisarya, Head of International IDEA's Constitution-Building Processes Programme.



1. Introduction



1. Introduction

Markus Böckenförde



The legal systems in West African countries are uniquely diverse.¹ They have their foundations in different colonial heritages and have been shaped by a great variety of customary and religious norms, which affects the design of each country's judicial system. At the same time, this region is growing together under the umbrella of the Economic Community of West African States (ECOWAS). Initially established in 1975 to promote economic integration and regionalism, the pressures and consequences of armed conflict, authoritarianism and a weak democratic culture that characterized the region in the 1990s later forced ECOWAS to redefine its mandate in 1993 to include cooperation on political and governance issues. The creation of institutions such as a subregional parliament and a Community Court of Justice underscores this shift, and signals an increasing interest in the rule of law and constitutionalism in the region—which in turn requires understanding the legal concepts applied in each state. Such a common knowledge of the different concepts facilitates collective progress and cooperation that prevents mutual misunderstanding.

In recent years, constitutions in West Africa and elsewhere have tended to give the judiciary the power to assess the constitutionality of laws. According to *Constitute*, an online database of the current constitutions of over 194 countries, 80 per cent of constitutions include a formal constitutional review mechanism (predominantly judicial) for checking the compliance of political authorities' actions and decisions with the constitution. This process seeks to bridge the gap between a merely semantic paper constitution and a normative constitution that effectively constrains and regulates the exercise of political power and protects human rights. Although the extent of authority granted to national constitutional review institutions varies greatly by country, all constitutions in the region offer at least some degree of judicial constitutional review.

¹ This book defines West Africa as all ECOWAS member states—Benin, Burkina Faso, Cape Verde, the Gambia, Ghana, Guinea, Guinea Bissau, Côte d'Ivoire, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo—and former ECOWAS member Mauritania.

This book has two objectives. First, it compares the variety of constitutional justice institutions in 16 West African states and analyses the diverse ways in which these institutions render justice and promote democratic development. There is no single best approach: different legal traditions tend to produce different design options. Second, it seeks to facilitate mutual learning and understanding among countries in the region, especially those with different legal systems, in efforts to frame a common West African system. The book is intended to serve as a reference in all 16 countries, either as a resource for comparative study or as a collection of good practices to promote reforms and identify benchmarks. The comparative analysis draws from country study questionnaires conducted by national experts as part of the project.² It provides an overview of the laws as written; it does not examine the extent to which they have been implemented or are respected, except when essential for illustrative purposes. Nor does it explore the unwritten conventions and informal dynamics that may govern the delivery of constitutional justice. These aspects will be explored during a later stage of the project and will be advanced by further activities with relevant stakeholders in each country.

The countries in the region have different models of constitutional review not only because they have different political systems but also because they come from different legal families with different legal concepts: common law and civil law systems have distinct approaches to constitutional review, despite some common features, as Table 1.1 shows. Further, translating key legal terms can result in misunderstandings. For example, in some common law contexts, the term ‘on the advice of’ in connection with the process of nominating judges may be understood as binding and not merely consultative, as a plain-language reading might suggest.

Table 1.1. West African legal systems, institutional types and terms of judicial tenure

| Country | Legal system | Institutional type | Legal qualification required for all members? | Ex ante review of laws? | Life tenure for justices? | Population (million) |
|---------------------|----------------|------------------------|---|-------------------------|---------------------------|----------------------|
| Benin | Civil law (fr) | Constitutional court | No (article 115) | Yes (article 117) | No (article 115) | 10.3 |
| Burkina Faso | Civil law (fr) | Constitutional council | No (article 153) | Yes (article 155) | No (article 153) | 16.9 |

² The questionnaire is reproduced in Annex 1. Completed questionnaires for each country are available at <http://www.constitutionnet.org/rule_of_law_questionnaires>.

| | | | | | | |
|----------------------|----------------|------------------------|---|-----------------------------------|----------------------|-------|
| Cape Verde | Civil law (po) | Constitutional court | Yes (article 215(3)) | No (except in very limited cases) | No (article 215) | 0.5 |
| Côte d'Ivoire | Civil law (fr) | Constitutional council | No (article 89) | Yes (article 95) | No (article 90) | 20.3 |
| The Gambia | Common law | Supreme court | Yes (article 139 (2)(3)) | No | No (article 141(2)) | 1.8 |
| Ghana | Common law | Supreme court | Yes (article 128 (4)) | No | No (article 145(2a)) | 25.9 |
| Guinea | Civil law (fr) | Constitutional court | No (article 100) | Yes (articles 94–5) | No (article 101) | 11.8 |
| Guinea Bissau | Civil law (po) | Supreme court | Yes | No (except in limited cases) | Yes (article 33 EMJ) | 1.7 |
| Liberia | Common law | Supreme court | Yes (article 66(b)) | No (article 66) | No (article 72(b)) | 4.3 |
| Mali | Civil law (fr) | Constitutional court | No (article 91) | Yes (article 86) | No (article 91) | 15.3 |
| Mauritania | Civil law (fr) | Constitutional council | Constitutional and legal texts silent on the matter | Yes (article 86) | No (article 81) | 3.9 |
| Niger | Civil law (fr) | Constitutional court | No (article 121) | Yes (article 131) | No (article 121) | 17.8 |
| Nigeria | Common law | Supreme court | Yes (article 231(3)) | No | No (article 291(1)) | 173.6 |
| Senegal | Civil law (fr) | Constitutional council | No (article 4) Organic law | Yes (article 92(1)) | No (article 89) | 14.1 |
| Sierra Leone | Common law | Supreme court | Yes (articles 121, 135) | No | Yes (article 137(2)) | 6.1 |
| Togo | Civil law (fr) | Constitutional court | No (article 100) | Yes (article 104) | No (article 100) | 6.8 |

Notes: (fr) = French; (po) = Portuguese

Key

Francophone West Africa

Anglophone West Africa

Lusophone West Africa

The book focuses on the constitutional review options, as stipulated in the various constitutions, and constitutional laws (organic laws). It is therefore predominantly a study of the ‘law on the books’. Organic laws are quasi-constitutional laws found in countries in the civil law family that are of constitutional scope and overrule ordinary statutes. They specify relevant organizational matters related to provisions in the constitution. Most

important for the study at hand, however, is the fact that all former French West African countries (with the exception of Senegal) require judicial scrutiny of organic laws before promulgation, thereby involving the judiciary in defining/safeguarding its own role in the system. The book uses the term ‘constitutional justice or review institution’ instead of ‘constitutional review court’ because four countries use the term ‘council’ instead of ‘court’ or ‘tribunal’ for their review institution. Ongoing debates in France and francophone countries highlight the relevance of this difference for the self-conception (and the popular perception) of the institution.

The concept of constitutional review

If a normative system divides rules into supreme law (constitution) and other laws and acts, mechanisms are needed to maintain this hierarchy. Most countries have given the courts the power to review legislation and acts that contradict the constitution (de Andrade 2001: 997), and consider the judiciary to be the primary institutional protector of the constitution (Chen and Maduro 2013: 97). The decision to entrust the judiciary with assessing the constitutionality of laws may be motivated by the desire to isolate the process from political bias by putting the decision in the hands of a neutral arbiter. Yet the political dimension of such judgements should not be ignored. Constitutional law is inherently political; some scholars refer to it as ‘political law’ (Tushnet 2004: 257). Disputes over constitutional provisions often involve the most sensitive political issues facing a country (Glenn Bass and Choudhry 2013: 2). Adjudicating politically significant cases and defining policy issues within the framework of a constitution that, by its nature, uses fairly abstract terms and expresses basic principles and commitments is not an exclusively legal affair. A constitutional review institution may thus enforce a reading of the constitutional text that differs from the reading that the legislature has implicitly relied upon (Comella 2011: 272). To quote Mark Tushnet, ‘[t]he rhetoric of merely following the law fails to capture the reality of constitutional adjudication’ (2004: 260). Especially in situations where courts have the power to review a law’s constitutionality before it is enacted, the courts may serve as ‘third chambers of government, as bodies that have the power to recast policy-making environments, to encourage certain legislative solutions while undermining others’ (Epstein and Shvetsova 2001: 125).

Yet judicial constitutional review is not a prerequisite for ensuring the integrity and effectiveness of a written constitution (de Andrade 2001: 977). For example, in the Netherlands (article 120) and Switzerland (de Andrade 2001: 978; Cappelletti 1970: 1035), no court can question the constitutionality of

national laws or strike them down on the grounds of unconstitutionality. Other countries refer constitutional review explicitly to political organs. In Ethiopia, articles 83 and 84 of the constitution vest the second chamber of the legislature with this authority, and until 1991 the constitution of Guinea-Bissau entrusted constitutional review to parliament, which received submissions from courts if questions of constitutionality arose (articles 56 and 98).

The impact of legal systems on the design of constitutional review institutions

Countries have developed their legal systems based on their own cultures and history, including pre-colonial and customary legal traditions. Yet the legal systems of the colonial powers have had an enduring influence on the institutional design of their constitutional review mechanisms and institutions. This path was not always consecutive: after independence, most of the French West African countries opted for a different variation of the supreme-court model. Under this model, the supreme court, in addition to its final appellate jurisdiction over all judicial questions, retained exclusive original and final jurisdiction over constitutional questions. This is the unity of jurisdiction, as opposed to the duality of jurisdiction that prevailed in France, the former colonial authority. After the post-1990 reforms, elements of the French design were introduced to different degrees into the former colonies' judicial systems. A recent study by Stroh and Heyl (2015) examined the degree of congruency of the constitutional review structure of former French colonies with the French model before its reforms in 2008 (see Table 1.2).

Table 1.2. Index values, deviations from France and indicator congruence of former French colonies with the French model

| | Benin | Burkina Faso | Côte d'Ivoire | Guinea | Mali | Mauritania | Niger | Senegal | Togo |
|------------------------|-------|--------------|---------------|--------|------|------------|-------|---------|------|
| Congruency with France | 57% | 86% | 82% | 71% | 75% | 89% | 75% | 75% | 75% |

Notes: The index is based on 11 different parameters relevant for the institutional design of an independent constitutional review institution. Along those parameters, the design of the Constitutional Council in France (before the 2008 reforms) was compared with those of 9 West African francophone countries. The parameters were: 1. Broad access to the court or decentralized constitutional review; 2. High quantity and political significance of court powers; 3. Diversification of actors involved in the judges' appointment; 4. Supermajorities to force a consensual selection of judges; 5. Adequate professional requirements for the judges; 6. Ample nonrenewable term lengths; 7. Protection of the judges against political removals; 8. Constitutional protection of the court's competences and structure; 9. Material security of the judges with adequate salaries; 10. Protection against easy amendment of the text that stipulates the court's rights; and 11. Ample legal reach of court rulings.

Source: Stroh, A. and Heyl, C., 'Institutional diffusion, strategic insurance and the creation of West African constitutional courts', *Comparative Politics*, 47/2 (2015), p. 176

The four former British colonies (the Gambia, Ghana, Nigeria and Sierra Leone) and the one former colony of the United States (Liberia) are informed by the common law tradition, whereas the former French and Portuguese colonies are influenced by their respective civil law traditions. Although the United Kingdom does not have a written constitution, and therefore no normative hierarchy that would allow for constitutional review, some notion of constitutional review had been familiar to British colonies. The British empire had written constitutions enacted by the British Parliament for the colonies. Colonial courts theoretically had the power to review whether any provision enacted by the colonial legislature violated this constitution (Chen and Maduro 2013: 98). In practice, however, these courts were too subordinated to the colonial administration to provide any effective oversight (see Chapter 2).

Although the common and civil law traditions have their origins in Western legal thought and practice, the different historical paths of both legal cultures have left relevant distinctions in the role of the judiciary as a third branch of government. The role of judges, their education and career paths, the type of judicial reasoning and the variety of remedies reflect these differences (Fleiner and Saunders 2013: 28). As a result, the concept of constitutional review also developed in different ways and under different logics. Even the civil law family is not homogenous; this is most evident in the context of constitutional review. In general, the civil law approach to constitutional review derives from the Kelsenian idea of concentrating the review of laws for compliance with the constitution into a single judicial institution (a constitutional court).



The French approach, however, of opting for a constitutional ‘council’ rather than ‘court’ remains very distinct, and its juridical nature—whether it is to be considered a political or judicial body—was for a long time contested by French constitutional scholars. Invoking the authority of a constitutional council was only possible prior to the promulgation of a law, and the jurisdiction of the council was limited to checking whether the legislature remained within its constitutional limitations and respected the principle of separation of powers when legislating. The differences between the civil and common law approaches eroded over time, but relevant characteristics of this model informed design options in francophone West Africa (Fleiner and Saunders 2013: 27) during the reforms of the 1990s.

On the one hand, the degree to which constitutional justice institutions in West Africa mirror either of the legal families is to a certain extent reflected in their institutional design and the form and timing of review. From an institutional point of view, all five common law countries rely on a supreme-court model with lifetime tenure for appointed judges (until retirement age). In contrast, all former French colonies opted for a constitutional court/council outside the ordinary court hierarchy, with judges selected for a specific period. The jurisdiction of the courts and the methods of drafting judgements also differ: none of the common law countries permits, in the strict sense of the term, *a priori* (pre-promulgation) review of laws, while all the francophone countries do (this distinction is discussed further in Chapter 7).

On the other hand, some West African countries have overcome the barriers of legal families through cross-systemic borrowing. For example, the majority of common law countries in the region (the Gambia, Ghana, Liberia and Sierra Leone) do not adhere to the concept of decentralized constitutional review, whereby any court in the judicial hierarchy has the authority to deny validity to a law it deems unconstitutional in a given case. Instead, if the question of the constitutionality of laws arises in the lower courts, they have to pause the proceedings and refer the issue to the supreme-court and await its decision.

Accommodation of traditional and religious law

All 16 West African countries surveyed have multiple legal systems; they differ in how formal and statutory laws coexist and how traditional and/or religious law is coordinated. The relationship among different normative systems is relevant to the concept of constitutional review. If the constitutional structure includes customary law and related institutions, the law (as written) recognizes the legal realities on the ground and provides an initial framework

for a coherent coexistence. Over time, a fruitful relationship may develop. Yet if the constitution is silent on the existence of customary law and its institutions, they do not cease to exist but continue to operate informally, detached from (and somewhat ignored by) the supreme law of the land. In West Africa, the relationship between customary law and the constitution can be clustered roughly into three categories.

The first category explicitly recognizes customary law and institutions. The most prominent examples are the constitutions of Ghana and Nigeria. Both countries have judicial bodies for traditional laws that predominately operate in parallel to the common law courts, but are integrated at the supreme level. The final decisions of customary courts (Nigeria) or the National House of Chiefs/judicial committees (Ghana) may be challenged in high-level ordinary courts.

The second category acknowledges the existence of customary law in the constitution and may offer some space for it to operate, but the constitution provides no further guidance about the institutional status or relationships between the two systems of laws. Examples include the Gambia, Benin and Liberia.

In the third category, constitutions are silent on the existence of customary law (lusophone countries and Mali, Senegal, Burkina Faso). This does not mean that statutory personal laws are not informed by traditional or religious customs, or that there are no references to these customs in pertinent local government laws, but that the relevant debate does not take place at the constitutional level.

Including customary law in a constitutional setting also requires accommodating it in the normative hierarchy. Here, again, different rules apply. For example in Liberia and Ghana, the constitution explicitly requires customs to conform to its provisions. Traditional norms that do not meet constitutional standards are void. Thus a clear and strict hierarchy is established that might be difficult to implement since cultural traditions and customs may only adjust over time. If they are considered unconstitutional, they may nonetheless informally persist. Other constitutions explicitly exempt customary provisions from conforming to some constitutional standards. For example, the Gambia and Sierra Leone exempt certain customary provisions in the area of personal law from the constitution's anti-discrimination clause (and thus from constitutional review). Some countries opted for a middle ground between the two extremes of not accommodating traditional laws at all and conserving certain traditional laws by exempting them from some constitutional prohibitions. For example in Niger, Côte d'Ivoire and Togo, the

legislature may (or is even explicitly asked to) identify a procedure that allows for the certification and harmonization of customs with the fundamental principles of the constitution. It is unclear, however, how such a process affects the level of constitutional review, since conformity is not generally required as long as the customs adhere to fundamental constitutional principles.

The majority of francophone countries in West Africa inherited the doctrine of *laïcité*—a French approach to secularism under which religious customs can inform formal laws, but religious law itself is not accepted as part of the formal legal order. One notable exception is Mauritania: its Constitution declares in the preamble that Islam is the sole source of law. Two anglophone countries formally established religious judicial institutions in their constitutions. In Nigeria, sharia courts may be established in parallel to customary courts at the state level, while the Gambia's Constitution gives cadi courts jurisdiction over matters of marriage, divorce and inheritance if the parties involved are Muslim.³

Table 1.3. Integration of customary and religious law in West African constitutions and judicial systems

| | Is customary/religious law acknowledged in the constitution? | Courts established in the constitution with explicit jurisdiction over customary/religious law | Relevant constitutional articles |
|----------------------|--|--|----------------------------------|
| Benin | The Constitution makes no direct reference, but requires the state to safeguard and promote cultural traditions. In addition, all communities comprising the Beninese nation shall enjoy the freedom to develop their own culture while respecting those of others. | Organic law establishes tribunaux de conciliation (conciliation tribunals) that may apply customary law. | Article 23(2) |
| Burkina Faso | No | No | |
| Cape Verde | No | No | |
| Côte d'Ivoire | The Constitution stipulates that the state has the duty to safeguard and promote the national values of civilization as well as cultural traditions that are not contrary to the law or good morals. The National Assembly has to enact a law that lays out the procedure by which customs are certified and harmonized with the fundamental principles of the constitution. | No | Articles 7, 71 |

³ Full texts of many of the constitutions referred to in this report can be found on the International IDEA website ConstitutionNet, <<http://www.constitutionnet.org/resources>>, and the website of the Constitue Project, <<http://www.constituteproject.org/>>.

| | | | |
|----------------------|---|---|------------------------|
| The Gambia | Yes. The Constitution states that laws of the Gambia include customary law and sharia law (with regard to matters of marriage, divorce and inheritance), which are applicable to the members of the communities to which they apply. The Constitution explicitly states that the anti-discrimination clause does not apply to 'members of a particular race or tribe of customary law with respect to any matter in the case of persons who, under that law, are subject to that law'. | The Constitution establishes <i>cadi</i> courts and <i>cadi</i> appeal panels, but is silent with regard to customary courts. | Articles 33(5) (d), 37 |
| Ghana | Yes. The Constitution formally recognizes the existence of customary law and prohibits all customary practices that dehumanize or are injurious to the physical and mental well-being of a person. | Chapter 22 of the Constitution established houses of chiefs and their judicial committees, which have the power to adjudicate matters relating to chieftaincy. They are integrated into the regular court system in the sense that an appeal goes from the National House of Chiefs to the Supreme Court. | Article 11(2)(3) |
| Guinea | No | No | |
| Guinea-Bissau | No | No | |
| Liberia | The Constitution indirectly acknowledges customary law with the statement of the supremacy of the constitution with the effect that 'customs and regulations found to be inconsistent with it shall, to the extent of the inconsistency, be void and of no legal effect'. It further acknowledges this type of law with the statement to 'preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed'. | No. Judicial power is vested in a 'Supreme Court and such subordinate courts as the legislature may from time to time establish' (with no explicit mentioning of customary courts). 'The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature.' | Articles 2(2), 5, 65 |
| Mali | No | No, but according to organic law, the first-instance courts, courts of appeal and the Supreme Court apply customary or religious law in civil matters. | |
| Mauritania | Yes, with regard to religious law: sharia is considered the only source of law | No | Preamble |

| | | | |
|---------------------|--|---|--|
| Niger | Yes, indirectly: 'The law establishes the rules concerning . . . the procedure according to which customs are certified and harmonized with the fundamental principles of the constitution'. | The Constitution acknowledges the authority of chiefs in their function as decision makers: 'The State recognizes the institution of traditional chiefs as the depositary of customary authority. In this capacity, this traditional institution participates in the administration of the territory of the Republic under the conditions determined by law. The institution of traditional chiefs is held to a strict obligation of neutrality and reserve. It is protected against all abuse of power that tends to turn it away from the role conferred on it by law.' | Articles 99, 167 |
| Nigeria | Yes | Yes. The Constitution provides for the establishment of a customary court of appeal/sharia court of appeal at the state level and in the capital. Decisions of those courts may be conferred to a court of appeal. | Schedule II, No. 61; Article 237; Article 260 et seq., Article 275 et seq. |
| Senegal | No | No Cohabitation / (local government act) | |
| Sierra Leone | Yes. The Constitution stipulates that, 'unless a contrary intention appears', the definition of 'law' includes 'customary law and any other unwritten rules of law'. The anti-discrimination clause shall not apply 'in the case of members of a particular race or tribe or customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons'. | Yes. 'The Judicature shall consist of the Supreme Court of Sierra Leone . . . and such other inferior and traditional courts as Parliament may by law establish'. | Articles 27(4)(e)), 120(4(e)), 161 |
| Togo | Yes, indirectly: 'The law establishes the rules concerning . . . the procedure according to which customs are certified and harmonized with the fundamental principles of the constitution . . . the integration of national cultural values'. | Not explicitly, but the 'Togolese State recognizes the institution of traditional chiefs, guardian of habits and customs'. | Articles 8, 143 |

Key


Francophone West Africa

Anglophone West Africa

Lusophone West Africa



2. Traditional and historical antecedents of constitutional justice in West Africa



2. Traditional and historical antecedents of constitutional justice in West Africa

Yuhniwo Ngege



Contemporary studies of the evolution of constitutional justice in West Africa tend to begin during the post-colonial period. Scholars such as Prempeh (1999: 140) argue that the African judiciary abdicated its responsibilities in favour of the executive in the decades immediately after independence. Others have suggested that real constitutional justice systems capable of advancing constitutionalism and the rule of law only emerged during the third wave of democratization in the 1990s (Fombad 2011: 1017; Prempeh 2006: 3–5). This is argued to be particularly true in francophone West Africa, where ‘constitutional justice had not begun to discover any kind of autonomy [...] until the beginning of the democratic transitions at the end of the 1990s’ (Kante 2008: 158–59). The event, in Kante’s view, was ‘a foundational element, of a new juridical [...] order in francophone Africa’ (2008: 159).

This perspective focuses on the institutional models and practices of constitutional justice that were inherited from departing colonial regimes or later borrowed from the West, and overlooks pre-colonial political establishments, legal orders and institutional models for political governance. Looking past the labels of ‘dark’, ‘irrelevant’, ‘primitive’ and ‘chaotic’ so often associated with the continent’s political organization before the partition, pre-colonial Africa had a solid political and governance infrastructure. This governance architecture integrated clear executive, legislative and judicial functions, as well as a clear system of checks and balances, rule of law and control against *ultra vires* conduct (behaviour that exceeds the scope of authorized power) by those entrusted with public power.

The concepts of rule of law, checks and balances, and control against *ultra vires* conduct implies the existence of a supra norm regulating political and public authority. Accordingly, any comprehensive study of the historical development of constitutional justice in West Africa (or anywhere else on the continent) must take these pre-colonial precursors into account.

The first part of this chapter traces the origins of constitutional justice in

West Africa from pre-colonial times. The second part examines the evolution of constitutional justice in colonial Africa, and the final section focuses on post-colonial Africa.

Pre-colonial West Africa

This section attempts to answer the following questions. What, if any, system of constitutional justice or analogous framework did West Africa have on the eve of European colonization?⁴ How did pre-colonial West Africa organize and deliver this form of justice? To answer these questions, it is important to understand how political systems in the region were organized prior to the partition. What was the organizational framework for political governance? What were the source of political power? How was the use of that power regulated, and through what kind of institutional mechanism?

The organization and exercise of political power

Pre-colonial African societies, although they recognized the existence of executive, legislative and judicial functions in the polity's governance architecture, did not necessarily distinguish between the various institutions or offices that exercise these functions (Alabi 2006: 119). Therefore, those diverse offices and institutions (and the powers that came with them) were often centralized in one person—usually a traditional paramount ruler—who exercised it through, or with the assistance of, other traditional authorities and institutions. The division and exercise of this power varied in different political communities. In most cases, however, the units of government tended to constitute a king as the supreme ruler (with supreme legislative, executive and judicial authority), an inner council, and a council of elders or chiefs, which in some contexts had supervisory authority over the polity's subpolitical units. While such councils were created primarily to assist the monarch in various aspects of governance, such as lawmaking and local administration, they also represented the first line of defence against royal despotism (Degu 2002: 133).

This kind of organizational structure prevailed predominantly in so-called chiefly or acephalous societies. Many scholars of pre-colonial African political systems, such as Ayittey (2006: 106, 112–16), define chiefly societies as those

⁴ Constitutional justice is defined much more broadly for the purposes of this section to include any form of action that is conducted by a separate body (or one acting on reserved powers) and may result in sanctions. It either (a) limits and regulates the exercise of political power by the monarch or institutions bestowed with such authority or (b) aims to ensure compliance with a higher normative order, belief system or societal convention, regardless of whether it is written as a constitution.

that have a centralized authority with clearly defined executive, legislative and judicial functions, and chiefless or ‘non-acephalous’ societies as those that do not. According to Ohaegbulam (1990: 98–9), Western Sudan—modern-day West Africa—is the best example of a chiefly society. In the Yorubaland of pre-colonial Nigeria, for instance, the *oba* or *alafin* (king) headed the organizational structure of each Yoruba town and exercised ultimate governmental authority—executive, legislative and judicial (Alabi 2006: 114). Below him was the *Oyo Mesi* (council of chiefs), headed by a *basorun* (prime minister), which represented the non-royal lineage of the Yoruba community. The council exercised a checks-and-balances function on the king and served as the link between the people and the palace. Next was the district heads or *baales*, who performed similar functions (Alabi 2006). Other West Sudanese political communities with similar systems of political governance include the great empires of Mali and Songhai as well as the Fantis of Ghana and the Mossis of Burkina Faso.

Institutional regulation of political power

As noted above, the distinction between acephalous and non-acephalous societies lay in the degree to which a central government or authority exercised legislative, executive and judicial authority. Such power did not exist in a void. In general, unwritten customary law provided the normative basis for the exercise of all power. This law, in turn, found its source in a higher unwritten convention, which consisted of ancient traditional values, beliefs and cultural norms that were developed and handed down orally through generations. These laws and values became integral to communal identity and provide an immutable, shared and inherited standard of popular legitimacy over time. Monarchs and other traditional rulers were bound (by contract) to comply with this higher order in the exercise of their public duties. In this regard, the higher normative order provided the ‘constitutional’ standard against which governmental action, decisions or laws were measured. Therefore the ruler was responsible to the people to enforce laws developed through their common heritage; (s)he merely represented the community and upheld its laws, and did not impose his/her own laws (see also Mboup 2011: 76).

This construction—even if it is not conceptualized in terms of the principles of popular sovereignty, rule of law, constitutional governance, social contract, separation of powers, and checks and balances—is similar to those of 18th-century classical liberal European philosophers such as Locke, Voltaire, Rousseau and Montesquieu (Akinjide and Elias 1988: 36). Central to the thinking of these philosophers is the argument that since public power—held at the behest of the people, who remain sovereign—is not subject to arbitrary exercise, control mechanisms are necessary to rein in or sanction any breaches

of this principle.

Such thinking and arrangements were common to the political organization of pre-colonial West African societies. In fact, although they conferred the supreme powers of chief judge, chief legislator and chief executive to the monarch, traditional African societies designed institutions to maintain stability, safeguard the system, and protect the fundamental order of society from arbitrary rule and breakdown. These institutions achieved these objectives by combining a number of important control functions that were, arguably, both political and judicial.

First, the inner councils and the council of elders, as indicated earlier, were the first line of defence against despotism. In this respect, Yorubaland again provides a useful example. The *Oyo Mesi* served as an important check on the monarch's political authority; it confirmed the enthronement of any king and ensured that the monarch exercised power in keeping with the dictates of tradition or the constitution (Alabi 2006: 117). Its head, the *basorun*, who often deputized for the monarch, commanded respect and instilled fear among everyone, including the monarch (Alabi 2006). While the king theoretically served as the chief judge, legislator and executive, he had to consult the *Oyo Mesi* when making decisions, and could only hold power as long as he retained the confidence of the *Oyo Mesi*, which could force his abdication via suicide when that confidence was lost. The *Ogboni* was a secret society of nobles that sat outside this structure and provided overall oversight and checks-and-balances for both the *alafin* and the *Oyo Mesi* (Alabi 2006). The *Ogboni* served as the 'custodians of public liberties and prerogative', and had counter powers that would be triggered in case of extreme political oppression or violation of the perceived societal or constitutional order, which included issuing heavy penalties against despotic, unpopular or corrupt leaders (Mboup 2011).

The *Ogboni* collaborated with and controlled both the monarch and his immediate advisory institutions and collaborators (Alabi 2006: 117). If the monarch became the subject of an inquiry warranting a judicial proceeding, a panel of judges drawn from the *Ogboni* and the *Oyo Mesi* would adjudicate the matter. Treasonable offences seemed to include corruption, tyranny, and flagrant disregard for sacrosanct traditional values and customs. The sanctions imposed on monarchs found guilty of such offences included forced abdication by committing suicide or involuntary exile (Alabi 2006). For example, oral records suggest that Daaw Demba, the Wolof king of the *Senegambia*, was exiled in 1647 after he became extremely abusive and oppressive (Mboup 2011: 77).



Many such cases existed elsewhere across pre-colonial West African societies. Ajayi and Epsie (1965: 333–34) describe the Jukun peoples of the Niger and Benue rivers as having strong counterbalancing institutions in the form of an Inner Council, led by an *abo* (prime minister), who together with a Council of Priests served as a check on tyrannical rule by the divine king. In pre-colonial Ghana, the king of the Akan people presided over a very hierarchical empire that dominated most of southern Ghana and its eastern borderlands, and was subject to constitutional restraints on his exercise of power. A council of kingmakers had the authority to investigate petitions and remove the king if he was found guilty of the charges (Prempeh 2015).

Although the geographic breadth of the Akan kingdom and the power of the king are vastly different today than in the pre-colonial days, this model of constitutional governance, which also persists throughout Southern Ghana, has largely survived (Crook 2005: 1). In some pre-colonial communities in present-day Liberia and Sierra Leone, the Poro Council—a secret society that reinforced the chieftain’s role but also had tremendous cultural, religious and political power within the community—served as a check on the chieftain’s exercise of power (Fulton 1972: 122; Little 1965: 349–65, 1966: 63, 66–72).

The pre-colonial Kingdom of Dahomey (present-day Benin) used an even more institutionalized system of review in which laws emanating from the king could only become legally binding after they were approved by a Council of Ministers that retained the power to reject laws they found ‘impolitic’ (Skertchly 1874: 443–44). In the 19th century, the kingdom created a Court of Appeals as part of a move to curtail the absolute authority of local lords over Dahomean subjects (Monroe 2014: 101–02).

If one conceives judicial review or constitutional justice as a function typically of judicial bodies, particularly constitutional courts/councils or supreme courts, these examples may arguably represent the administration of constitutional justice or judicial review. Yet judicial review creates an institutional mechanism for rejecting or constraining specific *acts* of power holders (rather than individuals themselves), without necessarily questioning the legitimacy of their rule. Considered thus, these cases—except, perhaps, the unique Dahomean case—seem more like examples of limiting or constraining power rather than judicial or constitutional review *per se*, as sanctions for breaches of traditional constitutional norms were seldom limited to the breach itself. However, the fact that the mechanism for limiting or constraining such power was both institutionalized and based on a pre-established customary normative order shows that pre-colonial African states had ideas of limited government and separation of powers that foreshadowed constitutional justice.

Constitutional justice in colonial West Africa

European interaction with Africa—which began in the 14th and 15th centuries—took an imperialist twist in 1884, when European powers held a conference in Berlin to partition the continent. The result was that the pre-colonial political systems of the Western Sudanese region came under the direct political control of France (which took the lion's share as compensation for concessions made elsewhere), England, Germany and Portugal. Each of these powers sought to introduce colonial governance policies, which did not always reflect or take into account pre-existing indigenous political governance systems.

Some, like the British, took an indirect approach, seeing their colonies as separate entities with institutions and customs that could be adapted and used to serve their colonial objectives (Lugard 1922: 193–229). France and Portugal, by contrast, considered their African territories to be integral components or overseas provinces, which the metropolitan government should administer in the same way as the mainland. The short-lived policy of direct rule or assimilation sought to make French people out of indigenes, over whom French laws would apply. They later changed to a policy of association, a form of separate co-existence in which locals served as agents of the colonial administration in the same way as the British policy of indirect rule. Despite the apparent similarities between 'association' and 'indirect rule', the French approach to indirect rule generally entailed more restructuring of pre-colonial political governance infrastructure for greater administrative convenience than the British, who were less interfering (Crowder 1964: 197–205). Therefore indigenous political units, laws, customs and ways of life—and, by extension, the pre-colonial system for constitutional justice—were left more intact in British than in French territories (Crowder 1964). An exception was made only where these failed to meet the 'repugnancy test'. Britain introduced this test in its colonies to determine the validity and applicability of native law: native laws and customs were maintained if they were not objectionable to 'natural law, equity and good conscience' and not incompatible with applicable English law.

While repugnancy and compatibility rules to an extent provided a standard of review akin to the scrutiny that takes place as part of judicial review, the colonial administration did not necessarily subscribe to the principles of separation of powers and checks and balances, which would require a judicial body alone to determine whether the standard was breached. An 1891 dispatch from the British secretary of state for the colonies to Sir Claude MacDonald, the consul general to the Oil Rivers Protectorate in Nigeria, illustrates this point. While advising the consul general not to unduly interfere with the



administration of indigenous justice, the dispatch authorized him to '[make] the chiefs understand that their powers will be forfeited by misgovernment' and to assume—should he deem it essential for the benefit of the natives—the 'chiefs' judicial and administrative powers' (Nwabueze 1982: 15–16).

This example suggests that agents of the colonial or occupying power, rather than the judiciary or an independent institution, determined the compatibility or repugnancy of laws and customs. This was due in part to the structure of the colonial administration. Colonial administrations had centralized, hierarchical power structures headed by a governor general, who delegated power to governors or lieutenant governors in the small colonial units, who were political appointees from the metropolis. These foreign officials had extensive legislative and judicial functions. For instance, the governor of British West Africa was often also the president of the Legislative Council—in theory, the lawmaking arm of the colonial administration—and had powers to veto, make laws by proclamation and rule by decree (Davidson 1992). The judiciary was also under the governor's control, and had no authority to review his decisions; it served as an instrument of colonial administration (Prempeh 2006: 25).

The approach to colonial administration was similar in French and Portuguese West Africa. French colonies were headed by a colonial minister (based in Paris) who had extensive powers, including to legislate by decree, and a governor general (representing him in the colonies) with judicial power 'beyond which there was no form of appeal' (Suret-Canale 1971: 308, 332). Indeed, the governor had the power to deny access to the colonial courts to persons seeking to challenge a legislative or executive act of the colonial administration (Bing 1968: 221). Kwame Nkrumah, independent Ghana's first president, stated in the 1950s that 'the judiciary and the executive under a colonial regime are one and the same thing' (Prempeh 2006: 25). District officers or administrators served as intermediaries between the central and native authorities to enforce the decrees of the colonial minister and governor general. Their role went beyond a principal–agent relationship, however, as district officers and administrators exercised judicial and executive functions in local administration (Bing 1968: 221).

The highly centralized, pyramidal organization of the colonial administrations prevented the emergence of an effective constitutional justice system to restrain and review the executive and legislative actions of colonial authorities: 'the colonial state was *par excellence* a rule *by* law, as opposed to a rule *of* law state' (Prempeh 2006: 24; emphasis in original). Therefore, there was no constitutional justice during the colonial period, since there were no mechanisms (judicial or otherwise) to ensure that colonial administrative

authorities complied with a higher legal order. Any pre-colonial approaches to ensuring the rule of law and constitutional governance were destroyed in the French colonies and diluted in British holdings.

Only the former Portuguese colonies of present-day Cape Verde and Guinea-Bissau had any form of constitutional adjudication. While the colonial authorities in these countries wielded similarly broad and highly centralized powers as their peers in the British and French colonies, some of their decisions in the colonies were subject to review by an Overseas Council. Under article 1 of Executive Law No 49146 of 25 July 1969, the council was, in addition to being the highest permanent consultative body of the overseas minister on political and administrative matters, also the court of constitutionality, the supreme administrative court and the tribunal for resolving conflicts of jurisdiction in the colonies. Article 7 of the law explicitly gave it jurisdiction to decide the constitutionality of statutes from the government of the colonies. However, because the overseas minister (who was a member of the executive) presided over the council, its impact as a veritable constitutional justice institution is debatable.

Constitutional justice in contemporary West Africa

In contrast to pre-colonial West African political establishments (which developed a functioning indigenous form of constitutional justice system) and colonial West Africa (where virtually no culture of constitutional justice flourished), the evolution of constitutional justice in the post-colonial era was characterized by both dormancy and resurgence at different times. To understand the evolution of constitutional justice during this time, it is therefore instructive to examine two time periods: (a) immediately after independence (the late 1960s to the late 1980s) when one-party states re-emerged and (b) the period characterized by the re-establishment of multiparty democracy (from the 1990s onwards).

The post-independence era: 1960–89

The end of World War II and the emergence of a new international system under the leadership of the United Nations, the founding charter of which espoused the principle of self-determination for subjugated territories, dealt a fatal blow to the colonial enterprise. Colonialism was denounced and largely discredited. Encouraged by the emerging international order, anti-colonial movements with widespread support both within and outside the colonies combated colonialism and led the colonies to independence. By the 1970s, many former West African colonies—beginning with Ghana in 1957—



became sovereign states with new constitutions establishing independent indigenous governments. Although these constitutions were altered significantly during the first decade following independence, many of them created political systems modelled on those in the West—particularly the former colonial powers.

Therefore, a common feature of these political systems was a judicial arm of government charged with the administration of justice. This included, in some cases, both constitutional justice and the promotion of constitutionalism, and the protection of human rights and the rule of law, although many scholars question the judiciary's record in the latter role (Odinkalu 1996: 124; Nwabueze 1977: 30; Seidman 1974: 827).

The institutional mechanisms established for judicial review in many of the constitutions in place between 1960 and 1989 vary depending on which colonial power administered the territory. In francophone and anglophone Africa, the power to interpret the constitution or ascertain the conformity (or not) of the lower category of norms of juridical value to the supreme law was generally vested in one or more superior courts, which also had appellate jurisdiction over other general questions of law arising in lower courts.⁵ For instance, at independence and during most of the period until 1990 in francophone West Africa, only the constitutional bench of the supreme court, which stood at the apex of the judicial hierarchy in the new states, had this power.⁶

The common law (essentially Anglo-Saxon) countries had similar arrangements.⁷ Only the supreme court in many of these jurisdictions—for instance, in the Gambia (1970, article 93(1)), and in Ghana and Sierra Leone (1978, article 105)—had jurisdiction over questions relating to the constitution.⁸ In others such as Nigeria, both the Supreme Court and the

⁵ Unlike in francophone Africa, where superior courts would normally consist of only a supreme court and the Court of Appeal, in common law West Africa this would also include the High Court.

⁶ Supreme courts generally had different sections that were responsible for different legal questions. Hence, in addition to the constitutional bench, they would normally also have administrative, civil and criminal benches.

⁷ Until many abolished the parliamentary regimes and became one-party presidential republics shortly after independence in the mid-1960s, the West African Court of Appeals and the Judicial Committee of the Privy Council, in that order, remained the final arbiter on all judicial questions including—presumably—constitutional questions.

⁸ Articles 42(2), 106 (1) and 118(1) of the constitutions of Ghana (1960), (1969) and (1979), respectively, vested the power of judicial review in the supreme court. Judicial review was suspended in Ghana during the interregna of 1972 and 1981, when the military suspended the 1969 and 1979 constitutions, respectively.

High Court (or sometimes the Court of Appeal) had this authority.⁹ The exception, perhaps, is Liberia. Unlike its 1847 Constitution (article 4)—which, following the American model that inspired it, did not explicitly grant the power of judicial review: articles 2 and 66 of the 1987 Constitution read together state: ‘The supreme court, pursuant to its power of judicial review is empowered to declare any inconsistent laws unconstitutional [and] shall be the final arbiter of constitutional issues’. This formulation suggests a more diffused American-style model than in other West African common law jurisdictions. In fact, the Liberian Supreme Court has confirmed this position in its case law when reinterpreting the word ‘final’ (see Chapter 3).

In lusophone West Africa, however, it would be misleading to speak of ‘judicial’ review because no judicial institution was involved. The constitutions of Cape Verde (1980, article 62) and Guinea-Bissau (1984, article 98) both authorized the parliamentary ‘policy’ review of the constitutionality of laws.¹⁰

The constitutions of Ghana (1979, article 35(1)) and Sierra Leone (1978, article 18) granted original jurisdiction to the high courts—with appeals going from the high courts to the other two superior courts—to adjudicate violations of fundamental rights guaranteed in the constitution. Lusophone and francophone West Africa, however, did not grant jurisdiction over these issues to the constitutional bench in the supreme courts or other specialized jurisdictions. There are two possible explanations for this. One is the degree of constitutional value attached to human rights in the different systems. In the common law systems of anglophone West Africa, for instance, all the countries surveyed had constitutionalized fundamental human rights by including elaborate Bills of Rights in constitutions adopted or revised during this period: Gambia (1970), Ghana (1969, 1979), Liberia (1987), Nigeria (1963 and 1979) and Sierra Leone (1978).

In contrast, of the 11 countries surveyed in both lusophone and francophone Africa, only a handful of constitutions during this period comprehensively addressed fundamental rights, including Cape Verde (1980, articles 22–44), Guinea-Bissau (1984, articles 24–45), Senegal (1960 and 1963, Title II),

⁹ See e.g. articles 115–19 and 125(1c-d) of the Constitution of Nigeria (1963) dealing with the Federal High Court and Supreme Court’s jurisdiction over constitutional issues; article 4(1–2) of the 1979 Constitution on the special jurisdiction of the High Court to enforce the Bill of Rights; and articles 213 and 220 on the Supreme and Appeal Court’s exclusive jurisdiction over questions of constitutional interpretation.

¹⁰ This form of constitutional review is not entirely uncommon. At the height of the French political class’s hostility towards courts in the wake of the demise of the *ancien regime*, this form of constitutional review was established under the 1799 and 1855 French Constitutions. Cuba, at least under its 1976 Constitution, and Ethiopia have also experimented with (or still have) this system of constitutional review.

Togo (1963, Title II) and Guinea-Conakry (1982, Title II). Others either delegated parliament to legislate on this, did not address the issue or made general references to international human rights treaties: Côte d'Ivoire (1960, article 41), Mauritania (1960, article 33 as amended up to 1985). The second possible explanation of the differences in approach between anglophone and lusophone/francophone countries is that human rights-related claims were litigated in regular courts, and it was only later that these systems acknowledged the importance of human rights claims, and ensured that citizens had direct access to specialized constitutional justice institutions.

1990s to the present

The historical development of constitutional justice in West Africa experienced another transformational phase during the broader political changes taking place across the continent in the 1990s. This was most evident in the francophone countries, where revised or new constitutions radically transformed the existing institutional architecture for constitutional justice. The principle of unity of jurisdictions that characterized the previous decade largely gave way to the principle of duality of jurisdictions. Consequently, the ordinary judiciary, which had jurisdiction over the administration of constitutional justice due to the supreme court's exclusive authority (through its constitutional bench) on the subject, lost its competence. In its place, specialized institutions of the Kelsenian model—referred to variously as constitutional courts or councils—with exclusive jurisdiction over constitutional matters emerged. Ngege (2013: 445) argues that the development of specialized constitutional courts in this context was just as much a reaction to the authoritarianism of the post-colonial African state as was the growth of constitutional courts in Europe after World War II. Lusophone Cape Verde and Guinea-Bissau also replaced parliamentary constitutional review with a judicial organ. While Guinea-Bissau has maintained the constitutional bench of the supreme court, a model that was common in the post-independence decade in francophone countries, Cape Verde opted for the Kelsenian centralized model of a constitutional court. The anglophone common law countries of West Africa have largely maintained or reverted to the institutional architecture for constitutional justice developed prior to 1989. As a result, the superior courts—the High Court, the Court of Appeal and the Supreme Court—have continued to exercise various degrees of jurisdiction over matters of constitutional review (or 'judicial' review) and constitutional adjudication.¹¹

¹¹ See in general the constitutions of the Gambia (1997), Ghana (1992), Nigeria (1999) and Sierra Leone (1991).

This chapter has demonstrated that constitutional justice was not an entirely alien concept in West Africa on the eve of Western colonization. As Table 2.1 illustrates, many countries had developed traditional forms of ensuring compliance with informal conceptions of traditional fundamental norms. Western colonization introduced significant changes to these systems, particularly in terms of institutional structure. The institutional framework in contemporary Africa is largely a product of Western influence, and is fundamentally different from the architecture for constitutional justice on the eve of the partition. Yet, the values and ideals behind the notion of constitutional justice—the rule of law and adherence to a superior juridical order—have remained essentially the same throughout.

It is also important to note that there are differences not only between the different periods (pre-colonial, colonial and post-colonial) but also within them. For instance, beyond the transformations in institutional architecture in francophone Africa in the 1990s, there were also significant operational and functional changes in the new institutions. Chapter 8 describes how the enforcement and protection of constitutional human rights has become an important mandate of the new constitutional courts/councils in the region. Likewise, access rules to these institutions (Chapter 9) have also been broadened in many jurisdictions, making it easier for individuals and other non-state actors to bring actions before them.

Table 2.1. Historical evolution of constitutional justice systems in Africa

| Time/period | Country/community | Constitutional justice institution (or analogous framework) | Functions |
|---|-----------------------------------|--|---|
| Pre-colonial West Africa (Before 1800) | Nigeria (Yorubaland) | <i>Oyo Mesi</i> (Council of Chiefs) | First line of defence against royal despotism; guardians of the constitution or laws of the land |
| | | <i>Ogboni</i> (secret society) | Conducts oversight of the king (<i>oba/alafin</i>) and <i>Oyo Mesi</i> ; has the power to review and sanction breaches |
| | Niger-Benue (Jukun Kingdom) | Inner Council led by <i>abo</i> (prime minister) | Hold the <i>aku</i> (divine king) accountable for his actions and ensure the consistency of his actions with custom |
| | | Council of Juju Priests | |
| | Senegambia (Wolof Kingdom) | Traditional Council of Kingmakers | Custodian of public liberties; has the power to review and sanction breaches |
| | Ghana (Akan) | Traditional Council of Kingmakers | Custodian of public liberties; has the power to review and sanction breaches |
| | Benin (Dahomey) | Council of Ministers | Review and approve royal edicts |
| | | Court of Appeal | Provide checks and balances on the absolute authority of local lords and vassals |
| | Sierra Leone/Liberia (The Kpelle) | <i>Poro</i> (secret society) | Checks and balances, legitimate the powers of the chieftain (<i>lai-kalon</i>) |
| Colonial West Africa (1884–1970) | British and French colonies | No separate institution: these functions were performed by the head of the colonial administration, the governor general and his subordinates within the colonial executive common | Administer justice; rule on the compatibility or repugnancy (in British colonies) of native laws to British conception of law |
| | Portuguese colonies | Overseas Council (<i>Conselho Ultramarino</i>) | Determine the constitutionality of colonial government statutes and actions |

| Post-colonial West Africa (1990s to present) | | | | |
|--|-------------------------|--|--|--|
| (i) 1960–89 | Anglophone West Africa | The Gambia | Supreme Court | Constitutional review and interpretation; enforce the Bill of Rights |
| | | Ghana | Supreme Court | Constitutional review and interpretation |
| | | | High Court | Adjudicate claims relating to constitutional Bill of Rights |
| | | Liberia | All courts in the judicial system | Constitutional review and interpretation |
| | | Nigeria | Supreme Court, Court of Appeal | Constitutional review and interpretation |
| | | | High Court | Adjudicate claims relating to constitutional Bill of rights |
| | | Sierra Leone | Supreme Court | Constitutional review and interpretation |
| | | | High Court | Adjudicate claims relating to constitutional Bill of Rights |
| | Francophone West Africa | | Supreme Court | Constitutional review and interpretation |
| | Lusophone West Africa | | Parliament | Constitutional review and interpretation |
| (i) 1990s–present | Anglophone West Africa | | Same as above except for The Gambia: its 1997 constitution transferred jurisdiction over the Bill of Rights from the Supreme Court to the High Court | Same as above except for The Gambia: its 1997 constitution transferred jurisdiction over the Bill of Rights from the Supreme Court to the High Court |
| | Francophone West Africa | Benin, Guinea, Mali, Niger, Togo | Constitutional Court | Constitutional review and interpretation; enforce the Bill of Rights |
| | | Burkina Faso, Côte d'Ivoire, Mauritania, Senegal | Constitutional Council | Constitutional review and interpretation; enforce the Bill of Rights |
| | Lusophone West Africa | Cape Verde | Constitutional Court | Constitutional review and interpretation |
| | | Guinea-Bissau | Supreme Court | Constitutional review and interpretation |



3. Institutional models for constitutional justice in contemporary West Africa



3. Institutional models for constitutional justice in contemporary West Africa

Yuhniwo Ngege



While examining the historical evolution of constitutional justice in West Africa, the previous chapter looked at pre-colonial or analogous systems of constitutional justice in the region. However, Chief Justice Marshall's famous dictum in the 1803 American case of *Marbury v Madison*—that 'it is emphatically the province and duty of the judicial department to say what the law is'—remains the cornerstone from which many later and contemporary approaches to constitutional justice developed. Constitutional adjudication only emerged in Europe in 1920—117 years after the *Marbury* case. This chapter assesses the current models of constitutional justice in the 16 West African countries under study. First, it provides a brief overview of the current different approaches to constitutional review. Then it explores what kind of institutional structures are responsible for constitutional justice in the different legal systems of francophone, lusophone and anglophone West Africa.

Models of constitutional review institutions

When analysing constitutional justice systems from an institutional architecture perspective, it is possible to distinguish between institutional structures for constitutional review that are either judicial or political in form. In the former, a system of courts is responsible for constitutional review or control, while in the latter political institutions have primacy.

Judicial models

Within this model, further distinctions are possible, depending on whether the constitutional review function is diffused across different types of courts or concentrated in a central institution, or combines elements of both.

The diffusion (supreme-court) model

Also known as the American, decentralized or dispersed model, the hallmark of this form of review is the multiplicity of courts at different levels involved in the judicial review process. It is most prevalent in countries of common law or Anglo-American legal tradition. These courts are institutions of the ordinary judiciary, and constitutional review is just one part of their job. A supreme or final court sits at the apex of this system, hearing appeals (including on constitutional questions) originating from other courts within the judicial system. Within the supreme-court model, a distinction is also possible between the decentralized (American) and centralized (Ghanaian) versions. The centralized supreme-court model was also common in many francophone African countries at independence and before the emergence of specialized constitutional courts/councils in the 1990s.

The concentration model

This model, which is also known as the centralized or fusion model, is a European invention, and is mostly associated with countries of civil law tradition. Its main feature is the concentration of the constitutional review function in one specialized institution—usually a constitutional court/council, often located outside the regular judiciary. This model was developed much later: the Austrian Constitution established the first Constitutional Court in 1920. Hans Kelsen, an Austrian jurist and key drafter of this constitution advocated an alternative to the US approach, which he argued lacked predictability and failed to promote unity and uniformity in the law, resulting in legal uncertainty because it granted different courts the power of constitutional review (Kelsen 1928: 197–257). He asserted that since judicial power in Europe was subordinated to other branches of government, an independent institution was needed to ensure effective control of government action.

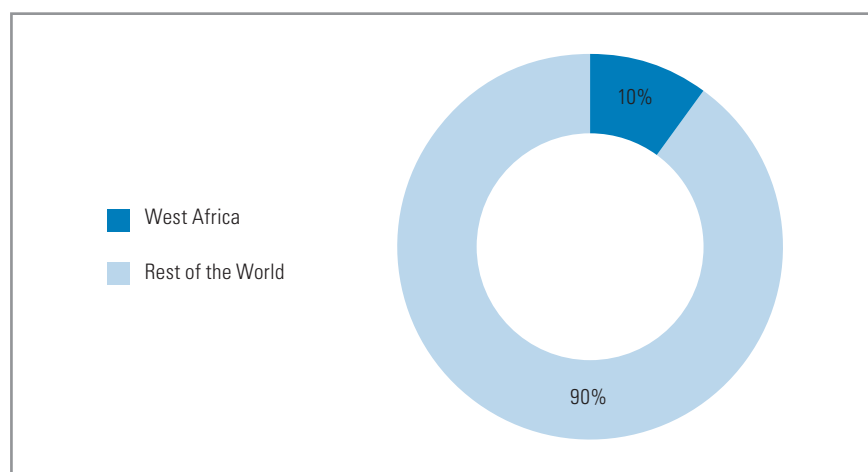
The hybrid model

The hybrid model, which is prevalent in Latin America, has two key characteristics that reflect aspects of both the concentrated and diffused models (Navia and Rios-Figueroa 2005: 191). One is the existence of a specialized chamber within the ordinary judiciary that has exclusive jurisdiction over constitutional review, specifically in the supreme court. The other is that ordinary courts may have the power to review and refuse to apply an unconstitutional statute, much like their counterparts in the decentralized review model. However, since they lack the power to declare the law invalid or unconstitutional, the effect of the decision is limited to the parties to the

specific dispute. The power to strike down the statute mostly belongs to one court—usually a supreme court, or in systems with a concentrated model of review, a constitutional court or council.

The Comparative Constitutions Project, which has developed a cross-national historical dataset of all written constitutions since 1789, has found that, as of 2013, 154 countries had adopted the judicial model of constitutional review (Ginsburg 2014). Approximately 10 per cent of this number, as Figure 3.1 shows, are located in West Africa. Of the global total, 34 per cent (52 countries) have a decentralized or supreme court system, 61 per cent (94 countries) use a constitutional court/council model, and 5 per cent (eight countries) have a hybrid system (Ginsburg 2014).

Figure 3.1. West Africa in the global distribution of the judicial model of constitutional review



Political models

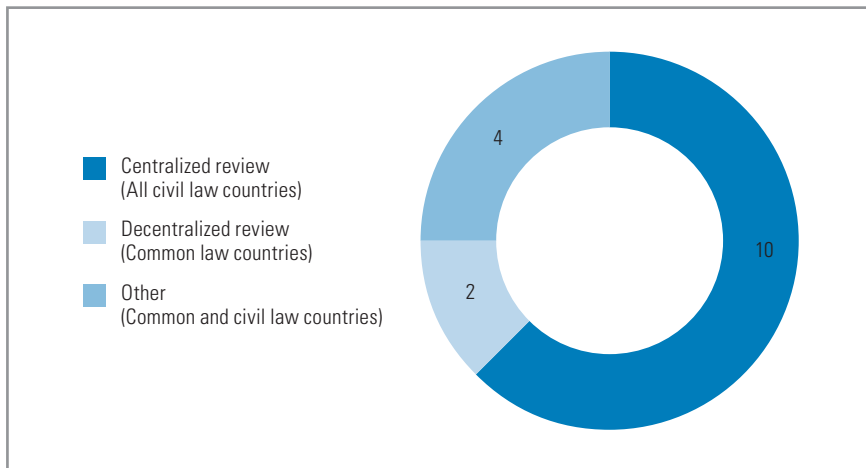
Less common today, the political model recognizes political institutions (such as a parliament or a (sometimes quasi-judicial) designated organ within it) rather than judicial institutions as the chief authorities for reviewing constitutionality. Countries that use this model or variants thereof include China (2004, article 67), Cuba (2002, article 75), Ethiopia (1994, articles 83–84) and Finland (2011, article 74). Elsewhere in Europe, British courts cannot set aside a duly enacted parliamentary statute, while article 120 of the Dutch Constitution forbids Dutch courts from controlling constitutionality

due to the principle of parliamentary supremacy, which gives parliament in these countries absolute sovereignty over all other bodies. No institution can therefore review its actions. As political rather than judicial institutions are responsible for the process, it may be more appropriate to call this political review.

Constitutional justice institutions in contemporary West Africa

As indicated in Figure 3.1, contemporary West Africa accounts for 10 per cent of the global distribution of systems with a judicial model of constitutional review. These represent all 16 countries in West Africa under study, which can be divided into three clusters. The centralized review cluster includes 10 countries—predominantly of civil law tradition—which have adopted a Kelsenian-type institution in the form of a constitutional court/council. The decentralized review cluster comprises two countries that have adopted the American model, and the remaining four countries (of both common law and civil law tradition) use a centralized supreme court model (Figure 3.2).

Figure 3.2. Distribution of the judicial model of constitutional review in West Africa



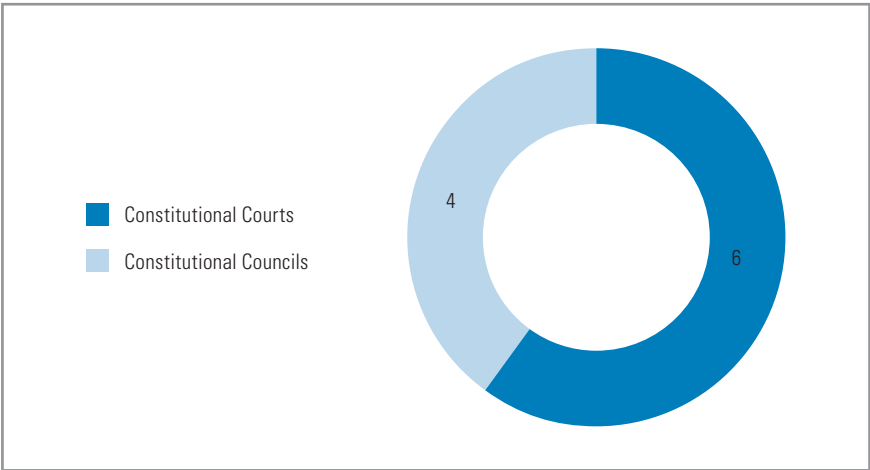
Countries with Kelsenian-type institutions

A Kelsenian-type constitutional review institution has been adopted by 10 countries in the subregion. Except for lusophone Cape Verde, these countries



are all in francophone West Africa—Benin, Burkina Faso, Guinea, Côte d’Ivoire, Mali, Mauritania, Niger, Senegal and Togo. Benin, Cape Verde, Guinea, Mali, Niger and Togo have constitutional courts, while Burkina Faso, Côte d’Ivoire, Mauritania and Senegal have constitutional councils (Figure 3.3).

Figure 3.3. Distribution of Kelsenian-type institutions in West Africa



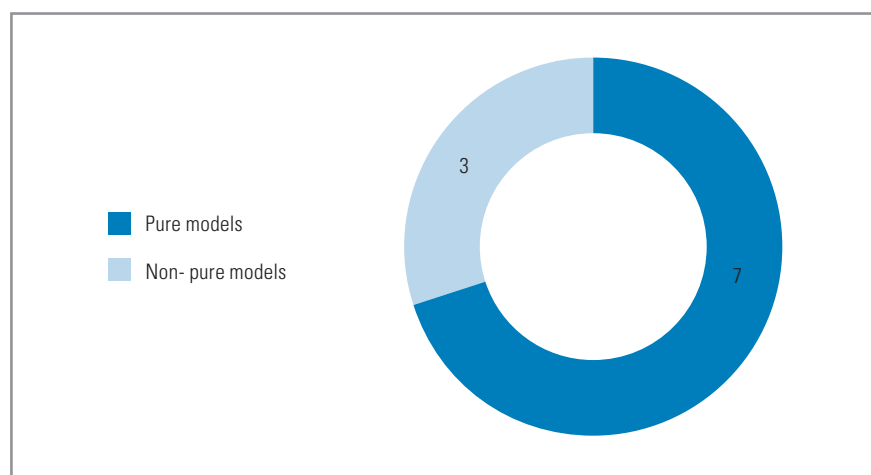
The degree to which these constitutional review institutions are integrated into the rest of the judicial system varies depending on the extent to which they are pure models of the Kelsenian-type or centralized review system. Strictly speaking, Kelsenian-type constitutional review institutions must meet three cumulative criteria. First, the institution must be a separate body that is independent from the ordinary judicial system. Second, the institution must specialize only in disputes over the constitution and must not share this function with other judicial institutions. Third, the institution’s decision must be final (not subject to appeal) and bind the entire polity (rather than just the parties to the dispute).

The Kelsenian-type constitutional review institutions in this study can be considered pure models in seven of the ten countries—Benin, Burkina Faso, Côte d’Ivoire, Guinea, Mali, Mauritania and Togo. The others—Cape Verde, Niger and Senegal—either lack a monopoly of jurisdiction or are located within (and sit at the apex of) the ordinary judicial system (see Figure 3.4).

In Cape Verde, the Constitutional Court is independent of the rest of the ordinary judicial system in the sense that it is not part of the ‘judicial power’; its exclusive jurisdiction over constitutional issues is limited to instances of abstract review (article 278). The formulation of article 281(1-2) of the Constitution—‘shall be appealed to the Constitutional Court decisions of courts’—suggests that jurisdiction over concrete review is appellate and final but not necessarily exclusive. This approach seems to be inspired by Portugal, which is the only other Constitutional Court system that uses the American model for concrete *a posteriori* review and the European model for abstract review.

Conversely, the Constitutional Court of Niger and the Constitutional Council of Senegal have exclusive jurisdiction over constitutional disputes but are not delinked from the rest of the ordinary judicial system since they are, constitutionally, an integral part of the judicial power. Title VI of Niger’s Constitution (2010) provides that ‘*judicial power* is exercised by the Constitutional Court, the Court of Cassation . . . and other courts and tribunals’. Likewise in Senegal, Title VIII of the Constitution (2001) begins with the provision that ‘*judicial power* . . . is exercised by the Constitutional Council, the Supreme Court, the Court of Accounts and the Tribunals’. Technically, Niger and Senegal might be more appropriately characterized as institutions of specialized jurisdiction within the broader judiciary system rather than separate entities existing entirely outside it.

Figure 3.4. Pure and non-pure models of Kelsenian-type institutions in West Africa



Jurisdictions with a decentralized supreme-court model

The key distinctive feature of this model is that multiple layers of courts within a single judicial system are responsible for constitutional justice and can therefore conduct judicial review. In West Africa, only two countries—Liberia and Nigeria—have adopted anything close to this model. Nigeria's institutional infrastructure for judicial review—in so far as it relates to the federal constitution—comprises the Federal Supreme Court, the Federal Court of Appeal, the Federal High Court and the state high courts. Only the Magistrate Courts, by virtue of article 295(1), cannot conduct judicial review.¹² The Nigerian system further grants the high courts original jurisdiction that extends beyond adjudicating constitutional human rights to enforcement and interpretation of the constitution. According to articles 233(2b–c) and 241(1) of the Constitution, the Supreme and Appeals Courts retain only appellate jurisdiction over enforcement and interpretation of the constitution, including the adjudication of constitutional human rights. Lower courts in Nigeria therefore remain key actors in the judicial review process, making it a veritable diffused infrastructure.

The same conclusion applies to Liberia—the only other common law jurisdiction in the region with a strictly decentralized model of review. Article 2 of the Liberian Constitution grants the Supreme Court the power of judicial review. However, this jurisdiction is neither original nor exclusive. Article 66 explicitly rules out any possibility of an exclusive original jurisdiction through both inclusive and exclusionary formulations. The inclusive formulation identifies the Supreme Court as only a 'final arbiter' of constitutional issues. It further grants it 'final appellate jurisdiction in all cases emanating from courts of record and courts not of record'. The use of the term 'final' suggests that the court's jurisdiction over constitutional questions is appellate. The exclusionary formulation explicitly lists cases in which the court has original jurisdiction: those involving 'ambassadors, ministers, or cases in which a country is party'; this is an exhaustive list that excludes constitutional matters.¹³ Article 26 further rules out exclusivity by vesting the Claims Court with original jurisdiction over constitutional human rights cases, with appeals going directly to the Supreme Court.

Liberia's Supreme Court has examined the question of the exclusivity of its jurisdiction over judicial review, especially regarding the review of the constitutionality of legislation. While the traditional view was that this was

¹² See also the Lagos Magistrates' Courts (Civil Procedure) Rules.

¹³ See also section 2.1 of the Judiciary Law (1972). It contains a similar exclusionary formulation, which provides that 'the Supreme Court shall have original jurisdiction in all cases affecting ambassadors or other public ministers and consuls, and those in which a country is a party'.

the court's exclusive jurisdiction, the court has recently revisited the question, focusing on the interpretation of the word 'final' in article 66.¹⁴ In *re Petition of Benjamin Cox*, the Supreme Court had to determine whether the petitioner was entitled to a declaratory judgement on the constitutionality of a statutory provision barring non-citizens from admission to the Liberian Bar. Among the preliminary questions the court had to answer was whether before referring the case, the trial court had any prerogative to resolve the constitutional issues raised. The court responded that it did. Article 66's use of the word 'final', the court argued, 'clearly infers that the matter must first have been heard by a lower court . . . otherwise, the word *only* would have been used'.¹⁵ In other words, nothing in the formulation of article 66 prohibits other courts from ruling on issues of constitutionality raised before them.

Since it was historically an American protectorate, Liberia's choice of a decentralized judicial review model might have been due to US influence. Nigeria's use of the same model, however, might—in addition to its common law heritage—have more to do with its large size in terms of surface area and population, which seems to be a shared feature of most countries with a decentralized constitutional justice system. Argentina, Australia, Brazil, Canada, India, Mexico and USA, for instance, all have a large surface area, as does Nigeria. Therefore, it is possible to argue that for reasons of expediency and efficiency, a single centralized constitutional justice institution—while workable in comparatively small states, which most countries with centralized review are—might be ill-suited to states with large populations distributed over a larger surface area, which explains the prevalence of decentralized constitutional justice systems in these countries.

Jurisdictions with a centralized supreme-court model

Unlike the first two clusters, which comprise countries of either distinctively civil law or common law traditions, this category combines countries from both traditions. The main civil law country with this model is Guinea-Bissau in lusophone West Africa, while Ghana, the Gambia and Sierra Leone in anglophone West Africa are the main common law countries that use this model. Except for the supreme courts' shared competence over constitutional human rights questions with the High Court (which exercises exclusive original jurisdiction) and the Court of Appeal (which exercises appellate jurisdiction) in the three common law countries, the distinctive feature of

¹⁴ *Morris v Reeves*, 27 Liberian Law Report 334, 337 (1978); *Fazzah v National Economy Committee*, 8 Liberian Law Report 85, 105 (1943).

¹⁵ 36 Liberian Law Report 850 (1990). See also *Gonsahn v. Vinton*, which re-emphasizes the court's view, in 37 Liberian Law Report 47, 56–57 (1992).



this model is the dominant role of the supreme court in all four countries.¹⁶

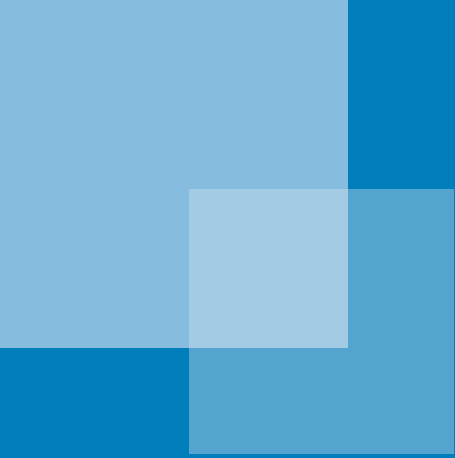
In Ghana, for instance, article 130 of the Constitution grants its Supreme Court ‘exclusive original jurisdiction’ over all matters relating to the enforcement and interpretation of the constitution. When exercising the same exclusive original jurisdiction, the Supreme Court alone can determine whether any authority or person has acted in excess of their duly constituted powers. Section 3(2) of the Ghana Courts Act invokes similar language by providing that where a question of enforcement or interpretation of the constitution arises in any court other than the Supreme Court, that court must stay proceedings and refer the matter to the Supreme Court for determination. Article 124(1–2) of Sierra Leone’s Constitution follows the same approach, using strikingly similar language. The same applies to the Gambia: under article 127(1), its Supreme Court retains original jurisdiction, to the exclusion of all other courts, on matters relating to the enforcement and interpretation of the constitution. Article 124(1) further requires all courts to expeditiously refer all questions of constitutional interpretation to the Supreme Court.

The implication of this formulation is that in the Gambia, Ghana and Sierra Leone, lower courts may not examine substantive constitutionality questions in the course of administering justice. It follows that they also cannot make declarations on the constitutionality or unconstitutionality of a statute. Likewise, in Guinea-Bissau, the only civil law country in the region without a Kelsenian-type constitutional review institution, a Supreme Judicial Tribunal, which sits at the apex of the judicial system (like the supreme courts of the Gambia, Ghana and Sierra Leone), remains the main institutional architecture for constitutional review. According to article 126 of the Constitution of Guinea-Bissau, the supreme court (i.e. the Supreme Judicial Tribunal), sitting in plenary, retains the sole right to determine questions of constitutionality and declare laws and decrees unconstitutional. The extremely dominant role of supreme courts, despite being part of the broader judiciary in these jurisdictions, arguably makes them more similar to Kelsenian-type institutions than to the American Supreme Court model. As suggested in the preceding section, one possible explanation might be their relatively small size.


This analysis demonstrates that the institutional architecture for constitutional justice systems in West Africa is predominantly centralized: 14 of the 16 countries in the region use a more concentrated model of judicial review (either in the form of a Kelsenian-type institution outside the judiciary or

¹⁶ See, in general, article 127(1) of the Constitution of the Gambia, as read with articles 18–33 and 36, article 130(1) of the Constitution of Ghana as read with article 33, and article 124(1) of the Constitution of Sierra Leone as read with article 122.

a dominant supreme court within the regular judicial system). It is also important to note that while the model of constitutional justice chosen often mirrors the country's specific legal system, which in most cases is a function of their colonial heritage, this has not always been the case. For example, the Gambia, Ghana and Sierra Leone have primarily common law traditions, yet they have adopted the centralized supreme-court model of review, which more closely resembles the model used in civil law systems. The same applies to Cape Verde, where in cases of concrete *a posteriori* review, its model (though Kelsenian in principle) operates more like a decentralized system.



4. Constitutional framework for the independence of constitutional review institutions



4. Constitutional framework for the independence of constitutional review institutions

Markus Böckenförde and Yuhniwo Ngenge



There is consensus that judicial independence is a prerequisite for sustaining the rule of law and economic growth (Melton and Ginsburg 2014: 187). The majority of constitutions around the world share a commitment to judicial independence, and West African countries are no exception. While there is no common understanding of what judicial independence exactly means, or how to measure it, there is agreement that judicial independence incorporates a number of key features: the independence and impartiality of judges, the autonomy of the judiciary, and the efficacy of its judgements. International guidelines, standards and initiatives provide a checklist of principles and guarantees of these aspects of judicial independence. Academia has collected the most important institutional concerns that may determine any court or council's level of *de jure* independence (Stroh and Heyl 2015: 174).

Constitutions in the region have incorporated these concerns to different degrees, but implementation remains a challenge. African scholars have illustrated the challenges involved in translating these constitutional norms into practice within the judiciary, allowing judges to apply the law without fear or favour (Prempeh 2006: 66). A judiciary with the power of constitutional review—deciding whether executive and legislative actions comply with the constitution—has a major effect on the dynamics of checks and balances. The more power courts have to participate in these discourses through ample jurisdiction, the more important the constitutional framework is that safeguards the institution's autonomy from undue interference. Constitutional justice institutions, specifically constitutional courts/councils, are relatively weak among the branches of government: they are unable to rely on the proverbial purse of the legislature or the sword of the executive.

Although this publication examines the law on the books, when examining the independence of constitutional justice institutions it is particularly important to identify the components of formal (*de jure*) independence in the constitution that enhance actual (*de facto*) independence. Recent statistical work on the subject indicates that certain components of judicial

independence are especially relevant in translating de jure independence into de facto judicial autonomy (Melton and Ginsburg 2014: 195). These include (a) the nominal statement regarding the independence of the relevant judicial organ from the other branches of government, (b) the tenure of judges on constitutional review courts, (c) the selection procedure, (d) the removal procedure and the conditions of removal, and (e) autonomous budget and salary insulation. The combination of the selection and removal procedures has the strongest impact on de facto independence. This chapter identifies and analyses the respective aspects in West African constitutions/organic laws with regard to constitutional justice institutions and the extent of their relevance for the bodies' independence.

Elements of de jure independence

Statement of judicial independence

The West African countries under scrutiny generally include provisions in their constitutions that preserve aspects of judicial autonomy. Except for Liberia's, all of the region's constitutions contain an explicit statement regarding judicial independence or the independence of courts/councils. Occasionally, guarantees of independence are limited. For example, article 24(1) of the Gambian Constitution stipulates that the guarantees only apply to '[a]ny court or other adjudicating authority established by law for the determination of any criminal trial or matter, or for the determination of the existence or extent of any civil right or obligation'. In countries with a constitutional court/council, it might be important to discuss the extent to which the statement of judicial independence of the 'judicial powers' extends to these institutions. There is no uniform praxis in the relevant West African constitutions. Niger and Senegal explicitly include the constitutional court/council as part of the judiciary. The Constitution of Cape Verde further grants to members of the Constitutional Court the same guarantees given to judges of other courts. In contrast, the constitutions of Benin and Côte d'Ivoire do not include constitutional courts/councils on the list of courts exercising independent 'judicial powers'. Again in other cases, the constitution is ambiguous regarding whether the constitutional court is part of the judicial authority that enjoys independence or whether it is to be perceived as a separate institution.

Terms and tenures of judges of constitutional justice institutions

The existence of constitutional justice institutions either as constitutional councils/courts or supreme courts at the apex of a court system also has

implications for the length of the judges' terms. Once selected, judges in countries with supreme courts enjoy tenure until retirement, which in these countries may be taken from the age of 65, and at the latest by the age of 70, absent a special dispensation. This upper threshold in the retirement age is significant, as a lower one may induce judges concerned with post-retirement employment to curry favour while on the bench, which has been an issue in some countries such as India. The fixed tenure with an upper threshold therefore helps insulate the judges from the legislature or executive's whim. Judges of constitutional courts/councils, by contrast, serve for limited terms of five to nine years. From the perspective of judicial independence, fixed term limits may come with the risk that judges who need to plan for a career beyond their term may be tempted to become attractive for political positions or jobs in the private sector. If such a career path is common in a country, actual independence is more difficult to observe since the professional fate of an individual judge following the end of their term may depend on the outcome of their judgements while on the bench. Judges' independence and impartiality might be at an even greater risk if their tenure is short but renewable—especially if the cases heard involve the actions of institutions involved in the re-selection procedure (for example, laws of the legislature, executive orders and so on). In West Africa, three countries allow for the reappointment of judges after terms of seven years (Mali, Togo) or five years (Benin). Benin and Mali limit this option to one renewal only.

Selection procedure

The appointment mechanism for judges should reflect their specific role in a constitutional setting, and might have to differ from procedures used in other courts. As stated earlier, the final review of the constitutionality of governmental actions has a powerful impact on politics. It is therefore commonly accepted that political actors should have a say in selecting judges in order to increase their commitment to obeying judgements that are not in their favour. Involving various political institutions/actors in the process also increases the likelihood of a more politically balanced court. With the exception of Cape Verde and Senegal, where Parliament and the president, respectively, retain monopoly over the selection process, the majority of West African countries follow one of two different selection models, both of which include a variety of political stakeholders. In the common law countries, the selection process relies on the consecutive involvement of political institutions, ranging between two (the Gambia, Liberia) and four (Ghana). The process is founded on the assumption that the consent or participation of multiple institutions prevents the selection of judges with a strong bias towards any one institution. Most of the francophone countries use a different approach:

different institutions appoint their candidates unilaterally and directly (see Chapter 6). This might result in a strong bias of individual candidates toward one or another political actor, but since different institutions (at least the president and the National Assembly) are involved, the assumption is that these biases will balance each other out.

Dismissal: cause and procedure

Even the best procedures for appointing independent judges will prove futile if, once they are appointed, judges remain vulnerable to removal from office. Thus in order for constitutional justice institutions to operate independently, it is important that the constitution or an organic law determines clear conditions and procedures for removing judges. The causes for dismissal are generally similar between countries, and include permanent physical or mental disability and misbehaviour such as (proven) misconduct; gross breach of duty; conviction in a court of law for treason, bribery or other serious crimes; disrespect of the oath taken; commitment of crimes and stated misbehaviour. In countries with term limits for judges, taking up another commitment that is incompatible with the office at the constitutional court/council is also cause for removal. This is worth noting, since it reflects the presumption that judges may not move to another position while serving their term.

The dismissal procedure differs between legal systems. Whereas it always involves external institutions in common law countries, the process in most civil law countries remains an internal affair for either the court or the judiciary.

All West African countries that belong to the common law family established a removal procedure that includes external actors. Although those five countries (the Gambia, Ghana, Liberia, Nigeria and Sierra Leone) share the same approach, their procedures differ considerably (see Table 6.1 in Chapter 6). In the Gambia and Liberia, the initiative rests with the legislature, while in Sierra Leone and Ghana an ad hoc committee is established to examine the case, and in Nigeria the Judicial Service Commission triggers the process.

In most of the other countries, constitutions and organic laws are either silent or ambiguous about the removal process. In Mauritania for instance, neither the constitution nor the organic law contains provisions on whether members of the Constitutional Council can be removed, or under what conditions. In Benin, Togo, Guinea, Senegal and Côte d'Ivoire, members of the constitutional justice institutions cannot be removed during their term except of their own volition, yet they can be arrested, detained and prosecuted



in criminal matters or cases of *flagrante delicto* with the authorization of the constitutional council/court. In Benin, the Supreme Court may also become involved. Similar provisions can be found in Mali. It is unclear what kind of sanctions a guilty verdict would attract following a criminal prosecution, but a logical inference would be that they are removed. Burkina Faso seems to be the only West African country—of those in the civil law family—that explicitly makes criminal prosecution a cause for removal.

Budget autonomy and salary insulation

Another feature of great import to judicial independence, especially to the extent that it concerns the independence of constitutional review institutions, is the degree of autonomy the institution enjoys in budgeting, administration and financial management. There are two broad dimensions to such autonomy: individual or personal autonomy and institutional autonomy. Personal autonomy (discussed further in the salary insulation section below) involves the salaries and entitlements of individual judges. Institutional budgetary and administrative autonomy, however, focuses on the entire judiciary as an institution. From an administrative and budgeting perspective, institutional autonomy implies a number of important elements, namely the power to hire and manage its own staff, to manage its own finances, and to plan and prepare its own budget—which may be submitted to parliament either separately or as part of the general state budget for approval. The extent to which constitutional review institutions in the countries surveyed have been granted such administrative and budgetary independence varies.

Administration and resource management

With respect to the general powers of administration, the trend in most of the countries surveyed is to grant the judiciary greater independence over general administrative and financial management matters than over budgetary questions. The Ministry of Justice, as an agency of the executive arm of government, is generally excluded from general administrative and financial management issues in both the common law and civil law jurisdictions of West Africa. In nine out of 11 civil law jurisdictions surveyed in francophone and lusophone West Africa, constitutions and relevant organic laws have directly granted the presidents of the constitutional courts/councils full powers of general and financial administration. As such, they hire and manage their staffs and handle their finances. In lusophone Guinea-Bissau and francophone Guinea, the Supreme Judicial Council has administrative authority over the constitutional review institutions. In anglophone West Africa, however, two approaches exist. In Nigeria and Sierra Leone, the constitution vests the power of administration in the Judicial Service Commission. In the

Gambia, Ghana and Liberia, constitutions explicitly give the chief justice of the supreme court the power of general administration and supervision. A scrutiny of the common law systems in anglophone West Africa, however, suggests that the distinction between who retains general administrative and financial management powers may not be relevant, since these countries all have judicial service commissions that are headed by the chief justice of the supreme court.

Budgetary autonomy

An institution's budgetary autonomy can be evaluated from two angles: (a) the power to elaborate its own budget or (b) the power to elaborate *and* table its own budget directly before parliament. Again, the survey reveals variations across the different jurisdictions. In some common law jurisdictions, for instance, the constitutional review institution's power is limited to preparing the budget, which must be submitted to the president of the republic (or an agency under his authority), who in turn tables it before parliament. The Gambia, Ghana and Liberia fall into this category (see Table 4.1). In others, however, the constitutional review institution or the auxiliary Judicial Service Commission is responsible for developing and submitting its budget directly to Parliament for approval. Where this is the case, such as in Nigeria and Sierra Leone, budgetary autonomy is in theory stronger than where it is not the practice. This includes most of francophone West Africa, and Cape Verde in lusophone West Africa. Here—with the exception of the Republic of Guinea, where the constitution is silent on the matter—constitutions and relevant organic laws have also granted the constitutional courts/councils autonomy in elaborating their budgets. However, as in the Gambia, Ghana and Liberia, they must submit their draft budgets to the Ministry of Finance, which retains final responsibility for consolidating and submitting it to parliament as part of the finance or budget bill.

However, a common feature in both francophone and anglophone West Africa is that whether they are developed and tabled directly to parliament or via the government, the budgets of the constitutional review institutions are listed as an integral part of the overall state budget. This observation is also true for lusophone West Africa. Yet this is as far as the similarities between francophone/anglophone and lusophone West Africa go in this regard, because not all constitutional review institutions in lusophone West Africa have the autonomy to prepare their budget, let alone table it directly to parliament for approval. While the Constitutional Court in Cape Verde under Law No 56/6/05 of 28 February 2005 has some degree of autonomy in this area, there is no evidence that Guinea-Bissau's Supreme Judicial Tribunal, its main constitutional review institution, has any direct involvement in the

elaboration of its budget. Further, under article 87 of Law No 3/02 on the judiciary (as amended by Law No 6/2011), Guinea-Bissau's Superior Judicial Council is responsible for administering financial allocations from the government to the court.

Salary insulation

With regard to individual financial independence, there is again a divide between common law and civil law countries (see Table 4.1). Four of the five common law countries have explicit provisions on judges' salaries and entitlements in the constitution, and three of the four explicitly protect these salaries against variations to the judges' disadvantage. All four countries extend these protections to all courts within the judiciary. The civil law constitutions in the region do not address judges' salaries, either in their constitutions or—with the exception of Côte d'Ivoire—in their respective organic laws. A relevant element of individual financial independence is not only protecting judges from a decrease in salary and entitlements, but also protecting against a substantial or spontaneous increase in remuneration/entitlements from other branches of government. The perception of judges as independent might disappear if shortly before an important judgement, their salaries or entitlements are suddenly increased. No constitution in West Africa yet shields against this type of influence.

Table 4.1. Budget autonomy and insulation of salaries of constitutional judges in West Africa

| Country | Degree of budgetary autonomy and administration | Insulation of salaries |
|----------------------|---|---|
| Benin | Organic law: president of the court is responsible for administering the budget, and introduces the budget claim directly into the national budget plan (article 18) | No provision in the constitution/organic laws |
| Burkina Faso | Internal rule of procedure of the council: president of the Constitutional Council is responsible for administering the budget, and oversees the preparation of the budget with support from a member of the Ministry of Finance (article 14) | No provision in the constitution/organic laws |
| Cape Verde | Constitutional Court prepares its budget and submits it to the government for consolidation with the general budget. The court is responsible for administering the budget with support from an administrative council | No provision in the constitution/organic laws |
| Côte d'Ivoire | Regulatory texts: president of the Constitutional Council oversees the elaboration of the budget, which is drafted by the Accounts and Treasury Department (article 42) | Organic law regulates the salary of the judges |
| The Gambia | Judiciary is self-accounting: General Accountant transfers the budget directly to the courts, as required by the chief justice, who is also their chief administrator and supervisor (article 144(1)) | Salary, allowances, retirement gratuity and pension shall not be varied to the disadvantage of the judge (article 142(1)) |

| | | |
|----------------------|---|--|
| Ghana | Constitution: administrative expenses for the judiciary are charged on the consolidated fund; funds voted on by parliament shall be released to the judiciary (articles 127(4), 127(1), 179) | Salary, allowances, retirement gratuity and pension shall not be varied to the disadvantage of the judge (article 127(4)) |
| Guinea | No provision in the constitution/organic law | No provision in the constitution/organic laws |
| Guinea-Bissau | Supreme Judicial Tribunal has no budgetary or administrative autonomy; the Superior Judicial Council is responsible for the financial administration of resources transferred by the government | No provision in the constitution |
| Liberia | Supreme Court prepares its own budget, which, once approved, is administered by the chief justice (article 23(1) Organic law) | Salary, allowances and benefits regulated by law; allowances and benefits are not to be diminished except under a national programme enacted by the legislature (salary is not addressed (article 72(a)) |
| Mali | Organic law: the Constitutional Court prepares its own budget, which is ultimately integrated into the national budget bill (article 15) | No provision in the constitution/organic laws |
| Mauritania | Organic law: president of the council administers the budget; budget plan is submitted to the Ministry of Finance, which is not permitted to alter it (only parliament can do that) | No provision in the constitution/organic laws |
| Niger | President of the Constitutional Court oversees the elaboration of the budget, which is then integrated into the national budget plan through the Ministry of Finance (article 27) | No provision in the constitution/organic laws |
| Nigeria | The National Judicial Council (which is comprised of the chief justice and other senior court judges) prepares and defends the budget before parliament and subsequently oversees its administration | Salaries, remuneration and other allowances of judges cannot be altered to their disadvantage |
| Senegal | Organic law: the president of the Constitutional Council manages the budget assigned to the institution (article 9) | No provision in the constitution/organic laws |
| Sierra Leone | The chief justice, with the advice of the Legal Service Commission, is responsible for administration | Salary, allowances, retirement gratuity and pension shall not be varied to the disadvantage of the judges (article 138(3)) |
| Togo | The president of the Constitutional court manages the budget, which is prepared and submitted for integration into the state budget through the Ministry of Finance. He or she can also authorize modifications to the budget (articles 15–16 of the Internal Rules of Court; article 26 of Organic Law of the Court) | No provision in organic law |

Key

Anglophone West Africa

Francophone West Africa

Lusophone West Africa



5. Judicial service commissions



5. Judicial service commissions

Babacar Kante and H. Kwasi Prempeh

With the exception of Liberia, the constitutions of all countries in this study designate a body or commission to select judges and perform other functions pertaining to the judiciary (see Table 5.1). These countries have a judicial service commission involved in the judicial appointments process.¹⁷ Liberia follows the American model: only the president of the republic and the upper legislative chamber, the Senate, have a formal role in selecting its judges. The structure, organization and mandates of judicial service commissions vary within the region.

Table 5.1. Judicial service commissions in West Africa

| Country | Key functions | Composition (including <i>ex officio</i> members) | Relationship with the constitutional justice institution | Relevant constitutional/organic law provisions |
|---------|---|---|--|--|
| Benin | <ul style="list-style-type: none"> assist in the appointment of judges and cases of presidential pardons; and assist the executive in his role as guarantor of judicial independence. | 12 members | No direct link | Articles 127–30 (constitution) |

¹⁷ Although referred to generally in this chapter as a judicial service commission, the names for this body vary. It is referred to as a Supreme Council for the Magistracy in the francophone and lusophone countries, a judicial service commission in the common law system (including the Gambia), a Judicial Council in Ghana, and a Judicial and Legal Service Commission in Sierra Leone. Nigeria is the only country in the region with multiple bodies that play the role of judicial service commissions: the National Judicial Council and the Federal Judicial Service Commission, and a state judicial service commission in each state of the federation. The National Judicial Council recommends specific judicial appointments (from a list of nominees) and removals to the president and state governors.

| | | | | |
|----------------------|---|----------------|---|---|
| Burkina Faso | <ul style="list-style-type: none"> • assist the executive in his role as guarantor of judicial independence; • issue opinions related to the granting of pardons; • make proposals on appointments and assignments of judges; and • issue opinions on proposals for the appointments of other judges. | 22 members | No direct link | Articles 131–4 (constitution) |
| Cape Verde | <ul style="list-style-type: none"> • discipline and manage the careers of judges; and • manage the human and financial resources of the judiciary. | 18 members | No direct link | Article 223 (constitution) |
| Côte d'Ivoire | <ul style="list-style-type: none"> • make recommendations on appointments to the judiciary; • give opinions on judicial promotions; and • ensure discipline in the judicial service. | 17 members | No specific link | Articles 104–6 (constitution) Article 3 (organic law) |
| The Gambia | <ul style="list-style-type: none"> • advise the president on judicial appointments; • administer and manage the judicial sector; and • exercise other functions provided by statute. | 6 members | Chief justice chairs Judicial Council; there is no other specific link | Articles 145–7 (constitution) |
| Ghana | <ul style="list-style-type: none"> • make recommendations on judicial reforms to the government; • ensure the efficient management and administration of the judiciary; and • perform other functions conferred by statute or the constitution. | 19 members | Chief justice chairs Judicial Council | Articles 153–4 (constitution) |
| Guinea | <ul style="list-style-type: none"> • approve presidential appointments to the judiciary; • issue opinions on matters of independence, judges' careers; • examine and advise on presidential pardons; and • oversee discipline in the judiciary. | 17 members | No specific link | Articles 109, 111–12 (constitution) |
| Guinea-Bissau | <ul style="list-style-type: none"> • manage the careers of members of the judiciary; • make recommendations on judicial reform; • develop the annual inspection plan; and • schedule inspections and surveys of judicial services. | 15 members | Some of its members are members of the Supreme Court, which is also the main constitutional justice institution | Articles, 120, 126 (constitution) Article 61 (organic law) |
| Liberia | <ul style="list-style-type: none"> • Not applicable | Not applicable | Not applicable | Not applicable |
| Mali | <ul style="list-style-type: none"> • support the executive in guaranteeing judicial independence; and • manage the careers of judicial officers. | 21 members | No specific link | Article 82 (constitution) |
| Mauritania | <ul style="list-style-type: none"> • recruit, evaluate and develop the careers of judges; and • support the executive in protecting judicial independence. | 11 members | No specific link | Articles 81–2 (constitution) |

| | | | | |
|---------------------|--|---|---|--|
| Niger | <ul style="list-style-type: none"> support the executive in protecting judicial independence. | Minimum of 7 members | No specific link | Article 119 (constitution) |
| Nigeria | <ul style="list-style-type: none"> advise the federal president on federal judicial matters; advise state governors on state judicial matters; recommend appointments to/dismissals from state judiciary; and recommend appointments to/dismissals from federal judiciary. | National Judicial Council (19 members) Federal Judicial Service Commission (8 members) | Various links through power of appointments/dismissals; and members of the various institutions are the same person for the most part | Schedule II, Part 1, Articles 12–13 (constitution) |
| Senegal | <ul style="list-style-type: none"> manage careers of judges (recruitments, appointments and dismissals); and provide discipline in the judiciary. | 15 members | No specific link | Article 90 (constitution) |
| Sierra Leone | <ul style="list-style-type: none"> advise the chief justice on the administration of the judiciary. | 7 members | The chief justice is chairman of the commission; there is no other specific link | Article 140 (constitution) |
| Togo | <ul style="list-style-type: none"> guarantee the independence of the judiciary; discipline judges; provide opinions on judicial recruitments; recommend appointments to the judiciary; and provide opinions on staff appointments in the state counsel's office. | 7 members | No link | Articles 116–17 (constitution) |

Note: Liberia is the only country in the sample that does not have a Judicial Service Commission or equivalent body.

Key

Francophone West Africa

Anglophone West Africa

Lusophone West Africa

Organization and operation of judicial service commissions

Judicial service commissions are organized and function differently in the countries surveyed. In particular, there are important differences in their

composition and competences, depending on the legal family to which they belong.

Composition of judicial service commissions

The size, types of members and mode of selection of judicial service commissions in the region varies widely. Their sizes range from six members in the Gambia to 22 members in Burkina Faso, and there is generally no logical correlation between the size of a country's territory or population and the size of its commission. For instance, Nigeria, the largest country by both area and population, has 19 members on its National Judicial Council (the same size as the equivalent bodies in Ghana and Côte d'Ivoire, which have relatively small territories and populations). Likewise, Mali, which is almost the same size as Nigeria but has a much smaller population, has 21 members on its commission.

Judicial service commissions in the region generally include three types of members. First, there are the *ex officio* members, who have an automatic or reserved seat on the commission by virtue of their current office within the judicial sector (e.g. chief justice, president of the Court of Appeal) or elsewhere in the government (e.g. minister of justice, attorney general). All of the 15 countries with this type of institution make provisions in their constitutions for this type of membership. The second category consists of members who are nominated or elected to the commission by their peers from the judicial division or tier of the court system to which they belong, or by the bar from among its membership. The third category comprises persons with specified qualifications who are appointed by a designated political or judicial authority, such as the president of the republic, parliament or chief justice, with or without the involvement of other institutions. In some jurisdictions, notably within the civil law system, some (or all) such appointments are subject to prior nomination by other institutions, and nominees must satisfy pre-determined criteria specified in the constitution or legislation. Discretion in appointments to the commission is therefore constrained or even absent in those cases. However, in other jurisdictions, discretion in appointing the third category of members is unconstrained—or only very loosely constrained—such as appointments restricted to women or laypersons.

In general, judicial service commissions in the common law and lusophone jurisdictions in the region may be distinguished from those in the francophone countries by the professional diversity of their membership and the commission's relationship to the political authorities. Two areas of difference are worth mentioning. The first is the presence of non-jurists or laypersons on the commission. The constitutions of Ghana (article 153), Nigeria (schedule



III, Part 1C, para. 20), Sierra Leone (article 140) and Cape Verde (articles 245–6) all reserve a specified number of seats on their commissions for laypersons. The Gambia, the other common law country in the study, reserves two of the six seats on its commission for persons of unspecified qualification; the president and the National Assembly each appoint one. Judges and other lawyers, however, constitute a majority of the membership of judicial service commissions in common law West Africa. By contrast, in the francophone countries, all members of the Supreme Council for the Magistracy are jurists drawn from the judiciary, prosecution service, bar or legal academy.

A second difference between members of the commissions and their relationship to the political authorities relates to the presidency or chairmanship of the commission. In the anglophone countries, the chief justice is always the *ex officio* chair of the judicial service commission. The same applies in Guinea-Bissau. In Cape Verde, the chairperson is nominated by the commission and appointed by the president of the republic. In the francophone countries, however, the judicial service commission is chaired by the president of the republic, and the most senior judge—the president of the court of cassation or the president of the supreme court—usually serves as the vice chairman.

Functions and powers of judicial service commissions

All judicial service commissions in the region nominate or recommend persons for appointment (by the president of the republic) as judges of designated courts in the judicial hierarchy. Beyond this basic judicial selection function, the commissions have various additional functions that vary across jurisdictions (see Table 5.1). In the francophone countries, the president of the republic's role as chair of the supreme council for the magistracy reflects a longstanding constitutional tradition that the president serves as the 'guarantor of the independence of the judiciary'. In that context, a judicial service commission simply serves as a presidential advisory council on matters pertaining to the judicial sector. In that capacity, the commissions advise the president on decisions related to granting pardons; appointing prosecutors; and on matters relating to the promotion, reassignment and discipline of judges. In English- and Portuguese-speaking countries, the commissions operate as part of the institutional structure of judicial self-governance, and assist the judicial leadership in administering and managing the courts. For instance, Nigeria's National Judicial Council is empowered to 'deal with all other matters relating to broad issues of policy and administration' concerning the judiciary. The Judicial Council in Ghana similarly helps the chief justice perform their duties as head of the judiciary. Some commissions also have an explicit role in judicial budgeting and financial management. For example, the commissions in Guinea-Bissau and Cape Verde produce an annual plan

of court inspections and contribute to preparing and managing the judiciary's budget. The commission in Nigeria is also responsible for collecting, disbursing and controlling the judiciary's budgetary allocation from the government. Anglophone judicial commissions also play a role in selecting, disciplining and removing lower or 'inferior court' judges and judicial staff. Sierra Leone's commission also advises the president on appointing the director of public prosecutions.

Role in relation to the operation of constitutional courts

Judicial service commissions are supposed to play a part in regulating the operation of the judicial system. Their establishment, and the terms under which they operate, often indicate the degree of judicial autonomy or independence within a country. Yet they play a limited and, at best, indirect role in constitutional justice. Although they play no part in adjudication, judicial service commissions can influence the overall composition and quality of the judiciary—and, for that matter, the jurisprudence—over time through their role in recruiting, evaluating and recommending persons for high judicial appointment, promotion and discipline. However, in jurisdictions where constitutional courts are not part of the ordinary judiciary, and therefore are removed from the authority of the judicial service commissions, even such limited and indirect influence on constitutional justice is generally absent.



6. The composition of constitutional justice institutions



6. The composition of constitutional justice institutions

Markus Böckenförde



Due to the political nature of cases that constitutional justice institutions handle, their composition requires careful consideration and may easily become highly political. The number of members, their qualifications, the criteria for selection and dismissal, and the length of terms and their renewability shape the role of the court and the dynamics within it.

Membership: size

With the exception of Guinea-Bissau, all West African constitutions provide some parameters regarding the number of judges that must sit on the constitutional court/council or supreme court. This number varies greatly, ranging from (a minimum of) three (Cape Verde) to (a maximum of) 21 members (Nigeria), but the majority of countries (10) provide 5–9 members. Various factors account for this variation, including the expected caseload and the efficiency of rendering decisions. Another factor is whether the institution sits at the apex of the court hierarchy and thereby serves as a court of last instance for non-constitutional cases.

In seven countries, the number of judges is not fixed; the constitution only sets a minimum (Burkina Faso, Cape Verde, the Gambia, Ghana, Côte d'Ivoire, Sierra Leone) or maximum (Nigeria) figure. In Burkina Faso and Côte d'Ivoire, this is because former presidents are *ex officio* members of the bench for life, which makes it difficult to specify a maximum number. However, in both countries the number of ordinary members is fixed. With the exception of Cape Verde, the other countries with a flexible number of judges follow the supreme-court model (the Gambia, Ghana and Sierra Leone) and may have chosen to keep the total number of supreme-court judges flexible in order to allow room to adjust the number depending on the general caseload. However, none of these constitutions mentions this limited purpose explicitly, nor do they stipulate who has the authority to increase the number of judges. Such flexibility is generally observed with great caution, as other branches of

government may be tempted to increase the number of judges in an effort to obtain judgements that are more sympathetic after they gain majorities in the institutions involved in the selection process. In Egypt (2001) and Hungary (2011) this flexible approach made it possible to alter the number of judges on the bench, while in the USA (1937) such an attempt failed. All constitutional justice institutions in West Africa rely on an uneven number of members, most likely in order to avoid ties during votes.

Professional background and legal qualification requirements

Varying perceptions of the role of constitutional review institutions in a political system may influence the professional qualifications or criteria for membership of the body. If the institution is also at the apex of the court system, it seems to be a natural choice that its members should be judges or at least eminent lawyers. Indeed, for all West African countries that follow the supreme-court model, legal education and a certain number of years of legal experience or practice are prerequisites. In the two lusophone countries, a law degree is the minimum requirement for the position.

The development in the nine francophone countries took a different path. There are three distinct sets of regulation. Some constitutions and organic laws are generally silent in terms of legal qualifications (Mauritania) or require members to have either administrative or legal experience. This approach recognizes that adjudicating politically significant cases and defining policy issues within the framework of the constitution—which expresses open-ended, basic principles and commitments—is not an exclusively legal affair. Other countries have a mandatory quota of recruits from the legal field. Whereas Togo, for example, remains unspecific about the requirements, stipulating that the selection of three out of nine members must be based on legal qualification, other countries are more precise: Benin requires that three out of seven members are magistrates and two are professors of law or long-standing practicing lawyers. Where legal practice and experience are required, the amounts vary greatly, from 5–20 years of experience. While not all countries specify a minimum age, where they do, it ranges from 25–40 years of age.

The selection mechanism

The procedure for selecting the constitutional justice institution's members differs, in most countries, from that of other judges. Due to the political nature



of the cases that constitutional courts/councils or supreme courts handle, political actors of the executive and/or the legislative branch of government, as illustrated in part by Table 6.1, are often involved in selecting their members. Their involvement is thus an indispensable part of checks and balances, and might encourage them to accept the subsequent decisions of these institutions. The challenge is to ensure that the selection mechanism completely insulates judges from political influence or manipulation downstream.

It is worth noting that the meaning of the term ‘appointment’ might vary according to the country’s legal culture. Often, processes of selecting judges include a rubber-stamp appointment by the head of state following a binding nomination from other players in the process. Elsewhere, the term means that the appointing authority has an effective veto and can reject the nominations sent to them. A small number of constitutions have recently included explicit language to avoid ambiguities in this regard. For example, with respect to the appointment of public officers, including judges, the Liberian Constitution states: ‘The President *shall* nominate and, with the consent of the Senate, appoint and commission’ (article 54, emphasis added). The Constitution of Sierra Leone (article 135) contains similar language.

Four different types of selection procedure are used around the world, according to the context:

1. Selection by the legislature through a supermajority
2. Selection through a consecutive process
3. Selection by different ‘recruiting authorities’
4. Selection by the head of state

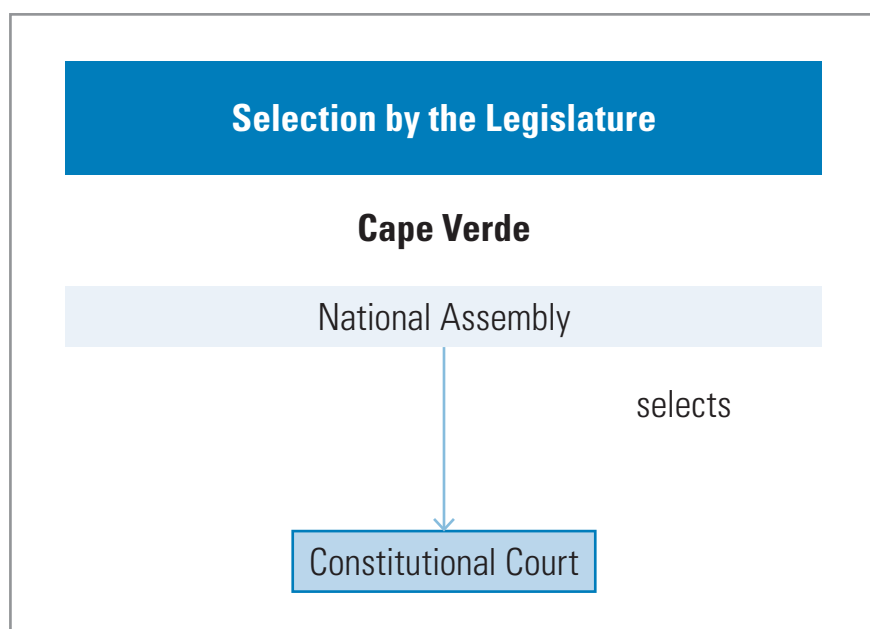
All models are represented in West Africa, with a clear preference for models 2 and 3.

Model 1: Selection by the legislature through a supermajority

In some countries, the legislature exclusively selects the judges (if a bicameral legislature exists, both chambers are generally involved). A high voting threshold is often required in order to include the opposition in the selection process. With an organized opposition in place, the process requires a deal between the parties that hold seats in the legislature and gives the institution a more balanced composition. In West Africa, only Cape Verde’s constitutional tribunal members are selected only by the legislature: its parliament elects the three members of the court with a two-thirds majority. In Togo, the two-thirds majority requirement is stipulated in the Constitution, but Parliament selects

only six of the nine candidates (three by the National Assembly and three by the Senate); the president appoints the other three. Giving the legislature a dominant role in the selection process exacerbates the risk of politicization (Sadurski 2001: 4), especially where coalitions (and the ensuing political horse-trading) are needed to reach a two-thirds majority threshold. However, one may also argue that the approach produces consensus candidates, thereby increasing the legitimacy and acceptability of the decisions of courts composed in this manner.

Figure 6.1. Selection by the legislature through a supermajority

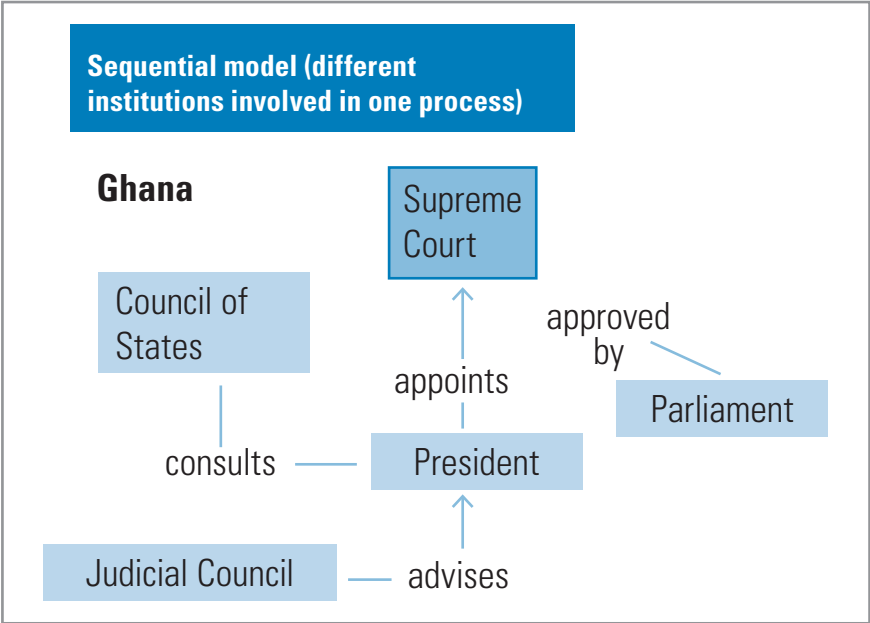


Model 2: Selection through a consecutive process

Another option is to involve different actors—which are often from different branches of government—at different stages of the selection process, frequently through a nomination and appointment/approval procedure. This approach seeks to balance the composition of the institution. It relies on identifying consensus candidates that all institutions support. In West Africa, four countries from the common law or Anglo-American legal family with a supreme-court model follow this approach. Liberia follows the US model, in which the president nominates candidates subject to Senate approval. Sierra Leone and Nigeria have added an additional player: the judicial service

commission provides a list of candidates from which the president appoints the judges, subject to the approval of the legislature (Nigeria: second chamber). Ghana also consults with the Council of State, which is composed of eminent persons and elected representatives of the regions. There is an ongoing debate in Ghana over the judicial council’s role: the constitution provides that the president appoints the judges ‘on the advice of’ the judicial council, but it is not clear whether this advice is binding.

Figure 6.2. Selection through a consecutive process

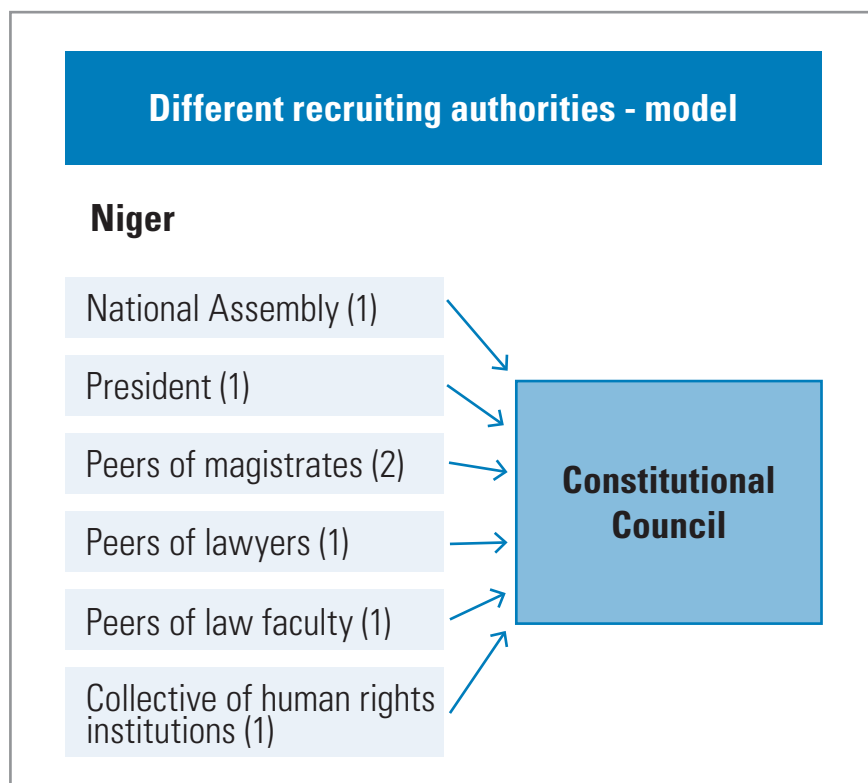


Model 3: Selection by different ‘recruiting authorities’

In the majority of West African countries, different ‘recruiting authorities’ have a role in selecting members of the constitutional review institution. As with the previous model, the idea is to involve different actors from different branches of government in the selection process. In contrast to the sequential approach, in which the actors must come to a consensus on appointments, in this model each recruiting authority selects its candidates separately. All nine West African countries that use this approach follow the constitutional court/council model, in which the constitutional review institution is not at the apex of the ordinary court system. The number of actors involved ranges from two (Benin, Côte d’Ivoire) to six (Niger, Guinea). In all cases, the

directly elected institutions—the president and the legislature—are among the recruiting authorities (in countries with a bicameral legislature, both chambers often represent separate recruiting authorities (Togo, Mauritania, Burkina Faso)). Some countries also consider the judicial council to be a recruiting authority, thereby providing each branch of government with the opportunity to appoint some of the members. Niger and Guinea offer the largest variety of recruiting authorities: in addition to the president and the National Assembly, the peers of magistrates, the peers of lawyers and the peers of law faculties are entitled to appoint member(s) of their group. Both countries also offer the collective of human rights institutions the possibility to select at least one representative.

Figure 6.3. Selection by different ‘recruiting authorities’



A possible rationale for this approach is the assumption that a balanced court might not only be achieved through consensus candidates, but also through a body composed of members who reflect the political landscape more broadly. Thus, compromise is important while writing the judgements. In this context,

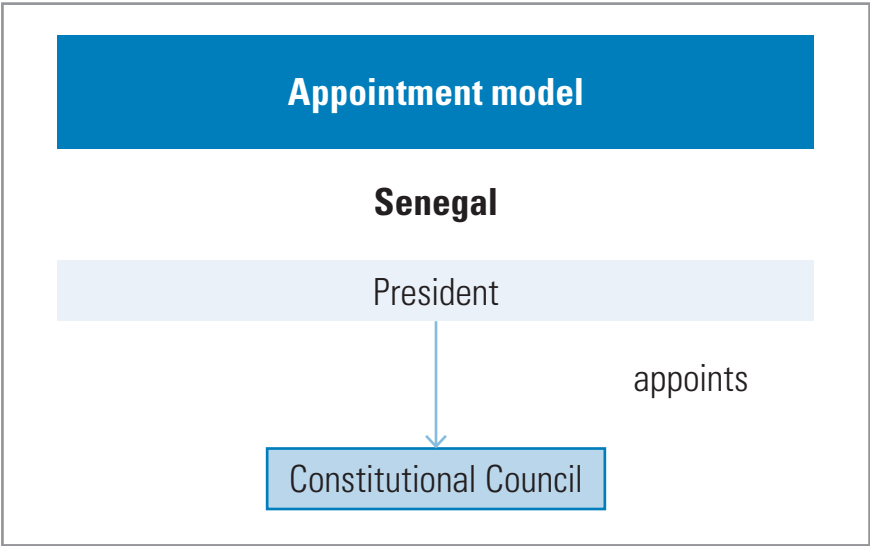


it is worth noting that, in line with the French tradition, judgements are always delivered as a uniform decision of the bench, neither disclosing the voting results nor allowing for concurrent and dissenting opinions.

Model 4: Selection by the head of state

In Senegal, only the president has the authority to appoint the members of the constitutional council. An organic law determines the criteria for eligibility. Given that West African countries often struggle with ‘imperial presidents’, this option might increase the challenge of creating an independent institution that may effectively control the executive. Yet each model’s ability to safeguard the diversity and political independence of the constitutional review courts often depends on the specific circumstances. For example, if one party holds a two-thirds majority in a parliamentary system, there is less need for consensus in selecting judges. Similarly, as the US example illustrates, the outcome of Model 2 is also very much influenced by the partisan composition of the institutions involved. The US Senate’s appointment power proves to be extremely important when different parties control the executive and legislative branches. Presidents from the same party as the Senate majority have confirmed their Supreme Court nominees 88 per cent of the time—compared with 55 per cent during times of divided government (Peri 2012: 16). Of course, if the president and Senate are from the same party, the judges selected may be less politically diverse.

Figure 6.4. Selection by the head of state



Terms of office and re-election

The duration of a member's term of office, combined with the issue of re-election, has a significant impact on the operation of the court. These factors may affect the turnover rate, the possibility of a political shift in the court, the independence of the judges and institutional stability.

In general, courts that do not stipulate a fixed term length risk over-aging, a limited turnover and a general excess of institutional stability (Venice Commission 1997: 9), ultimately resulting in jurisprudence that no longer matches the basic morals and political beliefs of the society and its representatives (Comella 2011: 270). Fixed terms are a given in countries with a constitutional court/council, whereas a lifetime tenure—until retirement age—is still widely applied for supreme-court judges. One explanation for this divide might be that supreme courts are an integral part of the court structure, functioning as the final court of appeal on other issues. Supreme-court judges therefore enjoy the same job guarantees as their colleagues in other superior courts. In contrast, judges of constitutional courts/councils have a unique position in the polity that intimately ties their tenure to political dynamics. In all six countries studies that use a supreme-court model, the judges' tenure lasts until retirement age, which ranges from 60–70 years of age. Four of the six offer an early retirement option of five or ten years before the mandatory retirement age.

The length of fixed terms varies, ranging from five years (Benin, Cape Verde) to nine years (Burkina Faso, Guinea, Mauritania). Generally, a ruling party is not in a position to pick all the judges. Therefore judges' terms should not coincide with parliamentary/presidential terms. To further delink the composition of the court from government political dynamics, long, staggered terms (to prevent all the seats on the court from becoming vacant at the same time) is considered advisable to avoid wholesale political shifts in the court. Burkina Faso, Guinea, Côte d'Ivoire and Senegal explicitly stipulate the staggered replacement of members in their constitutions.

Next to the length of terms, a term's renewability is contentious. In West Africa, three of the 11 countries that appoint members for a specific term allow for a renewal of the term (Benin, Mali and Togo). The debate over whether to permit the renewability of terms partly reflects the search for the right balance between independence and accountability. Some scholars have argued that non-renewable terms can be a weakness, because there are no constraints on the judges to ensure that they decide impartially and without a political agenda, and there is no remedy against underperformance (Glenn Bass and Choudhry 2013: 3). Therefore, countries that want to increase



judges' accountability often choose shorter tenures and re-election or re-appointment. This option, however, is often perceived as endangering the independence of the judiciary. Renewable terms increase the probability of political interference in the composition of the court. Judges who seek reappointment can be held politically accountable on single popular issues—especially if the actions of institutions that are involved in the re-election procedure are at stake (e.g. laws of the legislature, executive orders and so on). It is worth noting that Benin's Constitutional Court, which has the broadest jurisdiction of all constitutional justice institutions in West Africa and has the reputation of being the most active in the region (see Chapter 8), relies on rather short renewable terms for its members.

Representation of minorities

Requirements for minority representation to reflect the countries' diversity (ethnic, linguistic, religious, etc.) in the membership of constitutional justice institutions are rare and often based on political practice rather than legal regulation. Countries may include such a clause in their constitution due to their immediate history or underlying tensions in society. For example, the South African Constitution requires the composition of the judiciary, including the constitutional court, to 'reflect broadly the racial and gender composition' of the country, and the Interim Constitution of Sudan required an 'adequate representation of Southern Sudan' in the constitutional court.

Constitutions in West Africa do not contain such clauses. Where the selection of a judge requires a supermajority in the legislature, various political parties need to agree on the candidates, and thus deals to select a judge with a minority or opposition background may be negotiated. Beyond this, the Constitution of Nigeria requires that the supreme court contain justices with qualifications in either Islamic personal law or customary law.

Table 6.1. Overview of the composition and dismissal process for members of constitutional justice institutions in West Africa

| | No. of judges | Selection process | Selection of president/ chief justice | Tenure (years) | Reap- pointment possible? | Dismissal process |
|----------------------|-----------------------|---|--|--------------------|----------------------------|---|
| Benin | 7 (article 115(1)) | Two different recruiting authorities: National Assembly (four: 2 magistrates with at least 15 years of experience, 1 high-level jurist (professor or practicing lawyer) with at least 15 years of experience, 1 person of great professional reputation); president of the republic (three: 1 magistrate with at least 15 years of experience, 1 high-level jurist (professor or practicing lawyer) with at least 15 years of experience, 1 person of great professional reputation) (article 115(3)) | Elected by peers from among the legal profession (article 116) | 5 (article 115(1)) | Yes, once (article 115(1)) | Irremovable for the duration of their term of office Cause: no procedure laid out in the constitution, but according to Organic Law §§ 7-14 this includes permanent physical incapability and violation of the oath of office, which is considered treason: 'well and faithfully perform their duties, to exercise them impartially in accordance with the Constitution, to keep secret the deliberations and votes, not to take any public position, give no consultation on matters within the jurisdiction of the Court' Procedure: regulated in § 13, by a majority of the members of the court |
| Burkina Faso | 12+ (article 153 (1)) | Three different recruiting authorities and <i>ex officio</i> membership; three members (magistrates) require a two-step selection process: three by the president on the proposal of the minister of justice; three by the president alone (with at least one jurist among them); three by president of National Assembly (with at least one jurist among them); three by president of the Senate (with at least one jurist among them); former presidents (article 153(1)) | Elected by peers (article 153(2)) | 9 (article 153(2)) | No (article 153(3)) | Cause: no procedure laid out in the constitution, but according to organic law: when the judge so requests, physical incapacities, if a crime was committed |
| Cape Verde | 3+ | Selected by the National Assembly by a two-thirds majority (article 181(1a)) | Elected by peers (article 215(4)) | 9 (article 215(5)) | No (article 215(5)) | Cause: permanent physical or mental disability, disciplinary or criminal proceedings Procedure: subject to verification by the court itself |
| Côte d'Ivoire | 7 +(article 89) | Seven appointed by the president (including the president of the Constitutional Council), three of which are designated by the president of the National Assembly; former presidents are <i>ex officio</i> members (articles 90–1) | Appointed by the president (article 90) | 6 (articles 90–1) | No (articles 90–1) | Cause: death, resignation or absolute incapacity (article 92) They enjoy immunity, which only the Constitutional Council can suspend (article 93) |

| | | | | | | |
|-------------------|----------------------|--|---|---|----|--|
| The Gambia | 5+ (article 125) | By the president on the recommendation of the Judicial Service Commission (article 138) | By the president after consultation with commission (article 138) | May retire at 65, must retire at 70 (article 141(1)) | no | Cause: inability to perform functions due to infirmity of body or mind, or for misconduct (article 141(4)) Procedure: investigations are initiated by a motion from at least half of the members of the National Assembly and need to be approved by a two-thirds majority of all members. A tribunal of three members is appointed, chaired by a (former) high judicial official. Affirmative report of the tribunal needs to be confirmed by a two-thirds majority of all members of the National Assembly (article 141(5–6)) Judges enjoy immunity in the exercise of their judicial functions |
| Ghana | 10+ (article 128(1)) | Four consecutive steps: by the president on the advice of the Judicial Council, in consultation with Council of State and with the approval of Parliament; chief justice by the president in consultation with Council of State and with the approval of Parliament (article 144(2)) | By the president in consultation with the Council of State and with the approval of Parliament (article 144(1)) | May retire at 60, must retire at 70 (article 145(2a)) | No | Cause: stated misbehaviour or incompetence or on grounds of inability to perform the functions of the office arising from infirmity of body or mind (article 146(1)) Procedure: multi-stage process: petition of removal is made to the president, who forwards to chief justice, who in turn may establish a committee if there is a <i>prima facie</i> case (consisting of three justices of the superior courts or chairmen of the regional tribunals, or both, appointed by the Judicial Council and two other persons who are not members of the Council of State, or members of Parliament, or lawyers, and who shall be appointed by the chief justice on the advice of the Council of State); suspension is decided by the president in accordance with the advice of the Council of State (article 146(2–5)) |

| | | | | | | |
|----------------------|-----------------|---|--|-------------------------------------|------------------------|--|
| Guinea | 9 (article 100) | Six different recruiting authorities: Office of the National Assembly (one: notable person); president of the republic (one: notable person); peers of magistrates (three magistrates with 20 years of practice); peers of lawyers (one lawyer with 20 years of practice); law faculties (one professor with 20 years of experience); National Institution of Human Rights (two representatives of the institution) (article 100) | Elected by peers (article 101 (2)) | 9 (article 100(1)) | No (article 100(1)) | Irremovable for the duration of their term of office (article 102(1)) Their immunity can only be lifted by the Constitutional Court (except in cases of flagrant offence). In cases of crimes or misdemeanours, they are justiciable by the Supreme Court (article 102(3)) |
| Guinea-Bissau | | Suggested by the Supreme Judicial Council and appointed by the president (article 120(1)) | | Retirement age: 60 (article 33 EMJ) | No | Cause: disciplinary offences (articles 123(3), 47 EMJ) |
| Liberia | 5 (article 67) | Two consecutive steps: nominated/appointed by the president with the consent of the Senate. Candidates need to be Liberian citizens and have practiced law for at least five years (article 68) | Appointed by president with consent of Senate (article 68) | Retirement age: 70 (article 72(b)) | - | Cause: proven misconduct, gross breach of duty, inability to perform the functions of office, or conviction in a court of law for treason, bribery or other infamous crimes (article 71) Procedure: by the legislature (article 71) |
| Mali | 9 (article 81) | Three different recruiting authorities: president of the republic (three: two need to be jurists), National Assembly (three: two must be jurists); Judicial Council (three: all have to be magistrates) (article 91) | Elected by peers (article 92) | 7 (article 91) | Yes, once (article 91) | Cause: only in organic laws: if a member of the court has accepted an office or exercised an activity incompatible with the office, lost their civil and political rights, or has mistaken their general and specific obligations (Organic law articles 3, 10) Procedure: only regulated in organic laws: internal procedure within the court |
| Mauritania | 9 (article 81) | Three different recruiting authorities: president of the republic (four); president of the National Assembly (three); president of the Senate (2) (article 81) | By the president from among his candidates (article 81) | 9 (article 81) | No (article 81) | Cause: only in organic law: if a member of the court has accepted an office or exercised an activity incompatible with the office or if they suffer from a permanent physical incapability Procedure: within the Constitutional Court |
| Niger | 7 (article 121) | Six different recruiting authorities: Office of the National Assembly (one: legal or administrative qualification); president of the republic (one: elected by peers); peers of magistrates (two magistrates); peers of lawyers (one lawyer); law faculties (one professor); collective of human rights associations (one representative from the human rights institutions) (article 121) | Elected by peers (article 123) | 6 (article 121) | No (article 121) | Cause: gross negligence, or when the member no longer meets the requirements to serve on the court Procedure: within the Constitutional Court (stipulated in organic law only) |

| | | | | | | |
|---------------------|-------------------------|---|--|--|-------------------|---|
| Nigeria | Up to 21 (article 2(a)) | Three consecutive steps: recommended by the National Judicial Council, confirmed by the Senate, appointed by the president (article 231(1)) | Same procedure as for the other members (article 231(1)) | May retire at 65, must retire at 70 (article 291(1)) | No | Cause: in case of inability to discharge their functions (infirmity of mind or body, or misconduct or contravention of the Code of Conduct) Process: on recommendation of the National Judicial Council by the president; the Senate also has to approve the removal of a chief justice by a two-thirds majority (article 292(2)) |
| Senegal | 5 (article 89) | Appointed by the president (article 89); organic law requires that the president appoint at least three sitting/former judges of high rank; the remaining two persons have to be lawyers as well | Same procedure as for the other members (article 89) | 6 (article 89) | No (article 89) | Not laid out in the constitution, but in the respective organic law Cause: at their request, or physical incapability (article 89) Procedure: within the council |
| Sierra Leone | 5+ (article 121) | Three consecutive steps: advice of the Judicial and Legal Service Commission; approval by Parliament; appointment by the president (article 135(2)) | Same procedure as for the other members (article 135(1)) | May retire at 60, must retire at 65, article 137(2) | No | Cause: inability to discharge their functions (infirmity of mind or body or stated misconduct) Procedure: four consecutive steps: on suggestion of the Judicial and Legal Service Commission, the president appoints a special tribunal to look into the issue (three persons that qualify to be a judge of the Supreme Court); if the tribunal recommends removing the judge, the removal needs to be approved by a two-thirds majority of Parliament plus a two-thirds majority of Senate (article 137) |
| Togo | 9 (article 100) | Three different recruiting authorities: president (three: one on the basis of judicial competence); National Assembly with two-thirds majority (three; no member from the assembly; one on the basis of judicial competence); Senate with two-thirds majority (three; no member from the Senate; one on the basis of judicial competence) (article 100) | By the president from the members (article 101) | 7 (article 100) | Yes (article 100) | Cause: treason (breach of duty as confirmed in the oath); accepting functions incompatible with the office; loss of civil and political rights No procedure laid out in the constitution, but in the respective organic law Their immunity can only be lifted by the Constitutional Court (except in cases of flagrante delicto) (article 102) |

Key

Francophone West Africa

Anglophone West Africa

Lusophone West Africa



7. Reviewing the constitutionality of laws



7. Reviewing the constitutionality of laws

Yuhniwo Ngege



As suggested in previous chapters, the core business of constitutional justice institutions—whether centralized or diffused—is to uphold the rule of law and ensure compliance with constitutional principles. A key aspect of this function is the scrutiny of constitutionality (judicial or constitutional review), the objective of which is to uphold constitutional principles and provisions against any legislation, regulation or governmental action that might contravene them (International IDEA 2011: 6). This oversight function can take many forms in different jurisdictions and legal systems. This chapter examines the form and type of these differences in West Africa. It starts by outlining the models and types of review. It then explores the following questions: What subject-matter jurisdiction do current constitutions grant to the constitutional review institutions in the region, and what is their scope? What kinds of review can they conduct? What is subject to (or exempt from) constitutional scrutiny?

Models of review

In general, there are two models of constitutional review. The first looks at whether the examination of an act or law to ascertain its constitutionality is abstract (delinked from a legal controversy) or concrete (linked or incidental to a legal controversy). The second focuses on the timing of the review—whether it takes place before a law enters the legal system (*a priori*) or afterwards (*a posteriori*).

Abstract versus concrete review

Abstract review can be undertaken for both laws or other normative acts that have already entered the legal system and those that have not, such as bills under consideration in parliament. Yet this scrutiny generally occurs without reference to a particular case. Since the laws and rules under scrutiny may already be part of the legal order but the constitutionality challenge is not

based on a legal controversy, the statute's constitutionality is determined by contrasting the challenged legislation with a provision of the constitution (de Andrade 2001: 983). As the cause of action is not fact driven, the constitutional question is not only an element of the case, but the case itself (de Andrade 2001). This abstract nature of the case, however, requires the judge to invent or imagine facts to provide a context in which to understand the challenged law and assess its impact. This complicates the matter, because the range of factual circumstances to which the challenged law might apply is broad, and may differ significantly. Without doubt, some laws might be so manifestly unconstitutional that the outcome of a review process will be the same regardless of whether it was conducted in concrete or abstract proceedings. However, it is not always straightforward to understand or assess the unconstitutional effects—actual or potential—of a law in the abstract.

In contrast, concrete or incidental review is essentially fact driven. It generally arises in the context of a prior legal controversy, which is the primary cause of action pending before a jurisdiction. Such reviews involve challenging a law (or provision thereof) on constitutional grounds. The court seeks to ascertain whether, on the basis of a set of facts before it, the application of a particular law will yield unconstitutional outcomes. The review normally takes place either at trial or at the record or appeal level. In the latter case, the court's power to review may be founded on its exclusive original jurisdiction over constitutional questions (as is the case with constitutional courts/councils and some supreme courts) or its appellate jurisdiction (as is the case with most supreme courts). Therefore, unlike abstract review, concrete review can only occur *a posteriori* (after the law has been passed and has effectively become part of the legal system). While concrete review appears to be an intrinsic feature of legal systems with a decentralized judicial review model, many other jurisdictions that follow the centralized review model have adopted it. Emulating other jurisdictions with a centralized review model—and some West African countries of francophone heritage, which introduced concrete review earlier—France in 2008 established the *question prioritaire de constitutionnalité* (prejudicial question of constitutionality), a form of concrete review premised on the need to more effectively enforce and protect constitutional human rights.

Concrete review is conducted differently in countries with centralized as opposed to decentralized models. For instance, in jurisdictions with a strictly decentralized supreme-court model, the court exercises an appellate jurisdiction when conducting concrete constitutional review, whereas in the centralized model (whether Kelsenian or supreme-court), the court exercises an exclusive jurisdiction. As such, while the supreme court in the purely



decentralized model must wait for the case to work its way up through the judicial ladder, the constitutional court/council in the centralized model need not wait. By law, lower courts in decentralized systems must stay proceedings when faced with a constitutionality challenge and forward the matter to the specialized court for disposition. The same also applies in some contexts where the supreme-court model is in place but review is centralized.

Differences can also exist within systems that have adopted the same model of review. In some jurisdictions that use the centralized review model, such as France and Germany, the concrete review procedure is available only where constitutional rights violations form the heart of the constitutionality challenge. In many of the francophone West African states that have adopted it, however, concrete review is available whenever a constitutionality challenge is raised, regardless of whether human rights are at issue.

A priori versus a posteriori review

A priori or preliminary review takes place before the enactment of a proposed law or—if the legislature has already enacted it—before promulgation. Technically, the review is not of a law but of a bill, to ascertain its constitutionality before it formally enters the system of laws. Although political institutions or officials (such as members of the legislature and the executive) petition the courts for *a priori* review, private individuals sometimes challenge legislation before it is enacted through a form of citizen constitutional action (Stone Sweet 2012: 823; Ngege 2013: 451). This type of review has a preventive function: filtering out potentially unconstitutional laws or acts before they result in constitutional violations (Stone Sweet 2012: 823; Choudhry 2013: 8). It therefore has the advantage of ensuring that all proposed laws are properly vetted and certified as constitutional. Yet it brings the courts—sometimes unnecessarily—into the realm of legislative policymaking, which dilutes the principle of the separation of powers.

A priori review, because it takes place before a proposed bill enters the legal system, is necessarily abstract in nature. As such, it can be a hit-and-miss game, as the judge in some cases must invent or imagine facts to provide a context in which to understand the challenged bill and assess its impact. It is used mostly in countries with a centralized or constitutional court model of judicial review. Yet some countries with a supreme court model can undertake a form of optional *a priori* review, in which parliament seeks an opinion on the constitutionality of proposed legislation from legal experts, often including the judiciary. In contrast, *a posteriori* review takes place after a law or normative act has already entered the legal system. Therefore, it can be either abstract or concrete.

Types and timing of constitutional review in West Africa

This section addresses how constitutions in contemporary West Africa have defined the subject-matter jurisdiction available to constitutional review institutions and the timing of the review. To do so, it is helpful to distinguish between the civil law and common law jurisdictions in the region.

Civil law jurisdiction

The civil law jurisdictions comprise all the countries of francophone and lusophone heritage. The majority of these countries, as seen in Chapter 3, have adopted a centralized model of review, which is typically Kelsenian or similar. Despite this commonality, there are variations in the types of constitutional review adopted in each context.

Due to the dominant influence of the Kelsenian model of constitutional review—in particular the French version—abstract and *a priori* review, both of which are characterized by the absence of a legal controversy, have naturally formed part of the subject-matter jurisdiction of most of the constitutional review institutions in francophone and lusophone West Africa. As indicated earlier, this is in addition to concrete *a posteriori* review, which many of these jurisdictions, overtaking France, adopted at the outset of the establishment of the constitutional courts in the 1990s.

In general, review of constitutionality is available for three broad categories of normative instruments. The first is statutes, which are technically defined as laws of legislative origin, in the sense that they are adopted by parliament or a similar legislative body. Laws of legislative origin in civil law jurisdictions come in different forms such as constitutional amendment laws (which modify the constitution), organic laws (which organize and regulate the functioning of institutions created by the constitution), and ordinary laws (which regulate specific areas adopted through the ordinary legislative procedure). In theory, all statutes of legislative origin are subject to scrutiny. In practice, however, the extent to which the different subcategories of statutes can be subject to constitutional review is open to interpretation, given that few constitutions address this issue (see Chapter 8).

The second category of normative instruments is regulatory acts—loosely defined as decisions from the executive arm of government, such as presidential decrees or ordinances, and other administrative agencies. In some countries such as Benin, the desire to strengthen the system of individual human rights protection explains why regulatory acts are also susceptible to constitutional review. Hence, article 22 of the constitutional court's organic law states

that ‘regulatory acts deemed to infringe people’s fundamental rights, public freedoms or more generally, to violate human rights shall be referred to the constitutional court’.

The third category of normative acts subject to scrutiny includes certain types of international treaties and conventions, judicial decisions, and the internal rules of procedure of the legislature and/or other public bodies. Decisions from lower courts in the judicial hierarchy deserve additional attention. In the civil law jurisdictions in West Africa, constitutional justice institutions, because they are specialized institutions that exist outside the ordinary judiciary, do not normally control the decisions made by ordinary courts. In Benin, however, lower court decisions are subject to constitutional review by the constitutional court. In rights cases in particular, the constitutional court ruled in Decision No 04/107 of 7 December 2004 that it has the competence to hear appeals against judgements made by all other courts where violations of constitutional rights are alleged.

Table 7.1. Types of constitutional review and normative instruments in francophone and lusophone West Africa that are subject to control

| | Timing and type of review | | | Normative instruments | Relevant constitutional/organic law provisions |
|----------------------|------------------------------------|--|-----------------------------|-----------------------------|--|
| | <i>A priori</i> (pre-promulgation) | Concrete/incidental (<i>a posteriori</i> by nature) | Abstract (no case involved) | | |
| Benin | Yes | No | No | Internal rules of procedure | Articles 117, 121–3, 144, 146 (constitution) |
| | Yes | Yes | Yes | Statutes | |
| | Yes | Yes | Yes | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Burkina Faso | Yes | No | No | Internal rules of procedure | Articles 150, 152, 155, 157 (constitution) |
| | Yes | Yes | No | Statutes | |
| | No | Yes | Yes | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Cape Verde | No | Yes | Yes | Internal rules of procedure | Articles 12, 280–1 (constitution) |
| | Yes | Yes | Yes | Statutes | |
| | Yes | Yes | Yes | Regulatory acts | |
| | Yes | Yes | Yes | Treaties | |
| Côte d’Ivoire | Yes | No | No | Internal rules of procedure | Articles 52, 70, 88, 86, 96–7 (constitution) |
| | Yes | Yes | No | Statutes | |
| | Yes | Yes | No | Regulatory acts | |
| | Yes | No | No | Treaties | |

| | | | | | |
|----------------------|---------|---------|---------|-----------------------------|--|
| Guinea | No | Yes | Yes | Internal rules of procedure | Articles 93–5 (constitution) |
| | Yes | Yes | No | Statutes | |
| | Yes | Yes | Yes | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Guinea-Bissau | Unclear | Unclear | Unclear | Internal rules of procedure | Article 126 (constitution) |
| | No | Yes | No | Statutes | |
| | No | Yes | No | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Mali | Yes | Yes | Yes | Internal rules of procedure | Articles 85–6, 90 (constitution) |
| | Yes | No | No | Statutes | |
| | No | No | No | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Mauritania | Yes | No | No | Internal rules of procedure | Articles 86, 79 (constitution) |
| | Yes | No | No | Statutes | |
| | No | No | No | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Niger | Yes | No | Yes | Internal rules of procedure | Articles 120, 126, 131 (constitution) |
| | Yes | Yes | No | Statutes | |
| | Yes | Yes | No | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Senegal | Yes | No | No | Internal rules of procedure | Article 92 (constitution) |
| | Yes | Yes | No | Statutes | |
| | No | Yes | No | Regulatory acts | |
| | Yes | No | No | Treaties | |
| Togo | Yes | No | Yes | Internal rules of procedure | Articles 99, 104–5, 139 (constitution) |
| | Yes | Yes | No | Statutes | |
| | Yes | No | No | Regulatory acts | |
| | Yes | No | No | Treaties | |

Key

Francophone West Africa

Lusophone West Africa

The internal rules of procedure of public bodies are subject to one or more types of constitutional scrutiny, as Table 7.1 illustrates, in all civil law countries except Guinea-Bissau. The list of public institutions whose internal rules of procedure are open to scrutiny varies by country. In Benin for instance, the list according to article 117 of the Constitution includes not only Parliament



but also the Higher Audiovisual and Communications Authority and the Economic and Social Council. In Senegal, however, the relevant texts refer only to Parliament's internal rules of procedure; they do not provide further specification. It is important to note that as a matter of principle, parliaments' rules of procedure are subject to a specific legal regime. As such, while they must conform to the constitution, they do not necessarily become standards for scrutinizing or validating legislation passed in parliament. The only known exception to this pattern is Benin; its Constitutional Court Decision No 98/039 of 14 April 1998 ruled that a law passed without observing the necessary internal parliamentary rules of procedure violates the constitution by extension. In general, only *a priori* review is available for internal rules of procedure. The only exception is Guinea-Bissau, where the constitution provides little guidance.

In contrast, more than one form of review is available in most cases for statutes and regulatory acts or ordinances. Except for Guinea-Bissau and Mauritania, which provide only one form of review for statutes, all of the civil law countries allow for more than one.¹⁸ Six countries (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Guinea and Niger) permit more than one type of review for regulatory acts, while Guinea-Bissau, Mali, Mauritania, Senegal and Togo allow only one form of review for regulatory acts.

Constitutional review thus appears to be more robust—at least in principle—in countries that allow more than one type of review of statutes and regulatory acts, and at different points in time. This is because it provides more opportunities (or a broader menu of options and other stages) for bringing an action. For example, in nine of the 11 civil law countries, statutes are subject to (abstract) *a priori* review and (abstract or concrete) *a posteriori* review. Thus in such jurisdictions, mistakes made at the *a priori* stage can be rectified in a subsequent *a posteriori* review. By contrast, countries that have only one option available, such as Guinea-Bissau (where review is only concrete, in theory) and Mauritania (where only *a priori* review is available), have a much weaker constitutional review system. It is difficult to minimize the potentially negative impact of laws in Guinea-Bissau, as they are not tested until they are applied in real cases, when negative effects may have already occurred. Mauritania addresses this problem by providing for *a priori* review, but then has the disadvantage of preventing subsequent constitutional review.

¹⁸ The reference to statutes here does not factor in the distinction made by some constitutions between organic and statutory law.

Yet the Constitution of Guinea-Bissau provides little guidance regarding what types of review are available, and for which normative acts; the conclusions discussed above on the scope and forms of review rely on broad readings of constitutional provisions governing the matter. Article 126 of its constitution, for instance, provides that ‘in matters brought before the trial court, rules that contravene the Constitution or the principles enshrined therein cannot be applied’. When read with other parts of the provision—in particular, sub-paragraph 2, which provides that ‘admitted ..., the question of constitutionality goes separately to the Supreme Court’—the inference is that the constitution permits only concrete/*a posteriori* constitutional review. However, Parliament has since passed Law No 6/2011 of 4 May 2011 on the Organization of the Law Courts, which, though technically unconstitutional, appears to allow for the preliminary/*a priori* review of some normative acts. Its article 27 specifically authorizes the Supreme Court to make ‘prior review of constitutionality of any provision of a treaty or agreement submitted to ratification of the competent national authority’ and to ‘adjudicate the unconstitutionality of any rules or resolutions of a normative material content or of individual and concrete content’. While clearly resolving the issue of *a priori* review for treaties, this law does not specifically address the *a priori* review of the other normative acts it references. However in practice, the Supreme Court has adopted a rather inconsistent approach to the issue (Bastos 2013: 22). In judgements No 7/2000 of 5 December 2000 and No/2010 of 3 November 2010, the court was emphatic that ‘the only model of review of constitutionality predicated in the Constitution . . . is successive, concrete, incidental and concentrated’ (Bastos 2013). The 2010 decision contradicted two previous decisions in 2006 and 2008 in which the court recognized the possibility of abstract *a priori* constitutional review (Bastos 2013).

Further, laws and treaties in Guinea-Bissau, as discussed earlier, are generally subject to control, through a concrete procedure by virtue of article 126 and an *a priori* procedure, respectively. Whether judicial review is permissible for other categories of norms—such as regulatory acts and the internal rules of procedure of parliament or other public bodies—is debatable for the reasons mentioned earlier. Bastos (2013), however, argues that the document’s formulation that the ‘the validity of . . . other acts of state . . . depends on their conformity with the Constitution’ demonstrates an intention on the part of the constitutional drafters to extend judicial review to normative acts other than just statutes.

Common law jurisdictions

Whereas constitutions in the civil law jurisdictions in West Africa generally grant constitutional justice institutions wide-ranging powers to conduct



different forms of constitutional review of different categories of normative acts and at different stages, the situation in the common law jurisdictions of the region, principally the anglophone countries, is different. Constitutional review is generally *a posteriori*—that is, occurring after a law has been passed and in the context of concrete proceedings.

While constitutions in common law countries do not generally provide for *a priori* review, a form of non-binding scrutiny of bills takes place before they enter the legal system. In the Gambia and Liberia, for example, preliminary review is generally available as a consultative procedure during the law-making process, in which experts drawn from the judiciary, academia and the professional bar give non-binding opinions on the constitutional implications of bills of law before enactment. Such a review may also take place within specialized parliamentary committees such as a committee on constitutional affairs. Therefore, anglophone West Africa's constitutional review culture does not include judicial preliminary review as a general principle. Article 4(8) of Nigeria's Constitution appears to represent an exception: it provides that, 'Save as otherwise provided by this Constitution, the exercise of legislative powers ... shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law'. The consultative nature of the procedure (where it exists) also means that their opinions are merely advisory and not binding on any institution.

Abstract review is generally unavailable in common law institutions, although some constitutions, such as Ghana's, are broad enough to arguably allow abstract review. Although Ghana's Supreme Court has explicitly ruled that it does not conduct abstract review, article 2(1) of the constitution nonetheless provides that 'a[ny] person who alleges that an enactment [...] is inconsistent with or is in contravention of provisions of this constitution, may bring an action in the Supreme Court for a declaration to that effect'. Article 5(1) of the Constitution of the Gambia and article 127 (1) of Sierra Leone's Constitution contain similar provisions.

While abstract review is absent in Nigeria and Liberia as a general principle, it appears that courts can still perform such a review when faced with threats to their independence. Article 4(8) of Nigeria's Constitution appears to open that possibility by subjecting 'the exercise of legislative powers [...] to the jurisdiction of courts', and by barring parliament from enacting 'any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law'. While the law remains unsettled in Nigeria on this point, in Liberia—where it seems courts can also perform abstract reviews of laws that they deem threaten their independence—it appears to be clearer. The Liberian Supreme Court has twice taken the initiative to

review legislation in abstract that it deemed threatened its independence. In *Re Sections 12.5/12.6 of the New Judiciary Law*, for instance, the Supreme Court explained that ‘we deem it proper to have a full discussion of an act . . . which in its effect and operation interferes with [the] independence and separateness of the coordinate branches of government positively enjoined by the Constitution and which is the spirit and genius of this democratic institution’.

While concrete review is the norm in all five West African anglophone countries, the *modus operandi* for such a review is not uniform. For instance, except for challenges related to constitutional rights for which it has only appellate jurisdiction, supreme courts in the Gambia (article 127(1–2)), Ghana (article 130(1–2)) and Sierra Leone (article 124 (1–2)) have exclusive original jurisdiction in all other matters related to the enforcement and interpretation of the constitution, including those that arise in an incidental proceeding before another jurisdiction. In other words, all lower courts faced with a constitutionality challenge during judicial proceedings must stay such proceedings and refer the constitutionality question to the supreme court.

As such, concrete review in these jurisdictions proceeds almost in the same manner as in centralized review systems. In contrast, Article 66 of the Liberian Constitution provides that ‘The Supreme Court shall be the final arbiter of constitutional issues.’ Likewise, articles 241(1) and 233(2) of the Nigerian Constitution stipulate that ‘appeal[s] shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal [and ultimately] to the Supreme Court as to the interpretation or application of this Constitution’. Therefore, lower courts in these jurisdictions seem to have full powers to rule on constitutionality questions arising in the context of a litigation before them, with the supreme court retaining only an appellate (rather than exclusive) original jurisdiction. Direct review is also available. As in the centralized system, the need seems to be to safeguard and strengthen constitutional rights. For instance, article 33 of Ghana’s Constitution gives the High Court original jurisdiction to review constitutionality questions from individuals on grounds that ‘a provision of [the] Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to [them]’. Similar provisions are contained in article 37(1) of the Gambia’s Constitution, article 26 of the Liberian Constitution and article 46(1) of Nigeria’s Constitution.

It is worth noting that the formulations in these provisions are broad enough to cover rights as well as other cases, suggesting an interest in empowering individuals to be able to take actions to protect the constitution from violations. Such is the case with articles 5(1), 2(1) and 127(1) of the Gambian,

Ghanaian and Sierra Leonean constitutions, respectively. These articles refer more broadly to initiatives contravening ‘a provision of this constitution’ and not just to provisions relating to rights granted by the constitution or the rights chapter of the document, as provided in articles 26(1) and 46(1) of the Constitutions of Liberia and Nigeria. Such formulations suggest a much wider scope of application. Finally, it is useful to note that, unlike in francophone (and to some extent lusophone) West Africa—where constitutions specify the different categories of normative acts that are subject to scrutiny, such as statutes (and their subcategories), regulatory acts, rules of procedure and international treaties—no such distinctions are made in anglophone West Africa. These constitutions generally reference enactments, statutes, acts, laws and legislation, which are used interchangeably for normative acts of legislative origin. Table 7.2 elaborates the forms of review available in anglophone West Africa.

Table 7.2. Types of constitutional review and normative instruments in anglophone West Africa that are subject to control

| | Timing and type of review | | | Relevant constitutional/ organic law provisions |
|--------------|------------------------------------|--|-----------------------------|---|
| | <i>A priori</i> (pre-promulgation) | Concrete/incidental (<i>a posteriori</i> by nature) | Abstract (no case involved) | |
| The Gambia | Yes (but consultative) | Yes | Unclear | Articles 5(1), 37(1), 127 (constitution) |
| Ghana | No | Yes | No | Articles 2(1), 33, 130 (constitution) |
| Liberia | Yes (but consultative) | Yes | Yes | Articles 26(1), 66 (constitution) |
| Nigeria | Unclear | Yes | Unclear | Articles 4(8), 46(1), 233(1), 241(1) (constitution) |
| Sierra Leone | No | Yes | Unclear | Articles 124, 127(1) (constitution) |



8. Other competences of constitutional review institutions



8. Other competences of constitutional review institutions

Babacar Kante and H. Kwasi Prempeh



The exercise of public powers by public authorities, including judicial authorities, has important political consequences. This is especially so with respect to decisions made by constitutional justice institutions. These decisions often have a wide impact, including in areas such as human rights, social cohesion and legal certainty (du Bois de Gaudusson 2007: 609; Fromont 2013: 509).

The competence of constitutional justice institutions in Africa attracts particular attention, from both theoretical and political perspectives (Gelard 2007: 705; Wodie 1996: 625; Aïvo 2013: 23; Djedjro 2005: 304; Mede 2012: 458; Diop 2013: 332; Favoreu 2014: 1250; Salami and Gandonou 2014: 492). Their role in the overall political system, especially in contexts of democratic transition, may affect who wins and retains political power during elections. In some cases, a constitutional judge may need to settle a political crisis arising from a coup d'état or unconstitutional change of government. Yet such decisions can themselves precipitate a political crisis or be a source of political and social tension. In order to assess the competence of constitutional justice institutions, it is important to measure both the scope and limits of such competence.

Scope of the competence of constitutional review institutions

An analysis of the constitutional texts and laws that establish and organize constitutional courts/councils or supreme courts reveals several different types of competence; there are significant differences between anglophone and francophone states in this area. In general, constitutional review institutions or supreme courts in anglophone West Africa are constitutionally established as courts of general jurisdiction. By contrast, constitutions in the francophone states exhaustively list their jurisdiction or competences.

Unless the constitution makes a specific exception, the competences or subject-matter jurisdiction of the supreme courts in anglophone West Africa extend to all matters covered in the constitution. Thus, it is only the exceptions to the competences that are listed, and in general such exceptions are extremely limited. Furthermore, all the constitutions in the anglophone countries provide that the range of subject matter that falls within the competence of a constitutional review institution may be further expanded by legislation. As explained in Chapter 3, in anglophone West Africa constitutional jurisdiction is shared between the apex constitutional review institution and other designated (superior) courts within the judiciary: the constitution and national legislation specifies which level of court has original, and which has appellate, jurisdiction over which classes of cases.

Therefore, the anglophone countries covered in this study usually have more than one court that can be considered a constitutional review institution. For example, under the Nigerian Constitution, the apex federal Supreme Court has original jurisdiction only in a very narrow set of cases: those involving a dispute between the federation and a state or between states over legal rights, or where original jurisdiction has been conferred by federal statute. The bulk of the Nigerian Supreme Court's constitutional jurisdiction is in the form of appellate jurisdiction; the lower courts, notably the federal Court of Appeal and the High Court, also exercise constitutional jurisdiction in cases that must commence in the High Court. The Liberian Supreme Court is also mainly a final court of appeal in constitutional matters; its original constitutional jurisdiction is limited to cases in which a ministry or a foreign country is a party. All other constitutional cases—including those to enforce claims against the government for the alleged violation of a fundamental right or freedom—must commence in a claims court.

In contrast, in Ghana and the Gambia, the apex court has original jurisdiction in all constitutional matters except cases brought to enforce the constitution's human rights provisions; human rights cases must commence in the high court and can only reach the supreme court through appeal. The Supreme Court of Sierra Leone, by contrast, has original jurisdiction over all constitutional cases (that is, any case alleging a violation of a provision of the constitution or involving the interpretation or enforcement of a provision of the constitution), including those in which the complainant alleges a violation or infringement of a constitutionally guaranteed right or freedom.

Another important difference between the competences of anglophone constitutional review institutions and their francophone counterparts is that, as discussed in Chapter 7, the constitutional jurisdiction of anglophone courts over the constitutionality of legislative acts does not come into effect until



after a bill has been passed and signed into law. The one exception is Nigeria: article 4(8) of its Constitution states that ‘the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of the courts’ and ‘the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or a judicial tribunal established by law’. This means in practice that a bill that will have the purpose or effect of denying the courts jurisdiction over a matter if it is enacted may be challenged and declared unconstitutional *before* such enactment.

In general, constitutional jurisdiction in the anglophone countries, unlike in the civil law francophone and lusophone countries, does not include the power to issue advisory opinions; the courts have jurisdiction only to decide actual cases in litigation. Article 122 of the Constitution of Sierra Leone, however, allows the president to seek the ‘judicial opinion’ of the Supreme Court on ‘a petition in which he has to give a final decision’.

The remainder of this section focuses on two categories of competences of constitutional review institutions in the francophone and lusophone countries. The first category relates to their adjudicative power (to issue binding decisions), while the second is the power to issue (non-binding) advisory opinions (Favoreu 2013: 225; Salami 2014: 371).

Adjudicative power

Constitutional justice institutions in the francophone and lusophone countries are granted adjudicative powers in four areas: (a) scrutiny or review of constitutionality (discussed in Chapter 7), (b) electoral disputes, (c) monitoring the lawfulness of referendums and (d) conflict of jurisdiction between public authorities.

Electoral disputes and regulation of the political system

After review of constitutionality, adjudicating electoral disputes and regulating the political system is the second-most important competence of constitutional or supreme courts in the region, in both quantitative and qualitative terms. With the exception of Nigeria, where the Supreme Court only has appellate jurisdiction in election matters, all of the constitutions surveyed confer jurisdiction to hear certain electoral disputes in these courts. The extent of their competence varies, however, based on the nature of the election and the court concerned.

It is important to note that, while constitutional review institutions exercise jurisdiction over some electoral questions, their electoral jurisdiction is not

exclusive, as the ordinary courts still hear some elections-related cases (see Table 8.1). Examples include disputes related to election registration or campaigns. While competence in some countries, such as Senegal, is limited to declaring election results and ruling on disputes arising from candidate lists, in others the competence is broad and covers disputes related to the electoral register and the conduct of the ballot.

In general, the main type of electoral disputes over which constitutional courts and supreme courts have jurisdiction are presidential and national legislative elections. This is true of the majority of courts in the region and is consistent across French-, English- and Portuguese-speaking courts. In Togo, article 104(2) of the Constitution and article 2 of the court's internal regulations of 26 January 2005 give the Constitutional Court jurisdiction over disputes arising from presidential, parliamentary and senate elections. Similarly, in the Republic of Guinea, the Supreme Court has jurisdiction over disputes arising from presidential and parliamentary elections, in accordance with article 62 of the constitution. In Ghana, Sierra Leone and Nigeria, the apex court has jurisdiction over disputed presidential elections but not parliamentary elections; in Ghana and Sierra Leone, the Supreme Court has original jurisdiction to decide presidential election petitions, while in Nigeria a presidential election petition must first be heard by the federal Court of Appeal, subject to final appeal to the federal Supreme Court. In all three anglophone countries, the Court of Appeal, not the Supreme Court, is the final appellate court for election petitions that challenge the results of legislative elections. In Liberia, article 83 grants the Supreme Court jurisdiction to hear disputes relating to presidential and legislative elections, but all such election disputes must be determined, in the first instance, by the election management body itself before they may be appealed to the Supreme Court. The Gambia is the only anglophone country to confer on its supreme court exclusive original jurisdiction to decide both presidential and legislative election disputes. The Constitutional Court of Cape Verde is equally competent to hear cases relating to presidential, parliamentary and local elections in accordance with article 215 of the Constitution; articles 252, 353 and 376 of the Electoral Code; and articles 109–22 of Law No.56/VI/2005 on the Constitutional Court.

It is rare for countries to assign competence for disputes over local government elections to the constitutional judge. Burkina Faso, which used to be the rare exception in this regard, ceded this power to administrative courts in 2012.

In the region's English-speaking countries, the supreme courts are generally not involved in policing the electoral process itself or in proclaiming the results; this role is more commonly exercised by constitutional courts in



the francophone community. However, because of the very broad, open-ended appellate jurisdiction exercised by supreme courts in the anglophone countries, litigation over certain aspects of the electoral process, including internal political party disputes, may reach the apex court by way of appeal from the lower courts. The Constitution of Liberia specifically gives the Supreme Court competence to hear complaints brought against the election management body for refusing to register an applicant as a political party or as an independent candidate for the purposes of elections.

In lusophone Cape Verde and Guinea-Bissau, their constitutional/supreme courts are competent to examine and rule on the admissibility of candidates for presidential elections and to decide on election disputes.

In the francophone states, in addition to regulating the electoral process, the constitutional courts are the sole institutions with the power to ascertain and declare a vacancy in the office of president. Constitutional courts also exercise other competences that have a broader impact on the functioning of the political system. For example, they have the authority to oversee the operation of political parties. In some countries, for example, constitutional or supreme courts can rule on the legality of the establishment and operation of political parties and order the dissolution of those that do not meet the minimum statutory requirements. In Cape Verde, for instance, the Constitutional Court verifies the legality of the constitution of political parties and their alliances under article 215 of its constitution and articles 15 and 123 of Law No 56/VI/2005. Likewise, under the terms of articles 156 of Burkina Faso's Constitution and articles 26–27 of the organic law regulating the organization and functioning of its Constitutional Court, the latter is competent to monitor the constitutionality of political parties' charters. In addition, some constitutions, such as Senegal's (article 37), authorize the constitutional court to administer the inaugural oath for the president-elect, receive his declaration of assets and preside over impeachment proceedings, where necessary.

Constitutional courts thus enjoy broad adjudicative competences that allow them not only to rule on disputes referred to them but also to stabilize and regulate the political system in African countries. This gradual broadening of their field of intervention has helped consolidate their jurisdictional stature.

Control of the legality of referenda

In French-speaking countries, constitutional and supreme courts generally play a dual role in holding referenda. In addition to issuing an obligatory preliminary opinion on the referendum procedure, following a referral from the president of the republic, they proclaim the results.

In lusophone Cape Verde, the Constitution similarly establishes an obligatory *a priori* review of the constitutionality or legality of any referendum bill introduced by parliament or the government. In the anglophone countries, since the competences of the constitutional review institutions are general rather than exhaustively enumerated, the supreme courts are not explicitly conferred with powers related to referenda. However, since the use of referenda is commonly associated with amending the constitution, the constitutional jurisdiction of the courts would normally extend to cases in which a violation of a referendum-related amendment provision was alleged. For instance, the Constitutions of the Gambia, Ghana and Sierra Leone contain provisions designating certain ‘transitional provisions’ relating to actions arising from past coups d’état as unamendable by any means—including, by implication, by referenda.

Conflict of jurisdiction between public authorities

In some West African countries—particularly those that have experienced political crises, such as Benin—constitutions and the legal framework in place explicitly devolve the power to regulate the relationship between public authorities to constitutional courts. In others, however, such as Senegal, the attribution of competence is less explicit and therefore has to be implied. In the anglophone countries, where the scope of constitutional jurisdiction is generally not itemized, inter-branch and other interjurisdictional disputes are a normal part of the competence of the supreme courts. In Nigeria, the federal Supreme Court has exclusive original jurisdiction over disputes between the federal government and a state or between states over legal rights.

The role of constitutional courts in this regard is to ensure respect for the principle of the separation of powers, both horizontally and vertically. Although this usually means resolving disputes over competences between the legislative and executive branches, the growing number of independent offices and commissions in many of the constitutions in the region increases the potential number of interjurisdictional conflicts and disputes requiring judicial resolution. In legal systems based on dual court structures, the constitutional or supreme courts also play a role in settling disputes between the ordinary and administrative courts.

Advisory power

Outside the anglophone sphere, constitutional review courts tend to exercise advisory powers in three areas—control of organic laws, the referendum process, and the president of the republic’s use of emergency powers.



Obligatory opinion on organic laws

In the French-speaking countries in the region, constitutions and laws that create constitutional courts oblige political authorities, particularly the executive, to seek the opinion of the constitutional court on the constitutionality of any organic law before its promulgation. The exception is Senegal, where such pre-promulgation judicial review is no longer mandated. This advisory power is generally absent in anglophone West Africa.

Approval of the organization of referenda

Legal texts in all the countries studied grant the constitutional courts jurisdiction to intervene in referendum processes. The definition of such attributions is not always clear, but in general they fall into two categories: one is consultative and relates to the referendum procedure, the other is adjudicative and relates to the actual conduct of referenda and the declaration of results. Adjudicative competence in this area is less marked than in electoral matters, and the courts are less intensely involved. In Burkina Faso, for example, articles 28 and 29 of organic law no. 011.1N of 27 April 2000 and article 152.2 of the Constitution merely provide that the Constitutional Council controls the regularity of referendum operations and declares the results.

In English-speaking West Africa, the supreme courts rarely exercise advisory power or play any role in organizing referenda. They do, however, possess implied competence to hear disputes related to the constitutionality of an amendment or amendment process.

Referral prior to implementing emergency powers

Outside the anglophone states, when the president of the republic decides to invoke the emergency powers they hold under the constitution, they are obliged, as a condition of the validity of exercising such powers, to consult the constitutional court, among others. The rationale is to offer the constitutional court the opportunity to satisfy itself that the exercise of exceptional prerogatives that could infringe upon citizens' rights and affect the balance between institutions is compliant with the constitution. This mechanism is provided by article 39 of Mauritania's Constitution, article 50 of Mali's Constitution and by article 59 of the Constitution of Burkina Faso. Failure to comply with such provisions means that laws and adopted administrative actions be declared unconstitutional.

Limits to the competences of constitutional review institutions

Despite their generally broad scope, there are still certain subject-matter limits to the competences of constitutional courts in West Africa. It is useful to examine these limits to measure and assess the differences they reveal between countries and legal systems.

In the francophone countries, subject-matter limitations on the jurisdiction of constitutional justice institutions arise from two sources. The first is from the constitution or organic laws that establish and organize the courts. These texts provide an exhaustive list of competences, and therefore exclude certain matters from the courts' jurisdiction. The second source is the courts' own interpretations of their competence from both what is explicitly written in the constitution and from what is implied. Judges in different contexts (for example, determining competence) can sometimes interpret the same texts differently.

These limits include the rejection of cases arising from the legislature's unconstitutional inaction, the indeterminate nature of constitutional amendment acts or laws, the lack of jurisdiction over administrative acts, implicit competence over fundamental rights, ambiguities regarding the interpretation of the constitution, and risks related to the competence to review the decisions of other courts.

Rejection of cases of unconstitutional omission by the legislature

Constitutions and organic laws in West Africa are generally silent on the consequences of legislative inaction, for example when the legislature fails to enact implementing measures for constitutional provisions. Such cases arise, for instance, when a citizen has a right under a constitutional provision, but cannot invoke it because parliament has not enacted the implementing law mandated by the constitution. The legislature can then be deemed to have failed to fulfil its obligation to act, and therefore to have infringed upon the citizen's rights by omission or inaction. Cape Verde has one of the few constitutions with a provision that may be read to cover this situation of legislative inaction. Article 16 provides that 'the state and other public are civilly liable for the actions or omissions of its agents in the exercise of their public duties where it results in the violations of rights, freedoms of persons or other third parties'.

Where the court has the relevant competence, it may respond to the legislature's inertia by compelling it to enact the necessary legislation, failing



which it is liable to pay damages to the aggrieved party. This is common in administrative law cases in which an administrative authority faces legal action for failing to perform a constitutionally required obligation.

The constitutions and legal texts in most of the countries studied do not explicitly grant constitutional justice institutions the competence to determine cases of legislative omissions. Yet there are two notable examples of the court assuming such competence. In *Mensah v. Mensah* (2012), the Ghanaian Supreme Court applied a constitutional provision and its underlying principle directly to settle a dispute; the provision sought to confer equal spousal rights in the distribution of marital assets in divorce proceedings, but the required implementing legislation had not been enacted for well over a decade after the adoption of the constitution. Likewise, Benin's Constitutional Court has ruled that it has competence to hear actions arising out of the legislature's failure to implement specified constitutional obligations. Indeed, a constitutional judge can issue an order to force an institution to fulfil its obligations within a period set by the court. In decision DCC 08-072 of 25 July 2008, the court argued that a refusal to legislate constitutes a violation of article 35 of the constitution, which obliges citizens elected to a public office to fulfil their responsibilities conscientiously, competently and with probity, devotion and fairness in the interests of and respect for the common good.

The indeterminate nature of constitutional amendments

In general, constitutions and organic laws in francophone and lusophone West Africa do not explicitly empower constitutional or supreme courts to hear cases related to constitutional amendment laws. Burkina Faso is the singular exception. Article 154 of its constitution provides that the 'Constitutional Council ensures respect for procedures governing constitutional amendments'. The result of this general constitutional silence on the justiciability of constitutional amendments has been the emergence of two broad trends in the case law on the issue: some courts have taken a broad approach to interpreting the silence of those provisions, while others have opted for a restrictive approach. In the first trend, constitutional justice institutions have taken a more pragmatic approach; the general trend in the case law has been to subject constitutional amendment laws to constitutional scrutiny. This is the case in Benin, Burkina Faso, Cape Verde, Ghana, Guinea, Liberia, Mali, Niger, Sierra Leone and Togo. The methods of control, however, differ. In some countries, such as Burkina Faso, judges limit themselves to verifying procedural compliance. In others, they exert substantive control over the constitutional amendment.

In the second trend, constitutional justice institutions have taken a restrictive approach to interpreting the silence of the constitutional and legal texts in ways that exclude constitutional amendment laws from scrutiny. The Constitutional Council of Senegal is an example: on the two occasions when it has had to address the subject (in 2003 and 2006), the council has consistently held that constitutional judges do not have competence to rule on the constitutionality of constitutional amendments.

The situation is different in the anglophone countries. Since all of the constitutions in those countries provide for constitutional amendments, the constitutional jurisdiction of the courts extends, by implication, to cases alleging a violation of the amendment provision. The Nigerian Constitution includes a provision in its amendment section prohibiting the adoption of an official religion for any state or the federation. Presumably this is an immutable or unamendable clause, since the constitution states that the National Assembly's amending power is 'subject to the provisions of this section'. The Constitutions of the Gambia, Ghana and Sierra Leone also contain provisions designating certain 'transitional provisions' relating to actions arising from past coups d'état unamendable. Amendments of these provisions, if challenged, would arguably be subject to review by the appropriate constitutional review institution.

Exclusion of administrative acts

Most of the countries studied exclude administrative acts from the competence of constitutional justice institutions. This tends to be the case in civil law systems, where administrative courts—which can either be specialized tribunals or integrated into the broader judiciary—are responsible for controlling the legality of administrative acts. A limited number of constitutions, however, grant some of these institutions competence to examine the constitutionality of administrative acts if they pose a threat to human rights. In Ghana, where a 'right to administrative justice' is included as one of the fundamental human rights and freedoms guaranteed by the constitution, constitutional jurisdiction (which, in this instance, is located initially in the High Court) covers cases of the alleged denial of administrative justice. The Liberian Constitution also requires a 'hearing' that comports with 'due process of law' before a person's right or privilege is denied. Constitutional jurisdiction thus extends to cases of alleged violation of due process. In Benin, the Constitutional Court has decided it has competence under article 117 of the constitution to examine administrative acts. In theory, Benin's Constitutional Court should exercise this exceptional grant of jurisdiction under article 117 only when the administrative act in question contravenes human rights guaranteed in the constitution. The practice,



however, is different: Decision DCC 08-113 of 9 September 2008 suggests a trend towards broadening the category of administrative acts that are open to legal challenges before the court, as not all of the cases necessarily relate to infringements of constitutional human rights (Mede 2012: 74).

Implied competence in relation to protecting human rights

Unlike the anglophone countries (including Liberia), which include a ‘bill of rights’ or an enumeration of certain fundamental human rights and freedoms in their constitutions and expressly assign jurisdiction for their enforcement, legal texts in the francophone states in the region are mostly silent on the competence of constitutional or ordinary courts to protect fundamental rights. The few exceptions are Guinea (articles 93–94), Togo (article 99) and Benin (article 114), where the constitution explicitly provides a role for the constitutional court in the protection of human rights. In the rest of the francophone countries, the constitutions include a long list of rights and freedoms but do not grant constitutional courts any explicit competence to protect them. The general interpretation is that, in such contexts, the courts are competent to rule in this area through their normal scrutiny of the constitutionality of laws.

In Cape Verde, article 20 of the Constitution provides an important and effective instrument to protect the fundamental rights of the citizen—the *recurso de amparo* (citizen’s constitutional action), similar to the *amparo* in Spain and the *Verfassungsbeschwerde* in Germany—which grants individuals the right to approach the Constitutional Court to secure the protection of their fundamental rights. A similar tool is available in Benin’s Constitution. Benin’s Constitutional Court is also famous for developing case law that leans strongly in favour of protecting fundamental rights, while in other francophone countries the role of judges is limited to checking the compliance of challenged legislation with the constitution. The result is that the protection of fundamental rights remains weak in most of the region from both normative and practical perspectives.

Disputes over ambiguities around the constitution

It is important to distinguish between two types of constitutional interpretation. The first type is interpretations that form part of the everyday role of the judge. Judges exercise interpretive power on a routine basis by deciding the cases that are submitted to them, including whether laws comply with the constitution. The second type is interpretations requested by a competent authority or plaintiff to clarify the meaning of a disputed provision (Melin-Soucramanien 2005: 13).

The first category of cases relates to the role of the judge in the ordinary course of adjudication. If the judge encounters an ambiguous constitutional text in the course of deciding a case, he or she must simply construe or interpret the text and apply it to resolve the case; there need not be an explicit grant of jurisdiction on this, as it is inherent in the judge's powers. The second type of interpretive power, however, must be the subject of an explicit grant insofar as it relates to a specific dispute. While constitutional jurisdiction in the anglophone countries normally encompasses the power to interpret disputed constitutional text, only three other West African countries appear to make such an explicit grant of jurisdiction in their constitutions or legal texts: Niger (article 103), Burkina Faso (article 152) and Côte d'Ivoire (articles 90 and 94).

Difficulties associated with competence to examine court decisions

In the French-speaking countries, constitutional courts are generally viewed as judicial institutions that lie and operate outside the regular judicial system—in contrast to the Anglo-American tradition, in which the supreme court sits at the top of the regular court structure. Thus, in most countries of francophone heritage, constitutional courts/councils are considered to have a specialized jurisdiction, and are dealt with separately from the ordinary judiciary in the constitution. By implication, such constitutional courts are not, in theory, competent to examine or review decisions of the ordinary courts on appeal or referral.

Benin is an exception. Its Constitutional Court is competent, at least according to its case law, to examine decisions made by other courts, including the Supreme Court. Where supreme courts co-exist with constitutional courts, as in Benin, this type of competence can give rise to a problem of determining the *res judicata* (finality or irreversible) effect of decisions of the supreme courts. In addition, the Constitutional Court of Benin has asserted competence to examine not only legal actions; it has expanded the scope of its competence to also include 'societal events', including the screening of a video, a satirical drawing of certain activities and behaviours that have constitutional implications (Mede 2012: 3).

Table 8.1. Other competences of constitutional justice institutions in West Africa

| | Individual complaint | Review of constitutional amendments | Omission | Conflicts between state bodies | Fundamental rights | Election disputes | Conduct of referenda | Impeachment procedures of president | Constitutionality / dissolution of political parties | Relevant constitutional/ organic law provisions |
|----------------------|----------------------|-------------------------------------|------------------|---|--|-------------------|----------------------|-------------------------------------|--|--|
| Benin | + | + | + | + | + | + | + | - | - | Articles 4, 3, 177, 121–2 (constitution) Articles 24, 33, 68 (organic law) |
| Burkina Faso | - | + | - | + Very limited /in specific cases only | - | + | + | - | + | Articles 101, 108, 152, 154, 156 (constitution) Articles 26–8, 38 (organic law) |
| Cape Verde | + | + | - | + | + | + | - | + | + | Articles 20, 132, 215, 280, 294 (constitution) |
| Côte d'Ivoire | - | + | - | + | - | + | + | - | - | Articles 94–5, 124–6, Title V (constitution) |
| The Gambia | + | + | + | + | + Except economic and social rights | + | + | - | - | Articles 5, 127, 226 (constitution) |
| Ghana | + | + | + But limited | + | High Court has original jurisdiction | + | + | - | + | Articles 2, 23, 33, 55, 64, 130 (constitution) |
| Guinea | - | + | - | + But limited | + | + | + | - | - | Articles 93–5 (constitution) |
| Guinea-Bissau | - | + | - | - | + | + | + | + | - | Articles 32, 72, 85, 126–7 (constitution) Articles 19 (organic law) |
| Liberia | + | + | + | + | + | + | + | - | + | Articles 2, 4, 26, 66, 79, 80, 83 (constitution) |
| Mali | - | + | - | + | - | + | + | - | - | Articles 33, 41, 86–7 (constitution) |
| Mauritania | + | + Indirectly | - | + | - | + | - | - | - | Articles 59, 62, 85–6, 102 (constitution) |

| | | | | | | | | | | |
|---------------------|------------------------|---|---|----------------------------------|------------------------|----------------------------------|---|---|---|---|
| Niger | - | + | - | + | - | + | + | - | - | Articles 120, 127, 175 (constitution) |
| Nigeria | + State high courts | + | + | + Only appellate jurisdiction | + State high courts | + Only appellate jurisdiction | + | - | - | Articles 1, 6, 9, 42, 233, 239, 251 (constitution) |
| Senegal | - | - | - | + | - | + | + | - | - | Articles 29-35, 51, 60, 86, 92 (constitution) |
| Sierra Leone | + | + | + | + | + | + | + | - | + | Articles 18-33, 36, 124, 127 (constitution) |
| Togo | - | + | - | + | + | + | + | - | - | Articles 99, 104 (constitution) Article 34 (organic law) |

+ = Constitutional justice institutions fully or partially empowered

- = Constitutional justice institutions generally not empowered

Note: In Benin, the power of the constitutional judge to rule on the constitutionality of constitutional amendments as well as constitutional omissions is based not on an explicit constitutional provision but on a constructive interpretation by the court of the constitution



9. Access to constitutional review institutions



9. Access to constitutional review institutions

Babacar Kante and H. Kwasi Prempeh



Establishing courts and endowing them with jurisdiction is an important part of the constitutional review process, yet doing so does not guarantee that litigants will have access to the courts to check alleged violations, enforce legal obligations and secure the protection of rights. For courts to fully realize the promises that constitutions offer, both jurisdiction and access to the courts are necessary. Therefore, rules are needed that enable and facilitate individual access to constitutional justice institutions. These rules determine who has the right of standing and what procedure should be followed to access constitutional justice (Conac and du Bois de Gaudusson 1989: 299; Jan 2000: 689).

In West Africa, where strengthening and consolidating the democratic ethos has been a long-time challenge, the desire to establish and institutionalize constitutionalism and the rule of law during the democratization processes of the 1990s sparked renewed interest in constitutional review institutions. These new institutions were designed with at least two key objectives or considerations in mind. First, they were to serve as adjudicators of ‘political’ disputes, including those between political institutions. Second, they had to play a central role in protecting human rights as guaranteed in constitutional and legislative instruments (Holo 2009: 101; Aïvo 2006: 222).

To this end, the constitutions and laws that create and govern the functioning of constitutional review institutions in West Africa also provide a variety of rules, procedures and arrangements for accessing constitutional justice (Akerekoro 2013: 59). Some allow for broad or liberal standing rules that open up access to constitutional justice, while others adopt a more restrictive policy. Thus, when analysing standing (the ability to access and bring a claim) before constitutional review institutions in the region, two issues require attention: which parties have the capacity or interest to bring an action (*locus standi*) and what procedure, if any, must be followed to gain access.

Standing before constitutional review institutions

Identifying the persons and bodies that have the right to invoke and activate a court's jurisdiction is of fundamental importance when evaluating a judicial system's capacity and effectiveness to resolve disputes. With regard to constitutional justice, the ability of individuals to access a court of competent jurisdiction determines how effectively it can protect fundamental human rights and freedoms (Delperee 1991: 221). Similar access for political actors and interests is also crucially important to ensure respect for the rules of the political game and to police the exercise and limits of public power.

In the West African context, the constitutional and legislative response to the access or standing question varies greatly depending on the country and its legal heritage. In the francophone countries, standing tends to vary according to the type or subject matter of the dispute. In other words, the question of who is eligible to go to court to enforce the constitution depends on what constitutional matter is to be enforced. Depending on the dispute, political, administrative or judicial authorities—and even individuals or private corporations—may refer matters to constitutional courts.

Yet in anglophone countries, access to constitutional jurisdiction depends very much on the relationship of the complainant to the matter. Except in constitutional rights cases, where standing is restricted to persons directly affected by the alleged violation, there is a division among the anglophone states regarding standing requirements. In the Gambia (article 5), Ghana (article 2) and Sierra Leone (article 127), the Constitution generally allows a person who alleges that a piece of legislation (or any act or omission of any person or authority) violates a provision of the Constitution to invoke the constitutional jurisdiction of an appropriate court to have the act or omission declared unconstitutional. In such cases, the complainant need not prove that he or she has 'sufficient interest' or has suffered (or is threatened with) injury from the allegedly unconstitutional act or omission in order to have access to the supreme court's constitutional jurisdiction. If the complainant believes that an unconstitutionality has occurred, he or she may go to the supreme court to seek a declaration to that effect. This applies to both natural and artificial persons, including associations, companies and non-governmental organizations. In Liberia and Nigeria, by contrast, constitutional standing for all cases (not just rights cases) requires the complainant to establish 'sufficient interest' in the matter (such as actual or imminent injury to the complainant's interests) in order to gain access to the court's jurisdiction.

In Ghana, despite the constitution's stipulation that 'any person' can petition the appropriate institution to declare an act, piece of legislation or commission



unconstitutional, the Supreme Court has held that only citizens have the right to invoke the court's constitutional jurisdiction, except in human rights cases, in which non-citizens also have a right to constitutional justice.

In jurisdictions in which standing is restricted and differentiated according to the type of case or dispute in question (notably the francophone countries), in order to determine which persons or entities are entitled to refer matters to a constitutional judge, the different types of disputes must first be distinguished. Three broad categories of cases can be identified in this regard: cases concerning the review or control of constitutionality, disputes concerning the functioning of public bodies (conflict of attribution) and electoral disputes. In rare cases, some countries recognize constitutional courts as having the power to initiate proceedings of their own accord.

Constitutional review

Petitions to determine or review the constitutionality of acts or omissions can be referred to constitutional courts by political, administrative or judicial authorities, as well as individuals or legal entities acting on their own behalf or representing another party.

Political, administrative and judicial authorities

In cases concerning the review of constitutionality, the general rule is to give authorities that embody or represent the state access to the constitutional review institutions. In the French-speaking countries, the eligible authorities are nearly always the same. Where the subject of the petition involves scrutinizing the constitutionality of laws, internal rules of procedure of the legislature, organic laws or treaties, the right of standing is generally limited to the president, prime minister, speaker of the National Assembly, and a certain threshold of members of parliament (which varies by country) (Maus and Roux 2006: 200). In Côte d'Ivoire, article 20 of the organic law regulating the functioning and operation of the Constitutional Council empowers national human rights associations to refer violations of citizens' fundamental rights and civil liberties to the council. Mali is the francophone country in which the broadest range of persons has the right to bring an action before the constitutional court to challenge the constitutionality of a law. This right extends to the president of the High Council of Local Authorities or one-twelfth of its members, the president of the Supreme Court and the president of the Economic, Social and Cultural Council.

There is also the possibility of indirect review, or so-called *exception d'inconstitutionnalité*. The constitutions of most West African countries allow a

judicial authority that sits as a court of first instance (but lacks the jurisdiction to determine the constitutionality of a law or provide a constitutional interpretation that arises in the course of litigation) to refer the matter to the appropriate constitutional court. This way of accessing the constitutional court is available in Senegal (article 92), Togo (article 104), Niger (article 132) and Côte d'Ivoire (article 96). The constitutions of the Gambia (article 127), Ghana (article 130), Sierra Leone (article 124) and Nigeria (article 295) also allow (or, in some cases, require) lower courts to refer questions of constitutionality or constitutional interpretation that arise in the course of adjudicating a matter to the appropriate court. In Nigeria, the adjudicating court need not make an upward referral of a constitutional question unless it is of the opinion that the matter raises a 'substantial question of law' or if one of the parties requests a referral. Such a referral must be made in the first instance to a high court, which can resolve the constitutional question if it determines that it 'does not involve a substantial question of law'; it must further refer it to the Court of Appeal if it determines that the constitutional question raised is a 'substantial' one. Ghana's Supreme Court has also held that, where a constitutional question is raised in proceedings before a lower court, referral to the Supreme Court is not necessary if the provision in question is 'clear and unambiguous' in its meaning.

In Cape Verde, the prosecutor-general may also refer matters to the constitutional court, according to article 280 of the constitution. This procedure also exists in all of the French-speaking countries studied except Mali and Mauritania. It is important to underscore that even though the design of constitutional review institutions in francophone African countries was largely inspired by France, the indirect control of constitutionality, as mentioned in Chapter 7, was introduced in these countries long before its acceptance in France during constitutional reforms in 2008. For instance, it appeared in the 1992 organic law on the creation of the Constitutional Council in Senegal and in Benin's Constitution of 1990.

Private individuals or organizations

While not the norm in French-speaking West Africa, all of the common law countries of the region, as previously noted, allow individuals to refer matters to their supreme courts (or courts with jurisdiction over constitutional matters). This is particularly the case where the dispute is over an alleged violation of the constitution or a fundamental right of the complainant. Among the French-speaking countries, however, only Benin (articles 3 and 122 of the constitution and article 24 of the Organic Law on the Constitutional Court), Niger, Mali and Mauritania currently allow individuals to petition the constitutional court directly. While in Benin this right applies to both

constitutional questions related to human rights and those arising out of referenda or electoral processes, in Niger, Mali and Mauritania it is only available for election-related cases. Article 20 of lusophone Cape Verde's Constitution gives individuals access to constitutional jurisdiction through a special procedure known as the *amparo*, the operational aspects of which are regulated by Law No 109/IV/94 of 24 October 1994.

Conflict of attribution

This category of case relates to scenarios involving horizontal and vertical conflicts between governmental authorities. Horizontal conflicts are those that arise between institutions at the same level of the state structure, for example between the prime minister and the president, or between the executive and other branches of government such as the legislature. Vertical conflicts concern disputes between the central government and local authorities, and generally arise in federal states.

In the French-speaking countries, only political authorities may petition the constitutional court/council on such questions. These authorities are generally the president of the republic (or deputy or acting president), the speaker of the National Assembly, the prime minister and, where a second chamber exists, the leader of the Senate. In the anglophone countries, as previously discussed, any person with an interest in a dispute, even if it is not a personal or direct interest, may bring an appropriate case before the court with constitutional jurisdiction.

Electoral matters

Elections play a central role in the politics of democratization and constitutionalism in West Africa. While they remain the most legitimate and universally accepted route to political power, they are also very divisive—often resulting, in the West African context, in conflict, as parties frequently dispute certain aspects of the process or the outcome. Therefore constitutions in West Africa have established a clear role for constitutional justice institutions in resolving election-related disputes. Electoral disputes have a number of characteristics that make them unique among the different types of disputes that constitutional justice institutions have to resolve. These include the profile of eligible persons who can refer election-related cases to a constitutional judge (sitting in this instance as an electoral judge), the procedure to follow, and the dispute resolution mechanism and remedies available to the judge.

With respect to eligible applicants, it is difficult to classify them in relation to the different West African legal systems. For example, the Gambia, Ghana,

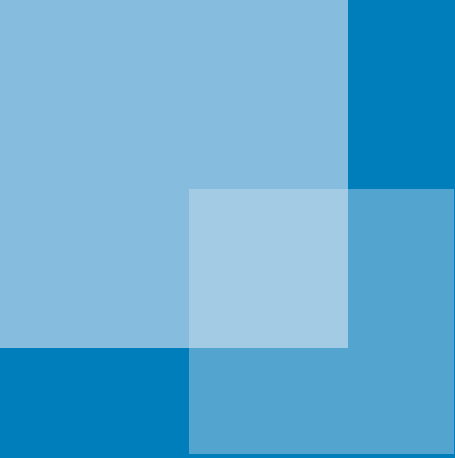
Liberia, Mali and Côte d'Ivoire grant political parties the right to petition the court regarding the election process or results. Candidates also have a right to lodge claims in Côte d'Ivoire, the Gambia, Ghana, Liberia, Mali, Mauritania, Nigeria and Senegal. In Mali, Niger, the Gambia, Ghana, Mauritania, Benin, Burkina Faso and Côte d'Ivoire, voters also have the right to file election petitions. It is also important to note that Senegal and Mali are unique in the region in also allowing government delegates, members of the Independent National Electoral Commission and polling station officers to file petitions to the court. Other countries, such as Benin (article 52 of the Organic Law of the Constitutional Court), have expanded the list of potential petitioners to include administrative authorities or bodies that run the elections. At a minimum, however, candidates or their representatives in almost all of the countries concerned can refer electoral complaints related to presidential and legislative elections to the constitutional judge sitting as an electoral judge.

Power of constitutional judges to initiate proceedings of their own accord


In a few of the 16 countries surveyed, constitutional justice institutions have the power to initiate proceedings of their own accord, even in the absence of a third-party suit. This is true of the Constitutional Court of Benin (Soumanou 2006: 67). According to article 121(2) of Benin's Constitution, the court shall 'rule of its own motion on the constitutionality of laws and any regulatory documents deemed to infringe on fundamental human rights'. Article 22 of the court's internal rules of procedure also authorizes it to claim automatic jurisdiction over a matter in order to rectify any material errors in its judgements.¹⁹ Under article 157(3) of Burkina Faso's Constitution (amended in 2012), the Constitutional Council is also authorized to 'refer to itself any questions within its competence'.

In Liberia, the Supreme Court can initiate proceedings of its own accord without a prior third-party application if the court considers a law to be detrimental to the independence of the judiciary. It may then decide that the law is contrary to the constitution in order to protect the power of the judiciary. An expansive reading of section 4(8) of Nigeria's Constitution may also suggest the existence of such an automatic jurisdiction for the courts.

¹⁹ Decision DCC 03-135 of 21 August 2003 and Décision de proclamation des résultats de l'élection présidentielle de 2001 [Decision proclaiming the results of the presidential elections of 2001], Recueil, p. 261.



10. Authority of the decisions of constitutional review institutions



10. Authority of the decisions of constitutional review institutions

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The authority attached to the decisions of constitutional review institutions stems from several factors, including the procedural posture of the legal proceedings, the hierarchical status of the court or judge, and the scope of the judgement. Due to the political nature of the matters they consider, the debate is often over whether the judgements of constitutional justice institutions, in particular constitutional courts/councils, have the same authority as those of ordinary courts. Even the judicial character of constitutional courts/councils remains a subject of some debate in French-speaking Africa. Similar debates characterized the creation of the French Constitutional Council. Some have argued that these institutions are political entities, and therefore that they ought not pass judgements that carry the authority of *res judicata* (force of finality and irreversibility).

Much of this debate is now largely academic, as other developments since their establishment have overshadowed earlier doubts about the juridical status of constitutional review institutions in the region. However, the debate reignites occasionally when presidential election results lead to judicial dispute. An important moment in the evolution of constitutional review institutions is their emergence as protectors of fundamental rights (Bon and Maus 2008: preface). As they have risen in prominence and legitimacy, these institutions are widely recognized and accepted as truly judicial in nature. In some countries that have constitutional councils instead of constitutional courts, there have been suggestions to reclassify them as constitutional courts in order to increase their judicial legitimacy and enable them to assert their authority more confidently. This, for instance, is one of the recommendations of a 2013 report from Senegal's National Commission on Institutional Reform. In African positive law, constitutional courts—because of their generally recognized judicial character—pass judgements that indisputably carry the authority of *res judicata* (Waline 2013: XI). This means that their judgements are final, not subject to appeal and universally binding. While these judgements have unquestionable legal authority, they often face enforcement challenges.

Due to the judicial nature of constitutional courts/councils and the importance of the judgements they must pass, positive law governs the form and procedure that these rulings must follow. However, due to the differences in legal traditions between common law and civil law countries, the form of judgements differs. To assess the authority associated with judgements passed by constitutional or supreme courts, it is necessary to first consider their form before analysing their effects (Rousseau 2004: 145; de Lamothe 2005: 193; Renoux 2003: 835).

Form of judgements

The form of a judgement may affect its substance. Its quality may depend on a number of factors, such as whether the court is composed of a panel of judges or a single judge, or the underlying decision-making process. In West Africa, divergent legal traditions are the main reason for the differences in the form of judgements. Depending on the legal system in place, a threefold classification of the form of a judgement is possible based on its drafting, adoption and formal presentation.

Drafting of judgements

While the judges in all of the courts concerned sit as a panel, courts in different legal systems adopt different methods of drafting their judgements. In civil law systems, such as Guinea and Senegal, the president of the court designates one judge to act as its rapporteur to prepare a draft judgement, which members of the court then discuss. In common law systems, each judge on the panel that heard a case is entitled to write his or her own judgement or opinion, whether the decision of the court is unanimous or divided. However, judges may choose to waive that right and adopt or sign onto the judgement of a colleague if they are in agreement with its reasoning and disposition of the case. Where a majority or all of the judges agree, the judge with the most persuasive reasoning may be designated to prepare the lead judgement on behalf of the rest. Article 294(2) of the Nigerian Constitution accurately summarizes the practice in the common law system.

In the two Portuguese-speaking countries, Cape Verde and Guinea-Bissau, the system of drafting judgements is similar to that in French-speaking countries: a rapporteur presents a draft judgement, which the full court reviews.

The content of the judgements of constitutional justice institutions in the common law countries often draws on precedent, while civil law systems prohibit the use of precedent. In practice, however, many civil law judgements still



draw inspiration from precedent even if they cannot directly apply it as the basis of their decisions.

The majority principle is applied almost everywhere for the adoption of judgements. At least seven of the French-speaking countries espouse the majority principle in adopting judgements: Benin, Côte d'Ivoire, Niger, Togo, Mauritania, Burkina Faso and Senegal. Senegal, however, favours consensus. If there is a tie, the president of the court casts a second tie-breaking vote. This is also the practice in Togo (article 24 of Law No 04/04), Senegal (article 22 of Law No 92/23) and Mauritania (article 81 of the Constitution). In Cape Verde, however, article 29 of Law No 56/VI/2005 stipulates that a deadlock triggers a second deliberation of the issues and a re-vote; the president can cast a tie-breaking vote only if the re-vote results in a second deadlock.

In the majority of the French-speaking countries, it is impossible to identify which judge wrote the draft judgement or how the members of the court voted. However, in the English-speaking countries, each judge who writes or adopts an opinion, including a dissenting opinion, is identified by name. The same applies in lusophone Cape Verde.

In Togo, article 28 of the Internal Rules of the Constitutional Court of 13 May 1997 prohibits abstentions; judges must therefore vote one way or the other.

Presentation of judgements

In most of the civil law countries of the region, including Senegal, judgements are usually published in the country's official gazette. In the common law countries, the reporting and publication of court decisions is managed by the judiciary or outsourced to a public body regulated by law (for example, the Council on Law Reporting in Ghana).

The constitutions of the Gambia, Nigeria and Sierra Leone deal expressly with the timing of delivering the final decision in a case. Where the supreme court is asked to interpret a provision of the constitution or determine the validity of a presidential or parliamentary election, the Gambian Constitution requires the court to deliver its decision within 30 days. In all other cases, courts must deliver their decisions within three months after the conclusion of the final addresses by the parties. Courts in both Sierra Leone and Nigeria (including the supreme court, court of appeal and high courts) are also obliged to deliver a decision in writing within three months (Sierra Leone) or 90 days (Nigeria) after the conclusion of evidence or final addresses. Additionally, all parties must be furnished with official copies of the decision on the date the judgement is delivered (Sierra Leone) or within seven days of its delivery (Nigeria). The

Constitutions of Liberia and Ghana lack deadlines for delivering a decision in a case—which can cause undue delays in the delivery of judgements.

With the exception of Niger, the constitutions of the civil law countries, especially those in the French legal tradition, require the constitutional justice institution to deliver its ruling within eight days in emergency cases. In Niger, all rulings on the preliminary review of proposed laws must be delivered within 15 days, and five days in the case of an urgent application from the government. For non-emergency cases, the deadline is 30 days in Burkina Faso, Mali, Mauritania, Niger, Senegal and Togo, and 15 days in Benin, Côte d'Ivoire and Guinea. In Cape Verde the deadline is generally 20 days, although the constitution provides—without specifying the number of days—that it may be shortened in case of an emergency at the request of the president of the republic.

There is a marked difference in the structure of the courts' judgements between the anglophone and other countries. In the Gambia, Liberia, Ghana, Nigeria and Sierra Leone, as noted previously, judges are free to issue dissenting opinions. Judges in these countries can also write individual (concurring) opinions even when the decision is unanimous. Of the French-speaking countries, only Togo allows judges on the constitutional court to write (only concurring) individual opinions to accompany the courts' judgements. Article 34 of Togo's Internal Rules of the Court provides that 'any judge of the Court may, at any time, make comments and issue publications in relation to judgements and opinions of the Court. However, in accordance with article 16 of the Organic Law on the Constitutional Court, such comments and publications must be of an academic nature and agree with the position of the Court'.

Effects of judgements

In order to assess the effects of judgements, it is important to first distinguish between several different types of judgements. The first type is judgements that declare a provision constitutional with reservations. With this type of judgement, the provision or law is valid only to the extent that is read or understood within the meaning assigned to it in the court's judgement. The second type is a pure and simple dismissal of the petition. Judgements of the third category order the appropriate authority to bring a law in alignment or compliance with the constitution—and in some cases specify a time limit for doing so.



Dismissals of petitions generally pose no particular problems, as their effects remain *inter partes* (limited to the parties to the case). However, the effects of declarations of unconstitutionality are *erga omnes* in nature: they apply to all within the polity (not only the parties to the case). Article 87 of the Constitution of Mauritania, for instance, forbids the adoption into law and enforcement of a bill that is declared unconstitutional. A further distinction between the temporal and spatial effects of constitutional court judgements is also possible.

Temporal effects of judgements

In principle, court judgements on constitutional disputes only apply to the future (*ex nunc*). The rationale for this is the stability of the legal system and the security of the resulting legal situations. As such, and in line with the principle of inviolability, rights already acquired cannot be repealed (Yannakopoulos 1998: 604).

In many legal systems in West Africa, as elsewhere, this position is part of the general principles of the constitutions and laws. In addition to establishing its power to review the constitutionality of legislation, article 144 of the Constitution of Benin provides, for instance, that its Constitutional Court ‘guarantees fundamental rights and public liberties’. Two conclusions arise from this. The first is that, in principle, the effects of judgements passed by constitutional courts are non-retroactive. The second is a corollary of the first: they take effect immediately. In Cape Verde, however, the legal position is slightly different, as the constitution distinguishes between original unconstitutionality and subsequent unconstitutionality. In the first case, a declaration of unconstitutionality—except for treaties—takes effect not only from the date of the decision but also from the date that the unconstitutional norm entered into force. In other words, the declaration has retroactive (*ex tunc*) effect (article 285 of the constitution). The rationale, it seems, is to remedy the negative consequences that resulted from the original unconstitutionality. With regard to the second case (unconstitutionality resulting from the breach of a subsequent constitutional rule), the declaration of unconstitutionality takes effect only from the date of the decision.

In the common law jurisdictions, one aspect of the temporal effect of a constitutional judgement concerns the binding effect of a supreme-court decision on later cases that come before the court. In general, while supreme courts are normally expected, under the doctrine of binding precedent (*stare decisis*), to follow their past precedents and apply the legal reasoning (*ratio decidendi*) of past precedents to later cases raising identical or similar questions, supreme courts, unlike the courts below, are not duty bound to

follow such precedents. The constitutions of the Gambia (article 126), Ghana (article 129) and Sierra Leone (article 122) expressly affirm this principle. In Ghana, a litigant against whom a decision has been rendered by the Supreme Court may petition the court to review its decision on the grounds that it was rendered in error.

Non-retroactive nature of judgements

The constitutions of West African countries and the laws concerning the creation and organization of constitutional and supreme courts provide that their judgements shall not have retroactive effects. This is true of both common law and civil law systems.

In all of the countries under consideration, the judgements of constitutional or supreme courts apply to the future. However, in Togo, the effect of a court judgement is deferrable. According to article 31 of the Organic Law on the Court, the judge may give the legislator time to adapt the legislation.

This is a general legal principle that applies in all legal systems that respect the rule of law. However, there is a distinction between the type of dispute and the content of the judgement. The scope of the authority of judgements varies according to the nature of the matter before the court. In the case of control of constitutionality, for instance, the principle is more absolute. However, in electoral disputes, where election results are overturned, enforcing such a judgement reopens the debate on results that have already been published (for Benin, see Mede 2012: 32; for Senegal, see Fall 2008: 233).

By contrast, advisory opinions adhere to a different set of legal rules. There are three types of opinions in law: optional opinions, mandatory opinions and assent. The positive law of African countries does not make this distinction, and generally says nothing about the authority of opinions.

Judgements with immediate effect

It is important to distinguish between judgements that dismiss petitions and those that censure disputed provisions. A dismissal equates to a confirmation of the disputed provisions, which means the status quo will be maintained. Under such circumstances, one can expect the ratification of a disputed treaty and the implementation or enforcement of a disputed administrative decision or court judgement. The act that has had its constitutionality confirmed will therefore be applied immediately. If, however, the court invalidates the disputed provisions, they (and related provisions still in draft form) will be set aside with immediate effect. In Senegal, both situations are regulated by



articles 16–18 of Organic Law no. 92–23 of 31 May 1992 on the Constitutional Council as amended by Law no. 99–71 of 17 February 1999.

Spatial effects of judgements

Given that the constitution is the supreme law of the land, judgements rendered by constitutional or supreme courts in exercise of their constitutional jurisdiction bind not just the parties in the case but the entire polity, including all persons and public authorities, whether they are political, administrative, judicial or military authorities. This principle applies in all of the countries under consideration.

Administrative authorities

The judgements of constitutional or supreme courts affect the administrative authorities for at least two reasons. First, administrative authorities are created by law and exercise their powers subject to law. Second, since legislative initiative from parliamentarians is rare in Africa, nearly all of the laws passed in African parliaments originate from the executive arm of government. It is therefore important to ensure that administrative authorities, as the implementing agencies within the executive branch, comply with (and be subject to) the judgements of constitutional review institutions. All of the countries in question obey this principle; Mauritania (article 87 of the Constitution), Burkina Faso (article 159 of the Constitution) and Guinea-Bissau (article 126 of the Constitution) are typical examples.

Political authorities

The power of courts to make decisions and orders that bind political authorities, namely parliament and the executive, is a new phenomenon in Africa. It is one of the aims and outcomes of the democratic transitions and constitutional reform projects the continent has witnessed since the early 1990s. The principle of constitutional supremacy, which subordinates all other law and all persons and authorities to the provisions of the constitution, is expressly enshrined in the constitutions of several African countries, including Ghana (article 4), Liberia (article 2) and Nigeria (article 1). In addition, the constitutions of the Gambia, Ghana and Sierra Leone include a provision that makes it a crime for any person to disobey or fail to comply with an order or direction given by the supreme court in a decision declaring a law or act or omission unconstitutional. Where such disobedience or non-compliance is by the president or vice president of the republic, the constitutions of Ghana and the Gambia make it grounds for impeachment and removal from office.

Judicial authorities

All African legal systems, especially those of civil law tradition with a centralized review system, share the principle that constitutional justice institutions' judgements are binding on other judicial institutions. In common law countries, there are no difficulties in applying this principle, as the court of final constitutional jurisdiction sits at the apex of a hierarchical court system. Thus the decisions of the supreme courts are automatically binding on all other courts in the judicial hierarchy, a fact that is expressly reaffirmed in the constitutions of the Gambia (article 126), Ghana (article 129) and Sierra Leone (article 122). However, in legal systems where the constitutional court coexists, in parallel, with a supreme court, problems may arise regarding the *res judicata* effect of the decisions of the former over those of the latter. This is because, in such cases, it could be argued that the judgements of both of these courts are final, and that therefore they each have the force of *res judicata* independently of the other. For instance, article 131 of Benin's Constitution provides that 'judgments of the Supreme Court cannot be appealed' and that 'they are binding on the executive, legislature and all courts'. Article 124 of the constitution also contains a similar provision with respect to the authority of Constitutional Court decisions, which it says 'shall not be subject to any appeal [and] shall bind public authorities . . . and jurisdictional authorities'. In an attempt to resolve conflicts between the two, the Constitutional Court has held that its judgements in matters that lie within its competence are binding on the Supreme Court. It is uncertain how other jurisdictions deal with conflict regarding the authority of constitutional justice institutions' decisions over other judicial authorities at a co-equal, if parallel, level in the court system.

Military authorities

Since the binding nature of decisions of constitutional justice institutions over the military would appear to be obvious, as the armed forces represent an element of state authority, this principle is not typically enshrined in law. However, given the historical propensity for political unrest and coups d'état in the region, some countries have chosen to specifically mention the binding nature of judicial decisions over the military in their constitutions: Togo (article 106), Burkina Faso (article 159), Niger (article 115), Côte d'Ivoire (article 98), Guinea (article 99) and Benin (article 34 of the Organic Law on the Court).

Table 10.1. Judgements of constitutional review institutions in West Africa

| | Form of judgements | | Temporal effect of judgements (in time) | | Spatial effect of judgements (in scope) | | Relevant constitutional/organic law provisions |
|----------------------|-------------------------------------|---|---|-----------------------|---|--|---|
| | Collegial | Possibility of individual/dissenting opinions | <i>Ex nunc</i> (future) | <i>Ex tunc</i> (past) | On military ¹ | Others | |
| Benin | Yes | No | Yes | No | Yes | Citizens, administration, legal institutions, political institutions | Articles 52, 124 (constitution) |
| Burkina Faso | Yes | No | Yes | No | Texts silent but can be implied | Public authorities and all administrative and judicial authorities | Article 159 (constitution) Articles 42–4 (organic law) |
| Cape Verde | Yes | No | Yes | Yes | Yes | Citizens, administration, legal institutions, political institutions | Article 284 (constitution) |
| Côte d'Ivoire | Yes | No | Yes | No | Yes | All public powers, administrative and jurisdictional authorities | Articles 95, 98 (constitution) |
| The Gambia | Yes | Yes | Yes | Yes | Texts silent but can be implied | Citizens, administration, legal institutions, political institutions | |
| Ghana | Only judge can write lead judgement | Yes | Yes | Yes | Texts silent but can be implied | All citizens and public authorities | Article 2 (constitution) |
| Guinea | Yes | No | Yes | No | Yes | Citizens, administration, legal institutions, political institutions | Article 96 (constitution) |
| Guinea-Bissau | Yes | No | No | Yes | Yes | Citizens, administration, legal institutions, political institutions | Article 126 (constitution) |

| | | | | | | | |
|---------------------|-------------------------------------|-----------------|--------------|--------------|---------------------------------|---|---|
| Liberia | Yes | Yes | Yes | No | Texts silent but can be implied | All except the president of the republic, legislature and judicial officers | Articles 2, 21, 61 (constitution) |
| Mali | Yes | No | Yes | No | Texts silent but can be implied | Citizens, administration, legal institutions, political institutions | Articles 88, 94 (constitution) |
| Mauritania | Yes | No | Yes | No | Texts silent but can be implied | Public, administrative and judicial authorities | Articles 86–7 (constitution) |
| Niger | Yes | No | Yes | No | Yes | Citizens, administration, legal institutions, political institutions | Article 134 (constitution) |
| Nigeria | Only judge can write lead judgement | Yes | Texts silent | Texts silent | Texts silent but can be implied | All individuals and public institutions | Article 294 (constitution) |
| Senegal | Yes | No | Yes | No | Texts silent but can be implied | Public authorities and individuals | Articles 16–20, 92 (organic law) Article 9 (institution's internal rules of procedure) |
| Sierra Leone | Texts silent | Texts silent | Texts silent | Texts silent | Texts silent but can be implied | Texts silent but can be implied | |
| Togo | Yes | No ² | Texts silent | Texts silent | Texts silent but can be implied | All other public authorities and individuals | Article 106 (constitution) Article 30 (internal rules of procedure of the court) |

Notes:

- ¹ In addition to what is covered by the general clauses, some countries (because of their specific and historical experiences with unaccountable military regimes) have decided to also explicitly state the effect of these judgements on the military as a public institution.
- ² Constitutional judges in Togo can provide commentary on the decision and opinion of the court, provided that it does not contradict the decision that is the subject of the commentary.

Key

Francophone West Africa

Anglophone West Africa

Lusophone West Africa



11. Watching the watchdogs



11. Watching the watchdogs

Markus Böckenförde

Under the rule of authoritarian regimes, the judiciary is subject to multiple pressures. The outcome of cases is often directed by a kind of ‘telephone justice’, in which politicians contact judges informally to influence the outcome of decisions (Dung 2003: 8). Judges (and others in official positions) are appointed based on their loyalty to a party or individual ruler. In such a regime, the judiciary is treated like a subsidiary of the executive branch. In this context, post-1990 constitutional reforms in the region focused on overcoming the reputation of judges as executive minded and pliable. By and large—and as highlighted elsewhere in this book—extant constitutions have strengthened the courts’ independence in West Africa and provided the foundation for more credible constitutional judicial review systems.

Constitutional review institutions, as with any other institution in a democratic constitution built on the principle of the separation of powers, should be designed with the means not only to protect their independence—which is of paramount importance, as discussed previously, to their powers of review—but also to provide some means of accountability to ensure they do not overstep their constitutional mandate. Since the judiciary is often perceived as the least dangerous branch of government, architects and scholars of constitutional design ‘have tended to focus their energies almost exclusively on limiting the powers of those officials and institutions that control the purse and the sword’ (Prempeh 2006: 69).

But constitutional review institutions are often met with the ‘democratic objection’ that their members are unelected. However, as long as constitutional judges desist from behaviour that mirrors law-making and focus on interpreting laws with respect to the constitution, they do not need a democratic mandate. Ideally, they do not represent anyone else but the law. Accordingly, they need not be subjected to the same accountability requirements as other (elected) members of government. However, the more law-making the institution engages in, the more important accountability and legitimacy become: unlike elected legislators, members of constitutional justice institutions have

the opportunity to thwart the will of the majority. It is the role of the courts to interpret the law where the legislative intent is unclear, which may result in law-making functions that, if unchecked, could lead to overly broad and arbitrary discretion on the part of judges (and give them more independent political power than the legislature). Though this power is crucial to safeguard the rule of law from the ‘tyranny of the majority’, it can also be dangerous. Since its role is to render decisions of high political relevance, and there is no objectively neutral way of interpreting constitutional norms, a constitutional justice institution may be perceived as just another political actor rather than a ‘neutral servant of constitutional norms’ (Horowitz 2006: 133). In addition, the power granted to chief justices in some common law contexts—as part of their supervisory and administrative prerogatives—to assign judges to specific cases where the court is not sitting as a full bench (*en banc*) can also pose a challenge to limiting discretion. In Ghana and Nigeria, for instance, a collegium of five or seven judges decides constitutional questions, but the chief justice has the sole authority to select which judges hear each case—a practice that is open to misuse.

As members of constitutional review institutions are not passive transmitters of the law, but citizens with value choices and political views that shape their way of reading and interpreting constitutional norms, how can their institutional and personal accountability be ensured without compromising independence?

This chapter widens the lens of focus to broad aspects of the constitutional framework that may affect the discretionary or arbitrary use of the power of constitutional review. Some of these may be found in the provisions concerning the judiciary, but others may be found elsewhere—for example, in the amendment procedures. This approach recognizes that the constitution must be viewed as a holistic document in which different parts of the constitutional framework work together. With this in mind, the chapter addresses the following mechanisms that may affect the scope for arbitrary discretion of the judiciary: open discourse of judicial decisions, amendment of the constitution to ‘overrule’ judicial decisions, and rehearing and finally fine-tuning the checks and balances between the three branches of government.

Enhancing public discourse

A key element of judicial accountability is access to judicial decisions and court trials by the public, including the professional legal community. Once judgements are part of the general discourse and open to scrutiny, it may compel judges to give adequate reasons to show that the decision matches



the appropriate rules for justification. This transparency can be supported through a constitutional framework that requires public hearing, timely decisions and the release of judicial opinions. Most of the constitutions in the West African countries studied provide for at least one of these requirements (see Chapter 10)

Another aspect of transparency is the extent, quality and content of the reasons given in judicial verdicts and opinions. As discussed in Chapter 10, there is variation in how judicial decisions are published, in particular whether courts are permitted to release dissenting opinions or whether only one opinion is published that reflects the unified judgement of the court. Especially after the breakdown of an authoritarian regime, constitutional courts cannot rely on existing constitutional jurisprudence, but often have to build a new and coherent system. Where the court's authority and legitimacy are still weak, and before a legal culture of articulating dissent on the bench has been established (as in Tunisia), there may be a reluctance to permit members of a nascent institution to issue dissenting opinions. In such a situation—and in particular with regards to specialized constitutional courts—it might be preferable for judges to present unified opinions to strengthen the judiciary's reputation and the legitimacy of the court vis-à-vis the broader legal community (Garoupa and Ginsburg 2015: 148).

Scholars in favour of publishing dissenting opinions (and some judges) seem to agree that a system permitting their release improves the quality of the majority opinion (Kelemen 2013: 1364). Since the constitutional justice institution is composed of members that are to a certain extent appointed by politicians, the need for increased transparency may be high (Kelemen 2013: 1356). Dissenting opinions may challenge the drafters of the majority opinion to write their judgement diligently and provide comprehensive legal arguments to support their view. The process may encourage a wider debate on the majority decision and stimulate an open discourse about the judgement.

These positions are not necessarily mutually exclusive: publishing dissenting opinions might be permitted at a later stage, once the newly established institution has found its place within the system and proven its legitimacy (for example, in Germany, dissenting opinions were introduced 20 years after the establishment of the Constitutional Court).

Encouraging public debate about relevant decisions also implies that there are fewer limitations on free speech when discussing or criticizing a case or a court's rulings. This specifically applies in a common law context in which some long-standing common law doctrines are still widely applied. For example, the *sub judice* rule punishes the publication of statements about

matters pending before courts even if no jury trials are involved. Another is the common law crime of ‘scandalizing the court’, which punishes opinions that may bring a judge or court into disrepute or contempt (Prempeh 2006: 69).

Rehearing

Another aspect of accountability in constitutional justice is when a court revisits its own decision. This was the case in Ghana, where the Supreme Court interpreted article 123 of the Constitution in a manner that permits litigants to petition the Supreme Court to review or take a second look at a decision it has rendered (the article reads: ‘The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so’).

While in this case the same institution is deciding again—rather than another institution holding the court accountable—it is reasonable to posit that rehearing may increase public attention to the case, resulting in greater oversight and accountability for the court.

Control and counter control through constitutional amendments

The constitution provides the framework within which the branches of government are supposed to operate. None of them is situated above the constitution, which is the supreme law of a country. Consequently, constitutional review institutions compare acts of the executive and/or laws from the legislature against the constitution and declare the respective act/law void if it is assessed to be unconstitutional. These institutions are the final custodians of the constitutional text, which may occasionally change through formal amendments.

Introducing a constitutional amendment is a legitimate way to adjust the paramount legal framework of a society to changing circumstances or new challenges. Amendments may correct provisions that have proven inadequate over time or remove unwanted or unexpected institutional effects. The amended text then becomes the new yardstick for controlling constitutionality. From the perspective of checks and balances, a constitutional court or a supreme court may—with regard to its future decisions—be ‘tamed’ by those with the constituent power to amend the constitution. For instance, faced with a supreme court decision to strike down a law or statute on the grounds of unconstitutionality, a legislature may decide to amend the constitution



in a way that allows the statute to survive (Tushnet 2011: 323).²⁰ All West African constitutions provide detailed provisions regarding their revision, stipulating who can initiate the process, which institutions are involved, what type of quorum is required, and what type of constitutional amendments are permissible (or not). There is an ongoing debate on the appropriate role of constitutional review institutions in this process. For example, there is controversy over the extent to which these institutions should ensure the strict observance of the procedural requirements during a constitutional amendment process. Except for Burkina Faso, which explicitly permits in article 154 of its Constitution a review of ‘the procedure of the revision’, all West African constitutions are silent on this matter. Yet this silence does not necessarily mean that judicial review institutions do not conduct this type of scrutiny. The constitutional amendment procedure is part of the constitutional framework and needs to be observed in order to keep the constitutional order intact. Constitutions are amended through an amendment law or act, and one may argue that this law—as any other law—must respect the principle of the hierarchy of laws, and, as such, is subject to constitutional review.

Several constitutions counterbalance the ability of political branches to amend certain constitutional provisions that are deemed to be of special importance. Generally, constitutions of the common law countries in this study—for example, the Gambia (article 226) and Ghana (article 290)—tend to entrench relevant provisions by demanding additional thresholds such as supermajorities for their amendment. By contrast, in civil law countries, for example, Benin (articles 41 and 156) and Niger (article 175), pertinent provisions are often turned immutable and cannot be amended at all. West African constitutions, with the exception of Liberia, generally contain provisions to protect them from amendment, and all of them follow the pattern of their respective legal family.

Such a decision may also affect the role and powers of constitutional review institutions within a governmental system. This topic has been widely debated in the context of immutable clauses, but it also applies to otherwise entrenched provisions. In general, constitutional norms are supreme with regard to other laws, but constitutional provisions enjoy an equal normative status. However, immutable provisions are not subject to amendment. By insulating various principles and provisions from revision, an intra-constitutional hierarchy is established: not only can ‘unamendable’ provisions not be abolished or altered, but other constitutional provisions cannot be

²⁰ Most francophone West African courts use this method. In order to guarantee the constitutionality of international agreements, constitutional review institutions may verify whether the constitution needs to guarantee its conformity with the international agreement prior to its ratification.

amended or introduced in a manner that would infringe on or contradict the unamendable provisions. The same holds true for specifically entrenched provisions: if they are negatively affected by the amendment of an 'ordinary' provision, this would contradict the additional protection of their content intended by the constitutional drafters.

In such a scenario, the question is whether constitutional justice institutions are also implicitly empowered to ensure that the normative hierarchy established by the constitution remains intact, and that no constitutional provision that impairs the immutable/entrenched clause is introduced without meeting the applicable additional thresholds.

In Benin, Burkina Faso and Niger, the constitutional courts/councils are considered to have an implied authority to review whether constitutional amendments comply with the formal and/or substantive limitations set forth in the constitutional text. In *Arrêt [Decision] No 2009 06 1(JN)*, Niger's Constitutional Court turned down President Mamadou Tandja's attempt to overcome the limitation of presidential terms, because the country's constitution declared that the provision on presidential term limits was immutable. Though the judgement focused primarily on procedural aspects (the constitution did not authorize the president to initiate the process envisaged by Tandja), it also mentioned the violation of the immutable clause.

Such a view would be more progressive than the restrictive perspective of the Constitutional Council in France, which in decision No. 2003-469DC shied away from assuming the responsibility to review constitutional amendments.

It is reasonable to suggest that when courts are given, or arrogate to themselves, the power to protect specifically entrenched or immutable provisions of a constitution, this may well make the constitution less vulnerable to the will of a large majority. But it may also give judges overly broad and arbitrary discretion, especially if the entrenched/immutable provisions are vague and reference fundamental principles or values. Far less susceptible to fears of 'juristocracy' are constitutions that specify, concretize and substantiate those provisions—thus taking the decision out of the hands of both the legislature and judiciary.

Creative interpretation of confident courts has sometimes amounted to 'judicial coups d'état'. In some—predominately common law—countries, constitutional review institutions empowered themselves to review the *substance* of constitutional amendments, although the constitution did not provide for specifically entrenched or immutable provisions and thus had no internal normative hierarchy. They relied on the 'basic structure doctrine'



developed by the Supreme Court of India (Roznai 2014: 54), which empowers the court to find proposed amendments unconstitutional if, *in the court's view*, they violate an unstated basic structure of the constitution, the substance and parameters of which are not found in the text of the constitution, but are instead determined by the court. The Supreme Court of Kenya applied this doctrine, stipulating that an amendment cannot change the constitution's basic structure. Discussing whether such 'judicial coups' are normatively justifiable, methodologically coherent or necessary to prevent 'constitutional coups' by the other branches of government is beyond the scope of this publication.

Other means of political control

As indicated above, amending the constitution is one way to change the legal parameters within which constitutional review institutions must operate in the future. Some countries have gone further: while continuing to rely on constitutional review, they introduced design options that limit the potential risk of turning the rule of law into a rule of judges (Tushnet 2011: 323). These countries have used two different approaches to achieve this goal. The first is the Canadian 'notwithstanding clause', which has yet to be replicated elsewhere, by which the legislature can make a statute legally effective, notwithstanding enumerated constitutional provisions dealing with human rights (Tushnet 2011: 325). The clause, from Canada's Charter of Rights, expires after five years but may be renewed. Since general elections will take place within the five-year period, voters will have at least indirect control over whether to renew the clause.

The second approach to limiting the power of constitutional review institutions is to overrule their judgements. In post-communist Poland, a supermajority of the legislature could veto final judgements of the Constitutional Court, and the Sejm (lower house) had the power to pass a statute that was invalidated by the constitutional tribunal with a two-thirds majority. In Cape Verde—the only West African country to have adopted a similar measure—the legislature may overrule an unconstitutionality decision from the Constitutional Court taken in *a priori* proceedings initiated by the president with a two-thirds majority vote (the same required for constitutional amendment). Parliament can only overrule, however, if the president does not veto the bill after the second vote; therefore an effective legislative override of the court's decision is only possible if parliament and the executive cooperate.



12. Conclusion and outlook



12. Conclusion and outlook

Markus Böckenförde and Yuhniwo Ngenge

The process of scrutinizing the laws and acts of public authorities to ensure compliance with a higher normative order—the constitution—is no longer what Alexis de Tocqueville once viewed as just another feature of American exceptionalism (Ginsburg 2014: 2). The institutionalization of judicial review has expanded in recent decades around the world (Ginsburg 2003: 6; 2014: 2). Beginning in the United States, Western Europe and Japan, it has now become a regular feature of constitutional design in Asia as well as Africa (Ginsburg 2003: 6–7). Focusing solely on the ‘laws on the book’ (constitutions and organic laws), this publication compared the institutionalization and modernization of constitutional justice institutions in 16 West African countries of anglophone, lusophone and francophone heritage belonging to both civil and common law cultures. Chapter 1 briefly addressed the status of traditional law in the constitutional structures of these countries and their place in the context of judicial review. Chapter 2 traced the emergence of constitutional justice in West Africa back to pre-colonial times.

The remaining chapters examined the variations and similarities in the design of constitutional justice institutions in contemporary West Africa, focusing on their institutional architecture (Chapter 3), independence (Chapter 4), auxiliary commissions such as judicial service commissions (Chapter 5), composition (Chapter 6), the control of constitutionality (Chapter 7), competence (Chapter 8), standing (Chapter 8), authority of judgements (Chapter 10) and limits on their power as watchdogs of the constitution (Chapter 11).

This book has sought to deepen mutual understanding of the different systems of constitutional justice in the region. Doing so has required an in-depth historical analysis to highlight the foundations of judicial review in Africa, which were generally taken for granted as ‘imprints’ from the past or products of constitutional migration. Chapter 2 explored and revealed pre-colonial trends in African political heritage and constitutional justice, including respect for the rule of law, institutions, responsibility and accountability,

which translated into the formation of institutional infrastructures and concrete enforcement procedures. Therefore it is more accurate to describe Africa's experience as a modernization (rather than an establishment) of constitutional review institutions; more innovative models of accommodating traditional law within a formalized judicial system are emerging in the region.

Chapter 9 makes a similar point with respect to long-standing rules and indirect constitutional action (*exception d'inconstitutionnalité*), which were introduced in francophone West Africa almost 18 years earlier than in France. The same applies to the *auto saisine* jurisdiction, which remains a *sui generis* feature of the Constitutional Courts of Benin and Burkina Faso and, to some extent, the Supreme Court of Liberia.

Likewise, Chapter 3 reveals that the institutional models of constitutional review bodies in the region are not always tied to a specific legal system that is partly a function of the region's colonial heritage. Some countries have an unexpected mix of elements of the centralized and decentralized review models. For example, common law countries such as the Gambia, Ghana and Sierra Leone have supreme-court models, which are partly designed to operate like the constitutional courts/councils that are predominant in civil law systems. The same applies to Cape Verde, where the Constitutional Court's review of constitutionality operates more like a supreme court in the decentralized system: it exercises only appellate and final (rather than exclusive original) jurisdiction.

This study emphasizes that the institutionalization and modernization of constitutional review institutions—constitutional courts/councils as well as supreme courts—in West Africa, especially in the wake of the democratic transitions of the 1990s, occurred in response to demands for democratic consolidation and respect for the rule of law, and the need to strengthen the culture of constitutionalism. These institutions, while present in different forms, were mostly weak before 1990. In francophone and lusophone West Africa, where the most extensive modernization projects (often surpassing the Western models that influenced them) in this regard took place in the post-Cold War period, this underlying objective is especially evident in a number of ways. These include expanding their jurisdiction to human rights and election cases, broadening the field of those with eligible standing (*locus standi*), creating safeguards for guaranteeing their independence from external influence, and in some cases, such as Benin, granting the constitutional review institution the power to seize itself (*auto saisine*), even in the absence of a prior third-party application. With the rule that constitutional justice institutions' decisions bind the entire polity without exception, constitutions in Cape Verde and Guinea-Bissau (which have constitutional justice systems modelled



on that of Portugal) have given greater force to the principle of equality before the law, as faulty law or provisions become invalid and therefore inapplicable to anyone. In Portugal, by contrast, the *inter partes* rule on a declaration of unconstitutionality has meant that infringing laws or provisions remain in the legal system and applicable to others.

This book's focus on the normative framework raises a number of practical questions to explore in future research. Chapter 2 notes that the inherently African nature of certain values—such as rule of law and limited, accountable, transparent and democratic government—instead of being labelled or dismissed as Western imports, must shape and inform the continuous modernization and delivery of justice on the continent as part of the broader goal of democratization. Thus it becomes necessary to understand how constitutional justice institutions have integrated such values into their jurisprudence, and how they can be encouraged to best balance any conflicting values—real or imagined—in the constitutional justice process. Understanding such issues from this perspective is relevant for attempting to meaningfully bridge informal traditions and formalized techniques of review.

Conventional wisdom would suggest that enforcing short tenures for constitutional court judges would undermine their independence, because the judges would be pressured to pander to political interests to protect their career development. Chapter 4 demonstrates that, although Benin's constitutional court judges have one of the shortest term lengths (five years, which is renewable once), the court has become a successful icon of judicial independence and courage. It has a growing reputation for being unprecedentedly activist in a region where dominant executives continue to successfully undermine the independence of constitutional review institutions. Future research could explore whether this performance is the result of design choices (for example relating to the selection of judges) or strategic action on the part of the court—and what other West African jurisdictions can learn from it.

Further, as additional safeguards on their independence, different political actors have a role in selecting members of constitutional review institutions in both civil and common law systems. The only exceptions, as Chapter 6 demonstrated, are Senegal and Cape Verde, where the president of the republic and parliament, respectively, have monopoly. However, the selection methods used in the civil law countries produce a more professionally heterogeneous composition than in common law systems, where judges must come from the legal profession and the different actors involved in the selection process must agree on every proposed candidate. Does this situation—coupled with the ban on dissenting opinions, particularly in the civil law countries—affect

the general quality of decisions or the effectiveness of constitutional review institutions in the various jurisdictions?

Likewise, while most jurisdictions have auxiliary bodies (judicial service commissions in common law countries and supreme councils for the magistracy in civil law systems), their relationship to the different constitutional review institutions and to the executive power varies considerably (Chapter 5). Future studies should explore what effect this has on the dispensation of constitutional justice.

Finally, what is the real authority of constitutional review institutions? As shown, all jurisdictions studied largely recognize the general applicability of decisions of the superior constitutional review institutions. In the civil law countries, the *erga omnes* rule makes the decisions of constitutional courts/councils binding on all authorities. In the common law countries, the doctrine of binding precedent (*stare decisis*) makes supreme-court decisions binding on the entire polity. However, these judgements are not always self-enforcing: the courts must rely on other actors within the system, usually the executive arm of government. In a political landscape dominated by the executive, it is therefore important to understand how this influences not only the effectiveness of decisions vis-à-vis political actors but also what bearing it has, if any, on how constitutional review institutions interpret their constitutional powers or determine which cases to accept in the first place.

Answering these questions is beyond the scope of this publication, which was intended to start a dialogue among the constitutional justice institutions of the different legal systems of the region on how the law, as written on the books, has fared in practice in the different jurisdictions. What has worked? Where are the gaps? How have they been (or can they be) addressed? Such dialogue can promote the cross-fertilization of best practices and ideas for reform that could enhance the rule of law, democracy and constitutional governance.



Annex: Questionnaire template



Annex: Questionnaire template



I. Introduction

II. The relevance of different legal systems as a source of inspiration for judicial systems in West Africa

| General structure | |
|---|--|
| What are relevant features of the common law system with regard to constitutional review and the institutional setting allowing for constitutional review? | |
| To what extent and in what ways is the legal system of the respective country (still) influenced by the common law system (related to constitutional review/ institutional setting allowing for constitutional review)? | |
| What are relevant features of the common law system with regard to the judiciary? | |

Religious/customary/mixed legal systems

| Religious/customary elements in the judicial system | |
|---|--|
| Does the judicial system in the respective country have religious courts/customary courts? | |
| Do (lower) courts apply/accept customary law or religious law? | |
| Does customary law or religious law have a formal status in the country (or does it exclusively exist in a parallel system and is not addressed in the constitution)? | |
| Are customary courts established under the constitution/a statute? Are they part of the regular court system? Are appeals from them taken to the regular court system? If yes, what is the appeals procedure? | |

III. Historical background of constitutional justice

Development of judicial systems

Has the judicial system/system of judicial review (and the relevant institutions) changed in comparison to the one included in the independence constitution? If so, in what respects?
Is there an autonomous constitutional review in the country (only focusing on the constitutional question of a case)? If so, since when?

IV. Different models of constitutional justice

Different judicial review institutions

What kind of judicial institutions are available in the respective country?

Which institution is considered 'the highest court' in the country?

Does the 'highest court' in the country also stand at the top of the regular court system? Or is it a separate institution?

Are there various highest courts in the country depending on the issue to be addressed (e.g. highest court of administration, highest tax court)?

Which courts can question the constitutionality of laws (regulatory acts and statutory enactments)?

Does the country have a judicial commission/council (self-governing body of the judiciary), etc.?

Systems of control

If a lower court assumes that a regulation is relevant to the case before it violates the constitution, what can it do?

Nothing, no power to question the constitutionality of the law/regulation.

If the court has serious doubts about the constitutionality of the law/regulation related to a specific case, it might pause the proceedings and request a statement of constitutionality from another institution (constitutional court, constitutional council, etc.), which may declare the regulation/law unconstitutional. What is the referral procedure in this case?

The lower court may declare the regulation (administrative acts/legislative acts/statutes/organic law) to be inapplicable in the specific context.

The lower court declares the regulation/law to be unconstitutional.

Any other action.



- a. Diffuse system of constitutional review: the supreme court
- b. Concentrated system of review: the constitutional court
- c. Hybrid systems of constitutional review

V. Relevant aspects of judicial independence

1. Independence of the judiciary vs. independence from the judiciary—the judiciary as legislature

2. The administration of the highest court and its budget

| Administration of the judiciary | |
|--|--|
| Which body/institution is administering the 'highest court'? | |
| Is the Ministry of Justice involved in the administration of the 'highest court'? If so, to what extent? Or is it administered by the judiciary (self-governing body)? | |
| Is there a body within the judiciary/highest court that is responsible for administering the resources? To whom is this body accountable? Is there any kind of external oversight? | |

| What kind of role does the judiciary/constitutional court have in the process of drafting/approving its budget? | |
|---|--|
| What kind of involvement does the 'highest court' have in devising its budget (who originally submits its budget)? | |
| Who might have the right to alter the budget (of the highest court) within the approval procedure? Can the highest court effectively ask for more resources to fulfill its duties adequately? | |
| How far do court statistics (case workloads, etc.) play a role in the determination of the budget? | |
| Is the budget (of the highest court) an integral part of the overall budget or is it separated? | |

3. Judicial commission/council

| Judicial commission/council | |
|--|--|
| Is there any institution like a judicial commission/council (see also IV.1= self-governing body)? | |
| If so, what are the tasks of the judicial commission/council? (might be a considerable discrepancy between common law approach and civil law approach) | |

| | |
|---|--|
| What are the criteria of eligibility for membership? | |
| How is the judicial commission/council composed? | |
| Do <i>ex officio</i> members have the same authorities as other members? | |
| Who selects members of the judicial commission/council? | |
| What kind of relation exists between the 'highest court' and the judicial commission/council? | |

4. Challenges of neutrality and impartiality

VI. Composition

| Composition of constitutional courts/supreme courts | |
|---|--|
| Eligibility: (a) minimum age / (b) maximum age / (c) legal education / (d) special legal qualification (e.g. sitting judge; being an expert in one legal system (e.g. sharia law)/ (e) years of professional experience / (f) limitations (no party membership, no other positions while sitting in the court) / (g) other requirements | |
| Selection of constitutional court/supreme court judges: all judges selected in the same manner? / who / which institution is involved in the selection process?/ Is there a complete replacement of judges or a partial replacement? | |
| Selection of constitutional court/supreme court judges: if selected in different processes, who/which institutions are involved in the respective processes? | |
| How many institutions are involved in the selection process? | |
| Sequence of the selection process (recommendation, advise, election, consultation, appointment, co-option) | |
| What are the terms of office | |
| Is a re-selection possible? | |
| Is the representation of minorities guaranteed (are ethnic, linguistic, religious differences to be considered)? How? | |
| Is the opposition involved in the selection process? | |



1. *Eligibility for appointment as a constitutional court/supreme court judge*
2. *Selection of judges of the constitutional or supreme court*
3. *Terms of office*
4. *Representation of minorities*

VII. Competences

Introduction: judicial review

1. Preliminary review

| Preliminary review (reviewing the constitutionality of a bill before it becomes law) | |
|---|--|
| Available? | |
| Who can trigger the procedure (or is it part of the legislative process) (who has standing)? What is required to take action? | |
| At which state of the legislative process can the preliminary review be triggered? | |
| Applicable to all bills/drafts? | |
| Are consultative opinions available? | |

2. Abstract review

| Abstract review | |
|---|--|
| Available? | |
| Who can trigger the procedure (who has standing)? What is required to take action? | |
| Applicable to all laws (or are there any restrictions (organic laws)? | |
| What kind of judgements may be rendered (nullification, directions to the legislature to fix the unconstitutional parts of a law within a specific period of time, others)? | |

3. Specific or incidental review

| Incidental review | |
|--|--|
| Available (are courts authorized to review the constitutionality of laws)? | |
| What happens if the court is of the view that a law relevant to the case at hand is unconstitutional? Can the court not apply that law or declare it unconstitutional? | |

| | |
|---|--|
| Is the doctrine of <i>stare decisis</i> legally applied (precedent)? | |
| Are there restrictions to incidental review (testing the constitutionality of a regulation/law as part of deciding the case at hand)? | |

4. *Direct action before the constitutional or supreme court (individual complaint)*

| Direct action | |
|---|--|
| Available? | |
| Who can trigger the procedure (who has standing)? | |
| What is required to take action (i.e. exhaust the access to ordinary courts first)? | |
| Are there restrictions to the right of individual complaint? Can highest courts decide whether or not they take a case? If so, what are the criteria? | |

5. *Limits on the review of constitutionality*

| Limits of review | |
|--|--|
| Are there explicit limitations to the review of constitutionality (for example international treaties, laws approved by referendum, laws that were valid before the constitution came into force, legislation passed under emergency power, limitation to manifestly unconstitutional acts)? | |

6. *Review of constitutional amendments (formal regularity and substance)*

| Review of constitutional amendments | |
|--|--|
| Is it possible to review amendments to the constitution itself? | |
| If so, is the review limited to a formal review of the process followed for amendment? Or is a review on the substance of the constitution also permitted? | |
| Does the constitution contain immutable clauses (provisions that are excluded from constitutional amendment)? | |
| Who can trigger the procedure (who has standing)? What is required to take action? | |



7. Unconstitutional omission

| Unconstitutional omission | |
|---|---|
| Is it possible to take action against constitutional obligations that haven't been implemented? | |
| Who can trigger the procedure (who has standing)? What is required to take action? | Any person (see point on standing above). |
| What kind of judgements may be rendered (instruction to the legislature/executive to take action (within a specific period of time), declaration that a law only insufficiently implements a constitutional obligation, court 'implements' the obligation by rendering a specific right to the claimant; others)? | All judgements are possible. |

8. Conflicts between state bodies

| Conflicts between state bodies | |
|--|--|
| Does the court have jurisdiction to decide whether or not a certain task falls within the authority of a state body or to interpret the limits of authority also in relation to other bodies, be it horizontally (between different institutions at the national level) or vertically (between national institutions and institutions from the province/local institutions)? | |
| Who can trigger the procedure (who has standing)? What is required to take action (how)? | |

9. Elections

| Elections | |
|--|--|
| Does the court have electoral competence/jurisdiction? What is the scope of that competence/jurisdiction: presidential, legislative or all types of elections? What kind of issues does the court have power over: declaring results, resolving disputes over election results, candidate eligibility, voter roll, etc.? | |
| Who can trigger the procedure (who has standing)? What is required to take action? | |
| If the court is not empowered, is there another institution that settles electoral disputes? | |

10. Fundamental rights

| Fundamental rights (see also individual complaint) | |
|--|--|
| Are (all) alleged human rights abuses subject to review before a court? | |
| Is there any other kind of institution that aggrieved individuals may turn to (human rights commission, ombudsperson)? What is its institutional relation to the (highest) courts? | |

| | |
|---|--|
| Who can trigger the procedure (who has standing: also NGOs/consumer protection organizations on behalf of individuals)? What is required to take action (how)? | |
| With regard to social rights, does the highest court in the country have jurisdiction to offer less than attributed by lower courts (<i>reformation in peius</i>) (example: right to water in the constitution, but how many litres/day as a minimum threshold: If lower court admits 30 l/d, but the complainant wants 40 l/d and appeals, can the highest court also overturn the lower court to the negative, only offering 25 l)? | |

11. Other powers of supreme/constitutional courts

| Other powers | |
|--|--|
| Conduct of referenda | |
| Determine constitutionality and dissolution of political parties | |
| Impeachment procedures for the president | |
| (Binding) interpretation of the constitution | |
| Others? | |

VIII. Standing

1. Who (see under VII)

2. How (see under VII)

IX. Form and effects of judgements (authority of the judgements) of the highest court

| Authority of judgements | |
|---|--|
| Is a judgement written together or rather exists of various parts, individually by each judge? | |
| If judgements are written together, is it possible to identify single judges (in general or through dissenting/concurrent opinions)? | |
| Do the judgements have <i>erga omnes</i> or <i>inter partes</i> effects (with regard to VIII. 2-4; 7-8)? | |
| Do the judgements have effects for the future only (<i>ex nunc</i>), do they have retroactive effects (<i>ex tunc</i>) or is the effect deferred in order to give the legislature time to adjust the legislation to the court's decision? | |



| | |
|--|--|
| What legal authority does the judgement have on the relevant groups (below) considering that they have been part of the process? | |
| In general, who (see below) is affected (and how) by the judgements of the constitutional court? | |

- 1. *On citizens*
- 2. *On administrations*
- 3. *On other judicial institutions*
- 4. *On political institutions*
- 5. *On military*

X. Control of the constitutional jurisdictions

| Control of the constitutional jurisdiction | |
|---|--|
| Political control (see selection of judges, terms of office) | |
| Removal/dismissal of highest judges (at all/only by judicial decision within the judiciary/by external institutions?) | |
| What are the criteria for the removal of the highest judges (e.g. proven legal misbehaviour)? | |
| May decisions of the highest court be overruled by another institution (legislature)? What are the requirements? | |
| Amending the constitution in light of a decision of the highest court. | |

- 1. *Independence vs. accountability*
- 2. *Political control*
- 3. *Constitutional amendment*
- 4. *Removal/impeachment of judges*
- 5. *Overruling of decisions*

XI. Conclusion



Glossary

Abstract review: A form of constitutional review that takes place in the absence of legal controversy. In terms of timing, it can be either *a priori* or *a posteriori*.

Administrative act: A decision emanating from administrative agencies subordinate to the executive arm of government, such as the immigration or tax authority.

***Amparo* (see also citizen constitutional action):** The hispanophone and lusophone equivalents of citizen constitutional action. It is premised on the need to protect constitutional human rights, and allows private parties to petition the constitutional justice institution in case of a breach to secure the protection of their rights.

Anglophone West Africa: A reference to the Gambia, Ghana, Liberia, Nigeria and Sierra Leone.

***A posteriori* review:** A review that takes place after a law has been adopted and promulgated.

***A priori* review:** A review or scrutiny that takes place before a law is adopted (or if already adopted, before promulgation).

***Auto saisine*:** A form of spontaneous jurisdiction assumed by a court over an issue without prior petition from a third party. For example, in Benin and Burkina Faso, the constitutional review institutions can exercise an *auto saisine* jurisdiction.

Cadi court: A court that applies religious law; it is commonly a feature of judicial systems in Islamic societies.

Centralized constitutional review (also Kelsenian or constitutional court/council model): A system of constitutional review, predominant in civil law countries, in which a single institution monopolizes the authority to

evaluate and make binding decisions on the conformity or non-conformity of laws and the actions of other branches of government and public authorities to the constitution. Examples of countries with this system of review include Benin, Burkina Faso, Côte d'Ivoire, Guinea, Mauritania and Niger.

Centralized supreme-court model: A model of constitutional review in which the supreme court has exclusive jurisdiction to evaluate and make binding decisions on the conformity or non-conformity of laws and the actions of other branches of government and public authorities to the constitution. Examples of countries that use this model include the Gambia, Ghana, Guinea-Bissau and Sierra Leone.

Civil law: A body of law that evolved directly from Roman law and is based on written codes. It is primarily a key feature of the legal systems of continental European countries and their former colonies or protectorates.

Citizen constitutional action: A form of action that allows private parties to petition the constitutional justice institution directly to (a) seek redress for breaches by public authorities of their constitutional rights; and (b) challenge legislation before its promulgation.

Common law: Historically, the body of law that evolved from the practice of English judges. It is primarily based on court decisions and customs, as opposed to the body of law enacted by parliament. Many former British colonies or protectorates model their legal system on the common law.

Concrete review: Constitutional review that arises in the context of a legal controversy in which a court is called upon to verify the constitutional conformity of a law or act that is being challenged by one of the parties in order to determine its applicability to the case at hand. It is necessarily *a posteriori*.

Constitutional adjudication: The judicial determination of disputes arising out of the constitution based on their merits.

Constitutional amendment: A limited form of constitutional reform that does not involve changing or replacing an existing constitution with a completely new one. Changes are limited to specific provisions.

Constitutional justice: An exclusive and specialized system of justice deprived of the general competence of ordinary justice systems, which focuses on the promotion of constitutionalism and the rule of law through ensuring respect for the constitution and its supremacy over other laws.

Constitutional justice institution (see also constitutional review institution):

Any institution, usually a quasi or quasi-judicial body, responsible for the administration of constitutional justice.

Constitutional reform: The process of making changes or modifications to the constitution, which can be partial/limited (constitutional amendment) or whole (constitutional replacement).

Constitutional replacement: A form of constitutional reform that involves the substitution of an existing constitution by a completely new one.

Constitutional review (see also judicial review): The process of ascertaining the conformity or non-conformity of laws and the actions of other branches of government and public authorities to the constitution. Unless noted otherwise, all references to constitutional review in the text are primarily a reference to judicial review.

Constitutional review institution (see also constitutional justice institution):

Any institution, usually a judicial or quasi-judicial body, that has the authority to evaluate and make *binding* decisions on the conformity or non-conformity of laws and the actions of other branches of government and public authorities to the constitution.

Constitutional supremacy: The notion that the constitution is supreme and the laws and actions of all individuals and public authorities must conform to it.

Consultative procedure: A procedure with a non-*binding* outcome. Compare with advisory procedure and/or opinion and consultative competence.

Decentralized constitutional review (also supreme-court model): A system of constitutional review, predominant in common law countries, in which more than one institution has the authority to evaluate and make *binding* decisions on the conformity or non-conformity of laws and the actions of other branches of government and public authorities to the constitution.

Decentralized supreme court model: A model of constitutional review in which the supreme court and other courts in the judicial system have jurisdiction to evaluate and make binding decisions on the conformity or non-conformity of laws and the actions of other branches of government and public authorities. The supreme court has final appellate authority in such a model. Examples of countries in the region with this model are Liberia and Nigeria.



De facto: A reference to what exists in practice, as opposed to what is written in the law.

De jure: A reference to what exists based on explicit law, as opposed to what happens in practice.

En banc: When members of a body or institution, usually a court, sit as a full bench with all the judges in attendance.

Ex nunc: Used in law to describe legal situations that have effects only for the future.

Ex officio: The term is used to describe situations in which a person's qualification for a particular office is based not on express conferral, for instance by appointment or election, but on a prior office or authority that that they held.

Ex tunc: In law, the term is used to describe legal situations that have effects in the past.

Erga omnes: A reference to something that affects the wider public. An example is a legal decision, the effect of which is applicable to the general public and not just the parties to the case. It is the direct opposite of *inter partes*.

Flagrante delicto: A legal term used to describe being caught in the act or in the middle of unlawful conduct.

Francophone West Africa: A reference to Benin, Burkina Faso, Côte d'Ivoire, Mali, Mauritania, Niger, Guinea, Togo and Senegal.

Inter partes: A reference to something that is limited to a specific number of people with a direct interest. An example is a legal decision, the effect of which is limited to the individual parties to the case, as opposed to the general public. It is the direct opposite of *erga omnes*.

Judicial review: A form of constitutional review conducted by a judicial body such as a constitutional or supreme court.

Judicial service commission: An auxiliary arm of the judiciary in common law countries with the responsibility to manage the careers of members of the judiciary by advising (or in some cases deciding) on their recruitment and promotion. It is also the main disciplinary arm for unethical or unprofessional conduct by members of the judiciary.

Laïcité: French conception of secularism that recognizes the complete separation of the public and religious spheres. It can be defined as the neutrality of the state with respect to religious issues.

Locus standi: Often simply called standing, it is a reference to the right or capacity to bring an action before a court of law.

Lusophone West Africa: A reference to Cape Verde and Guinea-Bissau.

Ordinary law: A statutory enactment that falls below organic laws and the constitution, and in some cases is distinguished from the first two by the ease with which it can be changed or amended. Such laws can regulate the relationship between private parties, or between individuals and the state. An example of an ordinary law is one that defines the category of crimes and their sanctions, or that regulates the right to free speech or association.

Organic law: A statutory enactment that strengthens and reinforces the constitution, for instance by specifying the details of the organization and functioning of public powers and institutions. In the hierarchy of norms, it is below the constitution but above other ordinary laws. An example is a law regulating the functioning and organization of a constitutional review institution.

Prejudicial question of constitutionality: This denotes a question that arises in the context of a case before a court challenging the constitutionality of a legal provision or act being applied to the case. When this happens, the constitutionality question raised must first be resolved, either by the court itself or by another court of competent jurisdiction, before the case can continue. In France and other French-speaking countries where the possibility exists, the terms often used are *question prioritaire de constitutionnalité* or *exception d'inconstitutionnalité*.

Ratio decidendi: A reference to the rationale, reason or justification for a legal decision. In other words, it refers to the underlying principles that inform the decision.

Regulatory act: An act with the force of law emanating from the executive arm of government. Examples include presidential or prime ministerial decrees, circulars and orders.

Repugnancy clause: A form of limitation clause used to exclude or limit the scope of the application of laws, particularly customary laws, on the grounds of their inconsistency with principles of public policy, natural justice or any other law deemed to be more acceptable.



Res judicata: The doctrine that a matter that has already been adjudicated and decided by the courts is irreversible and cannot be relitigated.

Review/control of constitutionality (see constitutional review)

Saisine d'office: A kind of *ex officio* jurisdiction assumed by a court on incidental matters (without a third-party request) arising out of a prior petition it has been seized with.

Stare decisis: Translated as 'let the decision stand', *stare decisis* is a legal principle that a court should respect or stand by its own precedent or earlier ruling in a subsequent case that raises similar issues (horizontal *stare decisis*), or follow the precedent or ruling of a superior court on the matter (*vertical stare decisis*).

Statute: All laws enacted by the legislative arm of government.

Sub judice: A reference to any unresolved matter that is still pending before a court of law.

Supreme constitutional review institution: Any institution, in particular those functioning in a judicial or quasi-judicial capacity, that has final authority to evaluate and make binding decisions on the conformity or non-conformity of laws and the actions of other branches of government and public authorities to the constitution. Examples are supreme courts and constitutional courts/councils.

Supreme council of the magistracy (in some cases also higher/supreme judicial council): The equivalent in civil law systems, particularly those of francophone heritage, of the judicial service commission. It is the main disciplinary arm of the judiciary and manages the careers of members of the judiciary by advising on their recruitment and promotion.

Ultra vires: A reference to the exercise of power beyond the scope, or in excess, of what is legally authorized.

West Africa: All countries belonging to the Economic Community of West African States (ECOWAS) and Mauritania. ECOWAS member states are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.



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The legal systems in West African countries are uniquely diverse. They have their foundations in different colonial heritages and have been shaped by a great variety of customary and religious norms, which affects the design of each country's judicial system. At the same time, the region is growing together under the umbrella of the Economic Community of West African States (ECOWAS).

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The authors analyse a broad spectrum of issues related to constitutional justice institutions in West Africa. While navigating technical issues such as competence, composition, access, the status of judges, the authoritative power of these institutions and their relationship with other institutions, they also take a novel look at analogous institutions in pre-colonial Africa with similar functions, as well as the often-taboo subject of the control and accountability of these institutions.

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ISBN: 978-91-7671-052-4