

CHAPTER 10

BETWEEN PRESIDENTIALISM AND A HUMAN RIGHTS APPROACH TO CONSTITUTIONALISM: TWENTY YEARS OF PRACTICE AND THE DILEMMA OF REVISING THE 1990 CONSTITUTION OF BENIN

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1 Introduction

The new constitutionalism launched by the 11 December 1990 Constitution of Benin has been influenced strongly by the country's social and political experience in the two decades following its independence. Since it obtained independence on 1 August 1960 as Dahomey, Benin has experienced an eventful political and constitutional history. Between 1963 and 1972 the country experienced eight *coups d'état*, adopted ten Constitutions¹ and had ten Presidents.²

Three major periods followed independence. The 1960-1972 decade was one of political instability and successive regime changes. Civilian and military regimes alternated with regularity. During this period, the country was known to be 'the sick child of Africa'³ in reference to its political turbulence and frequent *coups*.⁴

¹ These are the Constitutions of 28 February 1959, 26 November 1960, 11 January 1964; the Charter of 1 September 1966; the Constitution of 11 April 1968; the Ordinances of 26 December 1969, 7 May 1970, 18 November 1974; the Fundamental Law of 26 August 1977 amended by the Constitutional Act of 6 March 1984, and the Constitutional Act of 13 August 1990 which served as a constitution for the transition to democracy.

² Six of the *coups* were successful while three failed. For a comprehensive discussion of Benin's political and constitutional history see P. Méthinoué *Les gouvernements du Dahomey et du Bénin: 1957 – 2005* CNPMS (2005). See also M. Ahanhanzo-Glèlè *Naissance d'un Etat: l'évolution politique et constitutionnelle du Dahomey, de la colonisation à nos jours* Paris: L. G. D. J. (1969) and L. B. Bio Bigou 'La contribution du pouvoir législatif à la vie politique du Bénin de 1965 à 1979' in CAPAN (ed) *L'histoire du pouvoir législatif des indépendances à nos jours* Actes du colloque parlementaire du cinquantenaire Porto-Novo (2011) 81.

³ N. Dossou-Yovo 'The experience of Benin' (1999) 16 *Journal on World Peace* 59 and GriooCom 'Bénin: de l'enfant malade au modèle démocratique' <http://www.grioo.com/ar/benindelenfantmaladeaumodeledemocratique,19522.html> (accessed 20 June 2012).

⁴ B. A. Magnusson 'Testing democracy in Benin' in R. Joseph (ed) *State, conflict and democracy in Africa* (1999) 221.

The military *coup* of 26 October 1972, which brought President General Mathieu Kérékou to power and subsequently established the Benin Revolutionary People's Party marked the beginning of a second era. Kérékou ruled the country under a Marxist-Leninist dictatorship for 17 years and imposed a tight ban on freedoms. The regime actively abused the human rights of its citizens and transformed the country into a police state, sending the opposition underground.⁵

In 1989, the oil crisis in neighbouring Nigeria adversely affected Benin's economy. At the same time the pro-USSR regime could not withstand the democratic wind that swept across the continent in the aftermath of the collapse of the Berlin Wall. The long ban on civil and political rights fuelled growing discontent among domestic social and political forces, these forces resorted to indefinite strike and country-wide protests demanding change.⁶ These events led to the demise of the regime. Benin Marxist leaders agreed to the idea of the first national conference as part of the so-called 'third wave' of democratisation⁷ and new constitutionalism in Africa. The famous *Conférence des forces vives de la nation* was held in February 1990.⁸ Constitutional and liberal democracy, the rule of law, separation of powers and human rights have been at the heart of this third era of democratic revival which the country is still experiencing.

While this new constitutionalism was experienced amidst excitement, it also came with challenges. In fact, given the turbulent political history of the country, the drafters of the Constitution strictly followed the demands of the National Conference to design a fundamental law that leaves no room for the evils of the past. Right from its Preamble, the Constitution therefore reaffirms the Beninese 'fundamental opposition' to abuse of power, absolute power, lack of checks and balances, corruption, dictatorship and personal power and abuse of fundamental rights. In the vigilant custody of a Constitutional Court enjoying wide powers, constitutionalism in Benin gained unprecedented momentum with individuals and organisations directly challenging state governance and respect for fundamental rights. Fears to return to the abuses of the past eventually led actors to a dramatic rejection of any amendment whatsoever to a Constitution that has thus remained intact for over 21 years at the time of writing.⁹

⁵ As above, A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 281-283.

⁶ J Aivo 'Constitution de la République du Bénin, La Constitution de tous les records en Afrique' (2010).

⁷ C Fombad & NA Inegbedion 'Presidential term limits and their impact on constitutionalism in Africa' in C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) 7-8.

⁸ K Nwajiaku 'The National Conferences in Benin and Togo revisited' (1994) 32 *The Journal of Modern African Studies* 429-439.

⁹ Aivo (n 6 above).

However, constitution-making and constitutionalism are living mechanisms which face situational challenges in practice. When the revision of the Constitution eventually became a matter of public debate in 2004 the main concern was to avoid an ‘opportunistic’ amendment. The debate that followed provided an enriching experience of dilemmas surrounding constitutional revision and distribution of powers in modern constitutions. In the next section, an overview of the history of constitutionalism in Benin and the main features of the 1990 Constitution is provided. Subsequent analysis focuses on the main challenges that arose during more than two decades of constitutional practice, in light of the Constitutional Court’s decisions made while facilitating major political and constitutional conversations. The discussion deals with the guarantee of fundamental rights, separation and distribution of powers, powers of the President, and prerogatives of the Legislature, appointment and independence of the highest courts. Over the years since it adopted its new Constitution, the most important dilemma faced by Benin is certainly whether it should amend the fundamental law. The constant fear has remained that any amendment would open a Pandora’s box that would lead to adventurous and opportunistic amendments with the risk of putting the entire constitutional order in jeopardy. Actors within the system have had the daunting task of balancing a human rights-leaning Constitution and growing trends of a stronger presidential regime, namely presidentialism. The disputes that ensued over distribution of powers are revealed, before the discussion turns to the analysis of the advantages and disadvantages of the proposed amendments to Benin’s Constitution of 1990 and their potential impact on constitutionalism.

2 From constitutional instability to an African Charter-based Constitution

Compared to its predecessors, the Beninese Constitution of 1990 holds the record in respect of both its longevity and its human rights-friendliness. The first Constitution of the country, the Constitution of 28 February 1959, was a replica of the French Constitution, with the President of France at the time also the President of the ‘Africa’ French Union. Then, immediately after independence, the country adopted the Constitution of 26 November 1960 followed by a height of fundamental laws enacted under the military rule between 1972 and 1989.¹⁰ To understand

¹⁰ These are the constitutions of 11 January 1964 (adopted by referendum following a military coup – 2 years and 9 months), 1 September 1966 (19 months), 11 April 1968 (21 months), 26 December 1969 (adopted by a military directorate following a military coup – 4 months), 7 May 1970 (2 years and 5 months), 18 November 1974 (adopted by a military directorate following a military coup), 26 August 1977 (adopted under the Marxist military rule – 13 years), 13 August 1990 (adopted as an interim constitution during the political transition).

constitutional instability in Benin in the independence decade, one should look into the country's ethnic heterogeneity.

Along the omnipresence of the army, the North-South divide manifestly played in the frequent change of constitution.¹¹ Just as was the case in most of African countries at the time, political activity in Benin was organised along ethnic lines. Probably due to their geographic position, Beninese living in the southern part of the country had first encounters with colonial invaders and thus with modernity and knowledge. The largest part of the elite was therefore made up of cadres from the South who studied at French established education institutions while very few Beninese from the North had the same opportunity. This situation led to suspicion between ethnic groups and translated into the political arena in the form of ethnic strong hold based political organisations led by elite from specific ethnic groups. The failure for the three main political leaders from the North, Centre and South even led to the very peculiar phenomenon of collegial presidency known as 'presidential triumvira' with three heads of state alternating.¹² Although the history of nation-building has gained in strength in the democratic era, ethnic, and especially the North-South divide, is still used by political leaders particularly when the stakes are high, for example during presidential elections.

The drafting history of the 1990 Constitution made Benin's constitutional human rights entrenchment unique particularly from the perspective of its domestication of the African Charter on Human and Peoples' Rights (African Charter). As referred to earlier, the history of democracy and the protection of human rights by the Constitution in Benin are rooted in the popular struggle, which led to the demise of the 17 years long Marxist-Leninist dictatorial regime in March 1990. The ultimate achievements of the subsequent February 1990 Benin National Conference included the establishment of a Constitutional Commission. The Commission was tasked to draft a new constitution emphasising the 'promotion and the protection of human rights, as proclaimed and guaranteed by the African Charter'.¹³

The Commission faithfully followed-up on the demands of the sovereign national conference and drafted a constitution with a strong African Charter fingerprint. As in most constitutions adopted by African countries in the 1990s, the Preamble to Benin's Constitution includes a reference of the Benin people's adherence to the principles of the African Charter. From a legal standpoint, such a reference would have been

¹¹ HK Manga represented the North, Justin T Ahomadégbé originated from the central part of the country and SM Apithy came from the South East.

¹² Aivo (n 6 above).

¹³ JR Heilbrunn 'Social origins of national conferences in Benin and Togo' (1993) 31 *Journal of Modern African Studies* 277, quoted in Rotman (n 5 above) 284.

sufficient since Benin, as a monist country, had made the African Charter part of its municipal law through ratification in 1986.

However, the debate about the constitutional nature of the Preamble's provisions was still alive.¹⁴ An interpretative reading of the drafting history of the Constitution suggests that top constitutional law scholars and practitioners within the drafting commission failed to agree on the preamble question and thus resolved to a deeper entrenchment of human rights in the text of the new Constitution. As a consequence, the first provision of the Bill of Rights provided that 'the rights and duties of the African Charter' are 'part and parcel of the Constitution'.¹⁵ One could suspect that strong pro-human rights voices among the drafters of the Constitution¹⁶ insisted that further safeguard provisions be included in response to the still recent history of systematic rights abuse. The full text of the African Charter was consequently added as an annex to the Constitution. On the institutional side, two mechanisms were designed to give life to the normative human rights entrenchment. A Constitutional Court was established, and provided with a triple mandate to check the constitutionality of laws, regulate and guarantee the separation of powers, and adjudicate individual human rights complaints. The latter mandate was to be implemented through direct access granted to individuals and groups to initiate human rights cases and challenge the constitutionality of laws. These reforms were endorsed by the out-going Marxist regime and adopted by a popular referendum in December 1990.

3 Main features of the 1990 Constitution

For the purpose of the discussion, I adopt the definition of 'constitutionalism' as limited government where power is shared among at least three branches of the state independent from each other, which are the executive, the legislature and the judiciary. Such approach to constitutionalism will of course be incomplete in the absence of constitutional norms and mechanisms aiming at safeguarding individual and groups' fundamental rights.

¹⁴ Only the French Court of Cassation took the position in its decision 71-44 of 16 July 1971 that provisions of the Preamble to the French Constitution carry the same weight as constitutional provisions.

¹⁵ 11 December 1990 Constitution of Benin, art 7.

¹⁶ The 1990 Constitutional Commission included for example Professor Maurice Ahanhanzo-Glèlè, a pro-human rights legal expert and former member of the United Nations' Human Rights Committee, and Advocate Robert Dossou, a renowned lawyer and pro-African Charter jurist who was minister and President of the Constitutional Court (2008-2013).

3.1 Fundamental principles of the Constitution

Given the political unrest and civil rights' restraints suffered during the dictatorship, it was no surprise that the 1990 Constitution set very liberal goals for building a new nation. The Constitution provides for liberal democracy, the rule of law, separation of powers and respect for fundamental rights.¹⁷ As reflected in the Preamble, the people express its determination to:

- (i) Oppose any political regime based on arbitrary, dictatorship, injustice, corruption, regionalism, nepotism, confiscation of power and personal power;
- (ii) Create a state based on the rule of law and plural democracy, where fundamental human rights and freedoms, human dignity and justice are upheld, protected and promoted as the necessary condition for each Beninese to enjoy development in its temporal, cultural and spiritual dimensions; and
- (iii) Defend and safeguard its dignity in the face of the world and regain their place and role as pioneers of democracy and the defence of human rights which they once held.

This preliminary enunciation of principles in the Preamble has been spelt out in provisions of the Constitution. Article 2 of the Constitution provides that 'the Republic of Benin is one and indivisible, secular and democratic; its principle is government of the people, by the people and for the people'. Article 3(1) of the Constitution restates the principle of democracy through 'national sovereignty', which is said to 'belong to the people'. As mentioned earlier, the history of Benin reveals that power was frequently seized by unconstitutional means namely through *coups d'état*. One-man rule was also part of the political history of the country for decades and officials or state institutions could repeal legislation as it pleased. Hence, the principle of national sovereignty was provided in the same provision as the 'supremacy of the Constitution'. The presence of those principles in the same provision could imply that only the sovereign people may legitimately entertain constitutional changes, directly through the power of the ballot or indirectly through their representatives in Parliament. When it comes to amending key constitutional principles, as discussed later in greater detail, the Constitutional Court of Benin seems to even afford a higher weight to the direct expression of the people over the decisions of their representatives.¹⁸ Considering who has legitimacy to entertain amendments of the Constitution, the Constitutional Court held in the Amendment of the Constitution by Parliament case that since some

¹⁷ For a commentary on the goals and principles of the Constitution see Fondation Konrad Adenauer *Commentaire de la Constitution béninoise du 11 décembre 1990: esprit, lettre, interprétation et pratique de la constitution par le Bénin et ses institutions* (2009) 15.

¹⁸ Centre pour la Gouvernance Démocratique au Burkina Faso 'Constitutionnalisme et révisions constitutionnelles en Afrique de l'ouest: le cas du Bénin, du Burkina Faso et du Sénégal' (2009) <http://ddata.over-blog.com/1/35/48/78/Burkina-Faso/CONSTITUTIONNALISME-ET-REVISION-CGD.pdf> (accessed 21 June 2012).

principles of the Constitution proceeded from the people and the sovereign National Conference, no single entity had enough legitimacy to amend them without reverting to the people.¹⁹ The principle of ‘national consensus’, thus raised by the Court to the rank of a ‘constitutional principle’, was derived from the sovereignty of the people through the National Conference.

The 1990 Constitution has also made provisions for the rule of law and its protection. As one of the peculiarities of the constitutionalism established in 1990, individuals may challenge the constitutionality of any law or act in the Constitutional Court.²⁰ The Court was therefore well positioned to play a prominent role in upholding the rule of law, and it in fact did so right from the beginning. In the early years of its operation, the Court termed itself in the Executive Limitation of Constitutional Court Member’s Freedom of Association case as ‘the cornerstone of the liberal rule of law’ and the ‘keystone of the entire politico-legal system’.²¹

Political parties are placed at the heart of the electoral machinery in Benin and article 5 of the Constitution obligates them to operate in conformity with principles of national sovereignty, democracy, integrity of the territory and secularity of the state.²² Article 5 of the Constitution materialises the multi-party option decided at the National Conference although freedom of association allows individuals to run for elective positions. The President, Members of Parliament and municipal councillors are elected by universal suffrage which is equal and secret.²³ Universal suffrage is a consequence of popular sovereignty and a feature of liberal democracy.

Human rights constitute a central axis of Benin’s 1990 Constitution. The African Charter is given precedence over other international norms including the Universal Declaration of Human Rights (Universal Declaration). The Preamble to the Constitution includes a reference to the Charter. The rights and duties of the Charter are made part and parcel of the Constitution through the first provision of the Bill of Rights, article 7

¹⁹ Benin Constitutional Court Decision DCC 06-074 of 8 July 2006. In Benin’s constitutional practice, cases are not named as the South African *Treatment Action Campaign* and *Grootboom* or the Bostwanian *Unity Dow*. Rather, they are numbered as DCC (for *Décision de la Cour Constitutionnelle*) followed with the two last numbers of the year and the number of the case. Accordingly, DCC 06-074 of 8 July 2006 should be read as the 74th decision of the Constitutional Court delivered in 2006, on 8 July. In a very few instances, the number of the case comes before the year such as for DCC 33-94 of 24 November 1994. DCC is replaced with EL for decisions relating to electoral matters.

²⁰ The Constitution, art 3(2). The Constitutional Court of Benin has developed an extensive jurisprudence on the constitutionality of legislation including bills originating from both the Parliament and the Executive. See Cour constitutionnelle du Bénin ‘Contrôle de constitutionnalité’ http://www.cour-constitutionnelle-benin.org/cour_consbj.html (accessed 27 February 2012).

²¹ DCC 33-94 of 24 November 1994.

²² Art 5.

²³ Art 6.

of the Constitution. The full text of the African Charter is also annexed to the Constitution. Two interlinked mechanisms were designed for the enforcement of the rights enshrined in the Constitution. A Constitutional Court was established with an express human rights mandate and direct access was granted to individuals and groups to file human rights complaints.

Besides separation of powers, which is discussed below, Benin's 1990 Constitution provides for safeguards to prevent the military from intervening in political life. Arguably, the need to circumscribe the military's intervention is reasoned by its frequent incursions in the political arena in the past. As a consequence, one of the very few times the word 'military' is mentioned in the Constitution is in article 34 which makes it a 'duty for all citizens, civilians and the military to respect the Constitution and constitutional order in all circumstances'. The Constitution also prevents members of the armed forces from standing for elective positions²⁴ or sitting in the cabinet²⁵ unless they have retired or resigned well ahead of the considered election.²⁶ In 2007, when the country was confronted with the intervention of the military to support election management by transporting material, the Constitutional Court re-affirmed the independence and administrative autonomy of the National Autonomous Electoral Commission in EL 07-001.²⁷ Approached in a similar situation on the occasion of the 2010 parliamentary election, the Court threw out the application in DCC 10-116 on the basis that its previous decision on the matter was final and thus not open to appeal.²⁸ Although the military eventually supported the Electoral Commission, the Court had made it clear that its intervention must remain within the prescriptions of the new constitutional order.

3.2 Fundamental rights' protection in Benin's Constitution of 1990

3.2.1 Strong normative protection

The Constitution is articulated in a Preamble and 160 articles under 12 titles. Title II is devoted to the Bill of Rights and entitled 'Rights and Duties

²⁴ According to article 51 of the Constitution, members of the military cannot stand for presidential elections.

²⁵ Art 54(4).

²⁶ The Constitution, art 64(1). The timeframe within which such resignation should be filed is determined by the law. Relevant successive electoral laws seem not to have provided for the time frame. However, a 2010 presidential election act provides that prefects must resign 12 months before a local election in which they intend to be a candidate. The timeframe is of three months for candidates who hold top management positions in state companies. See *Loi* no 2010-35 of 24 August 2010 governing the election of members of Parliament.

²⁷ EL 07-001 of 22 January 2007.

²⁸ DCC 10-116 of 8 September 2010.

of the Person'. It comprises 35 articles (from article 7 to article 40) which enshrine both rights and duties of the person.

All categories of rights are enshrined in the Constitution of Benin, including civil and political rights, socio-economic and cultural rights, and solidarity rights. As expressly mentioned in the formulation of title II, the Constitution recognises individual and state duties. A particular feature of people's rights in Benin is article 66, the 'constitutional right to resist'. This article provides that any member of a constitutional organ has the right and the duty to recourse to all means to reinstate constitutional legitimacy in case of a *coup*, an aggression by mercenaries or any other attempt to take over power through the use of force. Article 66 further makes it a 'supreme right and imperative duty for any citizen to disobey and organise to oppose the illegitimate authority in the same circumstances'.

Like the Constitutions of most African countries, Benin's Constitution includes references to the Universal Declaration and the African Charter in the Preamble. However, as mentioned above, the Constitution further incorporates the Charter. The first implication is that all the rights omitted from or limited in the Constitution – such as people's rights – are made constitutional human rights through the African Charter. Another consequence is that stronger protection is potentially afforded by the African Charter to the human rights entrenched in the Constitution. Over the past two decades, the African Charter has remained at the heart of the constitutional protection of human rights in Benin.²⁹

3.2.2 Constitutional protection mechanisms and remedies

Constitutional human rights provisions bind all categories of both public and private subjects. Private persons, state and state agencies, social organisations as well as corporate entities are bound by these rights as there is no special derogation provided under the Constitution for the breach of human rights. In several instances, litigants of any of these categories have been involved in human rights litigation before the Constitutional Court and other domestic courts.³⁰ The police and armed forces have been at the centre of constitutional litigation of human rights involving state

²⁹ On the place and role of the African Charter in the constitutional protection of human rights in Benin see in general AL Sidi 'La protection des droits humains par la Cour constitutionnelle du Bénin de 1993 à 2005' *Mémoire de DEA Chaire UNESCO Université d'Abomey-Calavi* (2006) and H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* Paris: L'Harmattan (2011).

³⁰ Constitutional Court Decision DCC 03-083 of 28 May 2003 in the case of 438 civil servants. The Administrative Chamber of the Supreme Court had previously decided in the same matter that 111 of them be reinstated in their office by the Executive. See Supreme Court Arrêt no 33/CA of 20 November 1998. In both cases, public administration, and officials were involved on behalf of the Executive.

responsibility.³¹ These have involved not only top police service members but also the police as an institution. Individual judges,³² ministers,³³ court presidents and registrars,³⁴ domestic courts, public education bodies, the Secretary-General of the Cabinet, and private companies, have been found in violation of human rights by the Constitutional Court.³⁵

In addition to the strong protection of human rights in the light of the African Charter, the Beninese Constitution provides for judicial and supervisory mechanisms for the protection of these rights. One novelty of Benin's model as compared with many other constitutions in Africa is the generous and liberal individual access to its Constitutional Court.³⁶ The Court has special jurisdiction over human rights cases brought by individuals and groups.³⁷ Direct individual access is provided in cases of human rights violation by private persons, the state, its agencies or any other entities. Indirect access is provided through the 'exception of unconstitutionality' whereby proceedings before ordinary courts are suspended pending the decision of the Constitutional Court.³⁸ Individuals may also have the constitutionality of law tested when they believe a bill or acts of state organs are not in accordance with the provisions of the Constitution or may violate human rights. Although nothing prevents ordinary courts from exercising jurisdiction over human rights matters, the possibility of such competence is frustrated by their duty to refer constitutionality questions to the Constitutional Court. The very poor human rights jurisprudence inordinately seems to confirm the supremacy and exclusivity of the Constitutional Court's competence in human rights adjudication.

³¹ Police officers, including Director General of Police, have personally been found in violation of human rights in DCC 06-057, DCC 06-059 and DCC 06-060 (violation of article 5 of the African Charter, degrading treatment; reparatory order), DCC 06-062 (violation of article 6 of the African Charter, illegal arrest; reparatory order).

³² Constitutional Court Decisions DCC 03-084 of 28 May 2003 (15 years investigation without judgment, undue delay, violation by the Tribunal of First Instance of Lokossa of article 7(1)(d) of the African Charter) and DCC 03-125 of 20 August 2003 (violation of article 7(1)(c) of the African Charter, right to defense, violation of article 35 of the Constitution by the investigating judge).

³³ Both ministers and their offices were found in violation of human rights. See for instance Constitutional Court Decisions DCC 01-058 of 27 June 2001 where the Ministry of Education was found in violation of article 26 of the Constitution (equality before the law) for having allowed a teacher access to compete for a professional exam but refused access to a colleague of the same category, specialisation and criteria; in DCC 05-067, DCC 06-016 (involving the Minister of Justice for violation of the right to equality and refusal to execute the decision of the Constitutional Court) and DCC 06-052 (involving the Minister of Education).

³⁴ DCC 05-114, DCC 05-127 (involving the Chief Registrar of the Supreme Court), DCC 06-046 and DCC 06-113.

³⁵ For an overview of the human rights case law of the Constitutional Court of Benin, visit <http://www.cour-constitutionnelle-benin.org/>.

³⁶ See C Gangnon 'Les droits fondamentaux de la personne humaine' *Séminaire de formation des journalistes* Cotonou 2 August 2005 (unpublished conference paper on file with the author) 1.

³⁷ Art 114.

³⁸ Art 122.

A problem with the human rights mandate of the Constitutional Court is that no provision in the Constitution expressly grants power to the Court to provide remedies let alone evaluate the quantum of compensation when it finds that a violation has occurred. However, the right to remedy and reparation is self-evident by reference to the African Charter and the jurisprudence of the African Commission on Human and Peoples' Rights.³⁹ Moreover, the Constitutional Court has an express human rights mandate and its decisions are final and binding on the state and non-state entities. In its early years of existence, 1993-2001, the Court adopted a restrictive approach to its human rights jurisdiction. It limited its decisions to declaratory orders and findings of violations. From 2002, it embarked upon an 'era of reparation' although awards of reparation still applied on an inconsistent and unprincipled basis. Clear reparation orders including injunctions to public authorities have been made in very few cases, some of which the executive refused to comply with.⁴⁰ The victims collected monetary compensation in very few instances following new proceedings in ordinary courts to have the Constitutional Court orders enforced.⁴¹ The Executive-led process that began in 2008 to amend the Constitution envisages the inclusion of an express provision for the right to a remedy and reparation for human rights violations. I discuss the proposed provision further below.

This overview shows that the constitutionalism adopted by Benin in 1990 shares traditional features and principles of modern constitutionalism. However, the lurking dangers of Benin's new constitutionalism are revealed by practice especially on the several occasions of political debates and disputes as the country's democracy developed. While some of the challenges are technical and actual, others have appeared to be only perceived by political actors and prompted by purely opportunistic motivations. The following analysis focuses on how those issues were resolved in practice, whether there is a need for constitutional revision to address outstanding issues and the dilemmas of such revision.

4 Separation and distribution of powers

The principle of separation of powers is provided by the Constitution as follows: Executive power is exercised by the President and the Cabinet; legislative power falls within the competence of the National Assembly; and judicial power is vested in courts and tribunals.⁴²

³⁹ GM Musila 'The right to an effective remedy under the African Charter on Human and People's Rights' (2006) 6 *African Human Rights Law Journal* 442.

⁴⁰ *Equality for candidates to the Magistracy exam* case DCC 06-016.

⁴¹ *Favi (compensation for degrading treatment) v State* DCC 02-058.

⁴² Arts 3, 4 and 6.

While the Benin constitutional model provides for strict separation of powers, these boundaries are blurred by a strong presidential system. In fact, the issue is not one of lack of separation but unequal distribution of powers and its use by the President of the Republic. In practice, and when political actors are cooperative enough, the executive ends up exercising legislative powers and has the capacity of exerting strong direct influence on the judiciary. Segregation of powers under the law are eroded by strong prerogatives afforded to the President of the Republic to both make the law and exercise important political influence-related powers over public administration, armed forces, the judiciary and other checks and balances institutions, including the media, social and economic council, and the ombudsman institution.

4.1 Strong presidential Executive: ‘Presidentialism’?

Under its Constitution, Benin adopts a presidential system of the executive with a limit of two five-year presidential terms.⁴³ The President combines the functions of President of the Republic, head of state,⁴⁴ head of the executive⁴⁵ and supreme head of the army.⁴⁶ Other members of the Cabinet are appointed by the President, who determines their functions and powers and to whom they account.⁴⁷

The President also appoints three of the seven members of the Constitutional Court. His wide appointment powers⁴⁸ are extended to the President of the Supreme Court and members of the Supreme Court although from a list prepared by the *Conseil Supérieur de la Magistrature* (Judicial Service Commission), which is chaired by the President of the Republic. He appoints the President of the *Haute Autorité de l’Audio-Visuel et de la Communication*, a Broadcast Authority body, and the *Médiateur* or Ombudsman.

In addition to these powers, the President receives law-making powers directly from the Constitution although actions derived from this constitutional conferment may be brought to the scrutiny of the Constitutional Court by both the Parliament and citizens in ex-post constitutional litigation. The President shares the ‘initiative of laws’ with the National Assembly and while ‘propositions’ of law, parliamentary bills, are introduced by members of the Assembly, the President is given the power to make law through ‘projects’ of law, executive bills.⁴⁹ The

⁴³ Art 42.

⁴⁴ Art 41.

⁴⁵ According to art 54(1) he retains executive power; is the head of the executive and as such he determines and conducts national policies.

⁴⁶ According the art 54(2) he is responsible of national defence.

⁴⁷ Art 54(3).

⁴⁸ Arts 54 to 63 of the Constitution.

⁴⁹ Art 57.

President also has to assent to new legislation passed by Parliament. He makes regulatory norms and has the initiative of a referendum.⁵⁰ Although the law-making powers of the President appear to be wide, they are quite limited in terms of the law as the law-making powers of Parliament cover a much wider set of areas including citizenship, civic rights, fundamental freedoms, nationality, matrimonial regimes, criminal law, amnesty, organisation of the judiciary, taxes, currency, electoral law, creation of public entities, organisation of the territory, a state of emergency, environment and natural resources, and property.⁵¹

Despite the separation, constitutional practice has revealed that Benin's model should be considered as *presidentialism* instead of a parliamentary system.⁵² As a matter of general principle, the President of the Republic has always obtained the majority of the seats in Parliament and sponsored all members of the Bureau of the Assembly. He appoints top members of the judiciary including the President of the Supreme Court and he has an influence in the career management of magistrates and judges. In many instances, all seven members of the Constitutional Court were eventually nominated by the President as he had a say in the appointment by the Parliament of four of them. As pointed out in subsequent analysis, the President indirectly appoints the majority of members of the High Court of Justice which has the mandate to try the President, members of the cabinet and their accomplices for offences committed during their term in office. As discussed later, a bone of contention between the executive and other branches of the state has been the President's power, the so called 'article 68 powers', to issue special measures.

4.2 The Parliament

The Parliament of Benin has one chamber, named the 'National Assembly'.⁵³ The 83-member Assembly is elected by universal suffrage for four year terms.⁵⁴ The National Assembly has three main functions which are to make the law, to control the actions of the executive and represent the people.⁵⁵ It also has referral powers, through an impeachment-like procedure for trying the President, members of the Cabinet and their accomplices before the High Court of Justice. Members of Parliament enjoy parliamentary immunity and may not be investigated, wanted,

⁵⁰ Art 58.

⁵¹ Art 98.

⁵² DF Meledje 'The making, unmaking and remaking of the Constitution of Côte d'Ivoire: An example of chronic instability' in C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) PULP 119. See also S Bolle 'Le regime présidentiel: cache-sexe du présidentielisme?' *La constitution en Afrique* 2 October 2007 <http://www.la-constitution-en-afrique.org/article-12777017.html> (accessed 12 November 2012).

⁵³ Art 79(1).

⁵⁴ Art 80.

⁵⁵ Art 79(2).

arrested, detained or prosecuted for opinions or vote issued in the discharge of their duties.⁵⁶

4.2.1 *Internal functioning issues*

Benin's Parliament, as it operated from 1991, has also enjoyed the stability and political pluralism brought by the 1990 Constitution. Different to Members of Parliament in the one-party era whose terms could be interrupted before they ended, parliamentarians under the new constitutional dispensation not only always completed their terms but the National Assembly was also renewed every four years.⁵⁷ Moreover, while the 'Peoples' Commissioners' of the Marxist regime were exclusively sponsored by the 'Party'⁵⁸ and merely endorsed pro-USSR government programmes, democratic era parliamentarians are the representatives of the people who elect them directly through an open political competition.⁵⁹ These new constitutional processes not only ensured competition and diversity of views and opinions but also ethnic or regional representation. Most importantly, the new dispensation endowed Parliament with the necessary independence to balance the strong powers of the executive. The fact that the Speakers of the Parliament came from the ranks of opposition groups in at least two terms also helped the National Assembly to assert its independence in relation to the President of the Republic in some instances.⁶⁰

Although it has played the roles assigned to it under the new constitutional dispensation, Benin's Parliament has had issues of organisation and functioning. For instance, disputes have frequently raged over the Speaker's disregard for the National Assembly's Rules of Procedure. On several occasions the requirement that parliamentary secretaries must be present during sessions of the Assembly has been either ignored or used to postpone discussions depending on the political

⁵⁶ Art 90. Exceptions are provided in article 91.

⁵⁷ The Bureau of the Parliament has constantly been renewed as well as the presidents of its parliamentary committees. In the first two terms, the Speakers of the Parliament were not necessarily sponsored by the presidential coalition, which in fact fought their election as presidents of the National Assembly. See FJ Aivo 'Le Parlement béninois sous le renouveau démocratique: réussites et échecs' RADC-CRDA Conférence annuelle sur 'L'internationalisation du droit constitutionnel' Rabat, Morocco (20 January 2011) 3-4 and K Somali 'Le parlement dans le nouveau constitutionnalisme en Afrique: essai d'analyse comparée à partir des exemples du Bénin, du Burkina Faso et du Togo' Doctoral thesis Université de Lille, 27 May 2008, 2.

⁵⁸ Members of the then 'Assembly of the People' were designated as follows: 90 per cent were directly elected by the voters from a list of members of the Benin Revolutionary Peoples' Party (the Party) and 10% were appointed by the President of the Republic as one for each province.

⁵⁹ Aivo (n 57 above) 3-4.

⁶⁰ For the 1991-1995 and 1995-1999 terms of Parliament, the Speakers were sponsored by the opposition and the Bureau included members of various political groups. See Aivo (n 57 above) 6 and Somali (n 57 above). Those were the years when President Soglo's bills were systematically and strongly rejected by Parliament. See Fondation Konrad Adenauer (n 17 above) and Somali (n 57 above) 152.

interests at stake. In the *Parliamentary Secretaries* case, the Constitutional Court declared unconstitutional an amnesty law⁶¹ which was adopted in the absence of the secretaries.⁶² The latter were replaced by the Speaker with the Principal Accountant of the National Assembly despite the opposition of some Members of Parliament.

Another problem with the functioning of Parliament has been the tendency to resort automatically, if not overly frequently, to the Constitutional Court to resolve issues that could have been dealt with by a consensual application of the Rules of Procedure. The tendency to abuse its institutional autonomy has led Parliament to be subject to tight scrutiny and restriction by the Constitutional Court. An illustration is given in the *Adoption of Parliamentary Rules of Procedure* case where the Court held that Rules of Procedure of Parliament, including a section entitled 'regulatory provisions', which were enforced before they could be reviewed by the Constitutional Court, were in violation of the Constitution as 'legally speaking, the provisions of the Rules of Procedure of the Parliament are not regulatory acts'.⁶³ As discussed further below, in instances such as between 2006 and 2012 where the Speaker and the majority of the Bureau were sponsored by the presidential coalition, the presidential majority automatically resorted to the Constitutional Court to deal with any contradiction from minority parties within Parliament.

4.2.2 Law-making powers of Parliament

The law-making powers of Parliament include a wide range of issues. Such powers are also expanded by prerogatives to control the executive and the President. Law-making primarily falls within the powers of the National Assembly which also consents to taxes.⁶⁴ Ordinary legislation is adopted by a simple majority. Adoption of organic laws follows a more complicated procedure, is adopted by an absolute majority and may be promulgated after the Constitutional Court have declared them consistent with the Constitution.

The national budget is adopted through a finance bill according to the law. The bill is introduced no later than a week before the October session of Parliament. In case the Parliament has not adopted the bill by 31 December its provisions may be passed into law by ordinance. The Executive must however seek the ratification of such ordinances by the Parliament within 15 days of their signature. In such circumstances where

⁶¹ Loi no 98-013 relative à l'amnistie de certains faits commis entre 1990 et 1996 adopted on 20 February 1998.

⁶² DCC 98-039 of 1 April 1998.

⁶³ DCC 95-016 of 14 March 1995. For some other instances in which the Constitutional Court has declared provisions of the Parliament's Rules of procedure unconstitutional see DCC 95-010 of 13 and 14 December 1994 and 21 February 1995.

⁶⁴ Art 96.

the finance bill was not introduced for promulgation before the next budgetary year, the President of the Republic requests Parliament to implement incomes and expenditures by provisional ordinances named *douzièmes provisoires*.⁶⁵

4.2.3 *Parliamentary control of the Executive*

In the exercise of its control over the Executive, the National Assembly has several instruments at its disposal. These include interpellations, written questions, oral questions with or without debate followed with no vote, and parliamentary commissions of inquiry.⁶⁶

Experienced as one of the main control mechanisms, interpellation is used according to article 71. The President or any of his cabinet members may be called upon to provide explanation on on-going actions or projects implemented by the executive. The President is obligated to respond personally or instruct a minister to do so, the latter option being the most frequently used. Following the hearings, Parliament may take a resolution to make recommendations to the executive.

4.2.4 *Impeachment or dismissal of the President*

There is no specific procedure or mechanism in the Constitution for members of Parliament to impeach the President of the Republic. Members of Parliament may however initiate the dismissal of the President should they decide to have him investigated and tried by the High Court of Justice. This Court is provided under the Constitution to try the President and members of Cabinet for felonies, offences committed during or in the discharge of their function, and to try their accomplices in case of an attempt to threaten state security.⁶⁷ The decision of having the President investigated must be reached by a two-thirds majority vote of members of Parliament. Upon their indictment, the President or members of his cabinet are suspended. In case of conviction, they are dismissed.⁶⁸ As a general principle, the responsibility of the President is engaged in case of a felony, contempt to the National Assembly and attempt to honour and probity.⁶⁹ Each of these crimes is defined in the Constitution.⁷⁰

Members of Parliament enjoy parliamentary immunity and may not be investigated, wanted, arrested, detained or prosecuted for opinions or vote issued in the discharge of their duties.⁷¹ Exceptions are provided

⁶⁵ Art 111.

⁶⁶ Art 113.

⁶⁷ Art 136.

⁶⁸ Art 138.

⁶⁹ Art 73.

⁷⁰ Arts 74, 75 and 76.

⁷¹ Art 90.

under the Constitution. For instance, members of Parliament may, during parliamentary sessions, be arrested in criminal proceedings upon the authorisation of Parliament except in flagrant cases. Arrest may occur out of sessions, with the authorisation of the Bureau of Parliament except in flagrant or final condemnation. Any authorisation to detain or prosecute may be suspended by a two-thirds vote of members of the Parliament.⁷²

4.2.5 Presidential prerogatives erode Parliament's powers

While these powers are clearly delineated by the Constitution, they suffer direct interference from the President either under constitutional powers or by controlling other organs indirectly through appointments prerogatives afforded to him by the Constitution. One such prerogative that permits the President's interference with legislative powers of Parliament is 'article 66 powers' which are discussed later. The provisions allow the President to bypass Parliament and make the law under specific circumstances. The issue is that the provisions seem to be interpreted as enabling no control of the opportunity of recourse to those 'special powers'. Therefore, it has been used to circumvent Parliament rather than serve the purposes of emergency at which it was initially aimed.

Another way of interfering with legislative powers is the election of Parliament's Bureau which is supposed to be done according to the number of seats held by political parties and coalition of parties in Parliament. However, as discussed later, appointment powers of the President have been seen to be used in a way to control the Constitutional Court which has competence to settle disputes arising from the election of the Bureau and any other political matters within Parliament. Finally, the same means are used in practice to quash decisions made by the Parliament when they tend not to be in favour of the executive. While those manoeuvres constitute a violation of separation of powers and interference of the Executive in other powers, they seem to find a legal basis in constitutional provisions.

4.3 Judicial 'power' versus judicial 'authority'

The Constitution of Benin provides for a 'judicial power' (*pouvoir judiciaire*)⁷³ which includes ordinary courts and tribunals headed by two

⁷² Art 91.

⁷³ A whole title VI is devoted to the judiciary from articles 125 to 138.

highest institutions, the Supreme Court and the High Court of Justice.⁷⁴ As the Supreme Court has jurisdiction over administrative, criminal and financial matters, its decisions are final to the extent of their successful review by the Constitutional Court endowed with highest jurisdiction over constitutional matters and human rights. In other words, final decisions of the Supreme Court may be called to the scrutiny of the Constitutional Court should they be inconsistent with the Constitution or have the potential of infringing human rights.

In relation to the political branches of government both the Supreme Court and Constitutional Court play important roles. The Supreme Court is the constitutional legal advisor of the executive as it must issue an advisory opinion on any bill introduced by the executive and provide legal opinions on any legislation or international agreement projects upon the request of the President of the Republic. It also has jurisdiction over electoral matters for communal elections.

The Constitutional Court is endowed with much wider and stronger powers in relations to state governance. First it hears all matters related to the functioning of and relationships between state organs. Second, it has jurisdiction over cases of human rights violations and thus may control the constitutionality of all acts, decisions, and actions of the executive, parliament and the judiciary. Third, all disputes between branches of government fall within its jurisdiction including organisation, appointment, designation article proceeding from the functioning of Parliament, the executive and the judiciary. Last, the Constitutional Court also has jurisdiction over disputes arising from presidential and parliamentary elections.

Although established under a separate chapter in the Constitution, the Constitutional Court of Benin has played a central role in the political organisation in Benin. Over the years since 1993, it has shaped both the functioning of state organs and the political landscape especially through a close scrutiny of Parliament. In the recent years, the Court has however faced strong criticism due to the increased distrust in some of its decisions. Some of its members had prior to their appointment openly campaigned for the President of the Republic or even run for legislative election under the banner of the coalition of political parties which support the President.

⁷⁴ Constitutional provisions are completed by the following legislation on the judiciary: *Loi* no 2001-37 of 27 August 2002 on the organisation of the judiciary in Benin; *Loi* no 2004-07 of 23 October 2007 on the composition, organisation, functioning and competences of the Supreme Court; *Loi* no 2004-20 of 17 August 2007 on the rules of procedure applicable before the judicial sections of the Supreme Court and the Organic law on the judiciary. The 2002 Act brought significant changes in the judicial scheme which provided only height courts to cover the whole country since independence in 1960. The new law created 28 first instance tribunals and three appeal courts in Cotonou, Abomey and Parakou respectively in the south, centre and north of the country. According to the law, administrative, criminal and financial chambers are instituted at all three levels of the judicial system.

Whether potential influence may be avoided goes back to the possible influence of the President's appointment powers on the independence of Constitutional Court judges.

5 Challenges brought by the Constitution in action

5.1 Blurring boundaries to separation of powers: Executive's supremacy

5.1.1 Are 'article 68 powers' immune from jurisdiction?

The President's power to issue special measures has been at the heart of disputes with other branches of the state. Under article 68 of the Constitution, the President of the Republic may 'issue exceptional measures required by the circumstances without the citizens' constitutional rights being suspended'. The main condition is for the circumstances to include 'when institutions, the nation, the territory, execution of international commitments, functioning of public institutions are threatened or interrupted'. Presented with a petition challenging abuse of presidential special powers, the Constitutional Court held in the *Discretionary Recourse to Article 68 Powers* case⁷⁵ that recourse to article 68 powers constitutes 'a discretionary act of the President, ... an act of government which may not be subject to constitutionality check except as to the forms in which it was exercised'. Such a pronouncement suggests an absolute immunity from jurisdiction as long as the powers are exercised within the forms prescribed by the Constitution. Considering that article 69(2) of the Constitution further provides that the Parliament will determine the period within which the President may use article 68 powers, the Court has later held in the *Limitations to the Use of article 68 Powers* case⁷⁶ that since the President of the Republic concentrates so much power in the considered period, such powers must be exercised within the realm of article 69. The objective of article 68 powers has also been specified by article 69(1). The provision reads that 'measures issued must be inspired by the purpose to quickly provide public and constitutional institutions the means to discharge their duties'.

Recourse to article 68 powers has raised political tension as its use was perceived as a window for the executive to circumvent the legislature's power to control executive actions. Under the 1990 Constitution, all three presidents have had recourse to article 68 powers. They were used either to pass the national budget or to authorise loans despite the opposition of the majority of the day which was hostile to the executive. Opposition grew stronger since 2007 with the systematic use of article 68 powers which

⁷⁵ DCC 27-94 of 24 August 1994.

⁷⁶ DCC 96-023 of 26 April 1996.

is perceived as an erection of the Constitutional Court into a legislator by the Executive. Benin's Parliament has made an effective use of its power and prerogatives to keep the executive under close check. Importantly, recourse to article 68 powers to circumvent parliamentary control has been fiercely fought by the National Assembly especially when the majority had shifted to opposition groups. One of the main cases arose during the summer of 1994 when Parliament rejected President Soglo's budget and passed a revised version that called for greater increases in wages and student grants. Determined to meet his commitments to the International Monetary Fund (IMF), President Soglo passed his budget version by an article 68 based decree.⁷⁷ The Speaker of Parliament challenged the presidential decrees in the Constitutional Court for violation of separation of powers as most provisions dealt with issues within the competence of the National Assembly.⁷⁸ Although the Court declined its competence to decide on presidential recourse to article 68, in the Discretionary Recourse to article 68 Powers case referred to earlier, it declared the decrees unconstitutional for failure to abide by the proper procedure.⁷⁹

5.1.2 *Independence of the Judiciary: How powerful is the 'judicial power'?*

The independence of the judiciary from the two other branches of the state is primarily secured by the Constitution which provides that the judiciary is independent from the executive and legislature.⁸⁰ Reinforcing the aforementioned provision, article 126 of the Constitution makes it clear that 'judges, in the discharge of their duty, are subject only to the authority of the law' and that they are 'irremovable'. However, in terms of article 127(1), the President is the guarantor of the independence of the judiciary. The French word used in the Constitution is not '*pouvoir judiciaire*', which is the equivalent of the judiciary, but '*justice*' which should rather be understood as the fact that justice is administered, or the proper functioning of justice as in the justice system.⁸¹ Article 127(2) seems to suggest that the President also sees to the independence of judges, as the provision expands that 'he [the President] is assisted by the *Conseil Supérieur de la Magistrature*'.⁸²

Read in the light of constitutionally enshrined separation of powers and independence of the judiciary, the mandate of guarantor should be

⁷⁷ President Soglo issued Decrees 94-001 and 94-002 of 1 August 1994. See Answers.Com 'Nicéphore Soglo' *Gale contemporary black biography* <http://www.answers.com/topic/nic-phore-soglo> (accessed 25 June 2012).

⁷⁸ Those included the determination of income and expenditure, taxes, which are primarily within the domain of legislature. See arts 96 and 98 of the Constitution.

⁷⁹ DCC 27-94 of 24 August 1994.

⁸⁰ Art 125(1).

⁸¹ This meaning seems to be reinforced by article 41 of the Constitution which provides that the President shall also be the guarantor of the national independence.

⁸² The *Conseil* is the equivalent of the Judicial Service Commission.

understood as a duty rather than a privilege allowing the President to interfere in the functioning of the judiciary. This was confirmed by the Constitutional Court's decision in the *Executive Suspension of Court Orders* case that a presidential decree suspending execution of court orders was in violation of the Constitution.⁸³ Such prohibition extends to the executive as a whole, including members of cabinet, as well as to the legislature. In the *Minister of Justice Interference with Correctional Services* case the Court thus held that an order by the Minister of Justice to unlock an inmate's cell constitutes an interference with the judiciary and a violation of the Constitution. In the *Public Prosecutor Interference with Court Proceedings* case, the Court similarly found a letter, from a public prosecutor implying observations and orders in civil matters pending before courts,⁸⁴ to be in violation of the Constitution.

The same seems to apply to the principle that judges may not be removed without the observance of a minimum procedure even in the exercise of appointment prerogatives by the executive. In that respect, the Court made it clear that the principle of immovability constitutes the key guarantee to the independence of judges, the final beneficiary of which is the litigant. More specifically, the Court stressed that the principle demands that judges are personally consulted on the position proposed and the place of appointment even in case of a promotion. A letter and decrees from the Minister of Justice which omitted to mention the proposed post were therefore declared in violation of the independence of the judiciary and of the Constitution.⁸⁵ As a consequence, in application of its precedent, the Court also declared unconstitutional the posting of a judge without his prior consent.⁸⁶

Similar principles have applied in respect of the appointment of judges as article 129 stipulates that the President appoints judges as proposed by the Minister of Justice upon the opinion of the Judicial Commission of the High Council of Magistracy, the body in charge of the recruitment, training, and career management of magistrates and judges. An issue has been raised of the legal nature of the Commission's opinion and at what stage of the process it must be requested. In the *Limitations to Presidential Appointment Powers* case,⁸⁷ the Court determined that the silence of the President must be considered as a refusal to follow the opinion of the Commission and that such refusal to appoint a judge in the Supreme Court is in violation of the Constitution. However, independence of the judiciary as thus upheld by the Constitutional Court does not resolve the issue raised by an unbalanced distribution of powers. This leaves open the question

⁸³ DCC 07-175 of 27 December 2007.

⁸⁴ DCC 00-005 of 26 January 2000.

⁸⁵ DCC 97-033 of 10 June 1997.

⁸⁶ DCC 06-063 of 20 June 2006.

⁸⁷ DCC 00-054 of 2 October 2000.

how the independence of the judiciary will resist the wide appointment powers of the President.

5.1.3 Independence threatened by executive appointment in highest judicial positions

Appointment powers vested in the President of the Republic by the Constitution leaves him or her with the legal tools to threaten the independence of judges. First, as mentioned earlier, members of the Supreme Court are appointed by the President. The professional career of judges from recruitment to retirement is mainly managed by the executive⁸⁸ and the budget of both the Supreme Court and Constitutional Court are concealed within the financial control of the Executive if not annexed to the general state budget. It must be pointed out that the procedure for appointment of judges is clearly provided for under the law and must meet minimum requirements such as experience, training, and age.

Second, three of the seven members of the Constitutional Court are appointed by the President of the Republic and the probability is high that all seven are eventually appointed with his political approval, recommendation or support.⁸⁹ It is so because, as referred to earlier, the coalition of political parties supporting the President secures the majority of seats in Parliament as a general practice if not all the time and by all means. Constitutional Court judges are appointed for no more than two terms of five years.

The President's appointment powers might be mitigated by the requirements for nomination to the highest judicial positions in Benin. The country has demanding requirements for sitting on the Supreme and Constitutional Court. For instance, the minimum experience to sit on the Supreme Court is 15 years. Although the appointment of judges is left to the Judicial Commission High Council of Magistracy, the body is headed by the President of the Republic. As for the Constitutional Court, it must be composed as follows:⁹⁰

- (i) three magistrates with a minimum of 15 years' experience;
- (ii) two legal experts, law professors or legal practitioners with a minimum of 15 years' experience; and

⁸⁸ *Loi No 2001-37 du 27 août 2002 Portant Organisation Judiciaire en République du Bénin* and *Loi No 2001-35 du 21 février 2003 Portant Statut de la Magistrature en République du Bénin*.

⁸⁹ Benin's experience confirms this, and in fact prominent members of the current bench happened to have run for parliamentary election under the banner of the incumbent presidential coalition.

⁹⁰ Art 115 (3).

(iii) two personalities of high professional reputation.⁹¹

Article 116 of the Constitution provides that the President of the Constitutional Court is elected by his or her peers among magistrates and legal expert members.⁹² Articles 133 and 134 make similar provisions as regards presidents of the Supreme Court and its chambers as well as members of the Court. The Constitutional Court was petitioned as to who is a legal expert or '*juriste de haut niveau*'. The Court answered that 'the legal expert must inevitably be a professor⁹³ or legal practitioner'. As Benin's experience has shown, despite the fact that judges appointed to the Constitutional Court were so far unquestionably well qualified, they have not shown enough boldness towards the executive. For instance, their timidity in asserting powers of injunction has given rise to the question whether the problem was with the absence of express provisions or the judges' loyalty to the President for appointing many of them and having an influence in the appointment of others with a pro-presidential Parliament majority.

5.1.4 May the executive suspend execution of court orders?

The *Executive Suspension of Court Orders* case⁹⁴ is certainly the best illustration of how separation of powers is perceived and should be interpreted depending on the branch of Government involved. In the early months following his inauguration in April 2007 the newly elected President sought to respond to pressing calls from the capital city electorate to freeze evictions of hundreds of suburb dwellers. Evictions were ordered by courts through proper process following proceedings initiated by land owners.

Without consulting with judicial authorities, the executive issued an order that all court proceedings as well as the execution of court orders pertaining to the enforcement of evictions be suspended. This led to an indefinite strike decreed by the Benin Magistrates' Union. Petitioned by a group of citizens, the Constitutional Court decided that the decision of the executive constituted a clear interference with and violation of the independence of the judiciary.

⁹¹ In practice, those personalities have always been chosen among top civil servants with more than 10 years' experience in the public service.

⁹² Art 116.

⁹³ In Francophone Africa, the title of professor is granted following successful participation in the notoriously selective exam organised by the *Conseil Africain et Malgache de l'Enseignement Supérieur (CAMES)*. Conditions to apply for such examination include holding a doctoral degree and having published a couple of articles in accredited journals.

⁹⁴ DCC 07-175 of 27 December 2007. This case could as well be named *Benin Magistrates' Union v Executive*.

5.1.5 *May the Constitutional Court make injunctions to the executive?*

There is no doubt that decisions of the Constitutional Court are final and binding on all state organs, individuals and non-state entities. Whether the parties in a particular case comply with such decisions is another issue altogether. So far, no particular issue has arisen in respect of individuals or private parties complying with the decisions of the Court. The same cannot be said of state organs. May the Constitutional Court make injunctions to the executive? On the one hand, it may be argued that the Court has lacked judicial activism while it has also missed the opportunity to use its constitutionality control powers vis-à-vis the executive to secure compliance with its decisions. On the other hand, the Court has adopted a restrictive construction of its adjudicatory powers under the Constitution, namely regarding the *res judicata* of its decisions.

One problem with the powers of Benin's Constitutional Court has indeed been whether the Court may issue orders or make injunctions when it has found state organs in violation of the Constitution or in case of non-compliance with its decisions. With regards to reparation of human rights violations, the Court has taken a progressive approach. Initially, the Court made it clear that it could not grant orders against the executive without breaching separation of powers as illustrated in a number of decisions starting with the *Constitutional Court Jurisdictional Limitations to Review Administrative Acts* case.⁹⁵ However, this position has evolved in subsequent decisions where the Court made pronouncements in the form of clear injunctions, for instance that the 'complainants *must* be reinstated',⁹⁶ thus making orders for the performance of specific actions, as was the case in the *Executive Non-Compliance with Constitutional Court Orders* cases, even without expressly indicating the addressee of such order.⁹⁷

The Constitutional Court seemed to have had a better compliance securing influence over Parliament. In most of the cases concerned, the Constitutional Court construed upon its constitutional role to maintain a smooth functioning of Government through a review of the actions of its organs. For instance, in the *Expedite Election of the Parliament Bureau* case, the Court held that multiple suspensions by the dean – the oldest sitting Member of the Parliament – during the election of the Bureau of the National Assembly were in violation of the Constitution. The Court thus ordered that 'the 'dean' [call] a meeting of Parliament and [proceed] to have the Bureau elected during the same session; failing which, the dean

⁹⁵ DCC 95-024 of 6 July 1995. See also DCC 95-029 of 17 August 1995; DCC 03-003 and DCC 03-004 of 18 February 2003; DCC 03-052 of 14 March 2003; and DCC 03-083 of 28 May 2003.

⁹⁶ Emphasis added.

⁹⁷ DCC 05-067 of 12 January 2005 and DCC 06-016 of 31 January 2006.

should be replaced by the next oldest [Member of the Parliament] until the process is completed within 48 hours of the decision'.⁹⁸ The decision was complied with. In 2004, the Court made a similar order when eight members of the Economic and Social Council decided to block the election of their bureau by boycotting the session. The Court ordered in DCC 04-065 that the session be called and elections be completed within 72 hours of its decision.⁹⁹ In 2008, the Constitutional Court also found Parliament's decision to postpone *sine die* the adoption of a bill authorising the executive to loan for coastal erosion projects, to be in violation of the Constitution.¹⁰⁰ After protesting that the decision breached separation of powers, Parliament eventually adopted the bill as prescribed by the Court in the *Limitations to Parliament Powers concerning the Adoption of Executive Bills* case.

5.1.6 *The High Court of Justice: A political tribunal?*

The *Haute Cour de Justice* (High Court of Justice) is mandated to prosecute the President of the Republic and members of the Cabinet for treason and other crimes committed during their term in office. The Court is composed of six Members of Parliament, all Constitutional Court judges except the President and the President of the Supreme Court. The issue with this Court lies in its very nature, as well as in its composition, competence and procedures. That the Court has faced difficulties in its functioning is an understatement. Since its inception and operation on 15 February 2001, Benin's High Court of Justice has failed to hear a single case, although not for lack of actual and potential opportunities to do so.

The first issue is the composition of the Court and the fact that referral is left exclusively to Parliament. Decisions to investigate and then indict must be reached by a two-thirds majority vote.¹⁰¹ One is therefore not surprised by the timidity of members of the executive and the legislature to expose their political allies and former colleagues to such a political tribunal. Four cases referred to the Court by President Yayi Boni's *régime du changement* between 2007 and 2011 were met with rejection among parliamentarians as the accused were former Members of Parliament or leaders of political parties who support the President.¹⁰²

⁹⁸ DCC 03-077 of 7 May 2003.

⁹⁹ DCC 04-065 of 29 July 2004.

¹⁰⁰ DCC 08-072 of 25 July 2008.

¹⁰¹ Art 137.

¹⁰² Afriqinfos 'Bénin: le dossier de poursuite d'un ancien ministre devant la haute cour de justice est rejeté par le parlement' <http://www.afriqinfos.com/articles/2012/5/24/benin-dossier-poursuite-dun-ancien-ministre-devant-haute-cour-justice-rejete-parlement-203014.asp> (accessed 21 June 2012) and Adjinakou 'Poursuite devant la haute cour de justice Nouveau casse-tête pour anciens ministres' <http://www.journal-adjinakou-benin.info/?id=4&cat=1&id2=9648&jour=03&mois=11&an=2011> (accessed 21 June 2012).

Another issue about the High Court of Justice is the process through which its members are designated. Besides the direct involvement of the President of the Republic in the designation, Members of Parliament have the power to barely refuse to refer cases to the Court or simply delay the designation of their representatives to the tribunal. For instance, between 2007 and 2009, Parliament delayed the designation of its members on the third batch of High Court of Justice judges for two years with no specific reasons.¹⁰³ Noteworthy, some sitting Members of Parliament at the time were targeted by the executive's application for referral. However, the dispute equally involved political representation within Parliament and the bid of long marginalised opposition groups to take their revenge on the presidential majority. The Constitutional Court was eventually called to settle the dispute in DCC 09-002, when it ordered Parliament to designate its representatives to the High Court of Justice within six days of its decision.¹⁰⁴

From a legal standpoint, the lack of a specific law for the High Court of Justice to operate effectively is compounded by the constitutional silence about who may apply to Parliament for referrals. One consequence is that the two initial cases of former ministers properly referred to the Court could not proceed due to legal technicalities. The other inevitable consequence is that the 'political tribunal' is turning into a political weapon that both the President of the Republic and Parliament are believed to use against opponents.¹⁰⁵ Due to the personal jurisdiction of the High Court of Justice, it may be assumed that referral lies with the President of the Republic as the head of the executive. The problem with this assumption is that the prerogative to move a political and economic crimes mechanism is left with those most likely to be probed.

5.2 Development and interpretation of the Constitution

As was discussed above, the Constitution of Benin provides for a separate Constitutional Court which is not under the judiciary. Therefore, constitutional review is the exclusive function of the Constitutional Court although, as explained earlier, nothing in the Constitution or other laws prevents ordinary courts from hearing matters on breach of constitutional provisions and applying provisions of the Constitution.

¹⁰³ P Zinsou-Ply 'Bénin: Désignation des représentants du parlement à la Haute Cour de justice – Une 6ème session extraordinaire se négocie' 27 Septembre 2007 <http://fr.allafrica.com/stories/200709280692.html> (accessed 21 June 2012).

¹⁰⁴ DCC 09-002 of 8 January 2009.

¹⁰⁵ All Africa 'Bénin: Adihou devant la Haute Cour pour avoir osé insulter les députés' 19 July 2006 <http://fr.allafrica.com/stories/200607190590.html> (accessed 11 July 2012). The case involved former minister of relations between the institutions and education in the Cabinet of President Mathieu Kérékou. The minister was released after a three-year remand without being charged.

Both the exclusivity of jurisdiction granted by the Constitution and the self-restraint adopted by ordinary courts with respect to the competence of the Constitutional Court have asserted the Court as the central body of Benin's constitutionalism. Since 1993, the Court has decided hundreds of cases on the breach of fundamental rights and freedoms but also on other matters mainly concerning power regulation between state organs. Some of these cases are worth examining for their significant bearing on constitutionalism in Benin.

5.2.1 Candidates to Presidency must 'reside at the time of the election'

Article 44 sets six main eligibility conditions for presidential candidates.¹⁰⁶ The condition which has attracted most political suspicion is probably that of six-month residence 'at the time of the particular election'. The Constitutional Court was called to determine the 'time of the election' on two occasions in 2006 and 2011. In EL-P 06-002, the petition was submitted before the publication of the final list of candidates and was thus declared premature.¹⁰⁷ Upon publication of the list, a new petition on the same issue in EL-P 06-014 was rejected for lack of standing.¹⁰⁸ The Court seemed to have resolved the issue while checking the constitutionality of the 2005 Code for presidential elections in which Parliament defined 'the time of the elections' as the period running from the inauguration of the Electoral Commission to the proclamation of the final results.¹⁰⁹ In DCC 05-069, the Constitutional Court held that 'by determining the period as set in the law, law-makers have set a supplementary condition relating to the duration of residence' while the only condition set by the Constitution is the one of residence.¹¹⁰

An informed observer of Benin politics could well argue that the whole dispute was about the high chances of an outsider in the 2006 presidential election, a candidate viewed with great sympathy by the electorate but whom veterans generally disliked. The spirit of the condition seems to be that candidates to the highest political and public position in a country are expected to have a sound and grounded knowledge of realities on the ground. As far as constitutional development is concerned, it is re-assuring to note that the Court has respected what has now become a 'public interest' precedent. In the 2011 presidential election, the Court authorised the candidature of a non-resident national in the same circumstances as in 2006. By adopting such a position, the Court has upheld equality and

¹⁰⁶ These are: nationality, morality, civil and political rights, age between 40-70 years, residence 'at the time of election', and physical and mental health.

¹⁰⁷ Decision EL-P 06-002 of 19 January 2006.

¹⁰⁸ Decision EL-P 06-014 of 28 February 2006.

¹⁰⁹ Art 5 of the Loi No 2005-26 portant règles particulières pour l'élection du Président de la République.

¹¹⁰ DCC 05-069 of 27 July 2005.

belied public perceptions that it had interpreted the rule to serve a particular candidate in 2006.

5.2.2 Role of armed forces and their involvement in the management of elections

Arguably because Benin has experienced frequent incursions of the military in the political arena in the past, specific reference to this section of society has been limited if not avoided under the new constitutional order.

In turn, both positive and negative behaviour is required from the armed forces. For instance, the punishment of any ‘agent of the state’ found guilty of acts of torture and degrading treatment¹¹¹ applies to the armed forces not only as a punishment but as a proscription. This implies responsibility and penal sanction although these have not been used consistently against numerous members of the armed forces found in violation of human rights by the Constitutional Court. Equally, the fact that ‘any person or agent of the state is released from the duty to obey where the order constitutes a grave attempt to human rights and public freedoms’¹¹² is a supreme obligation on armed forces.

One of the very few times the word ‘military’ is mentioned in the Constitution is in article 34, which makes it a ‘duty for all citizens, civilians and the military to respect the Constitution and constitutional order in all circumstances’. Such a duty is arguably mostly directed at armed forces given the history of Benin, but also recent instances of power seizure by the military through unconstitutional means in Africa. It is also an expression of constitutional supremacy over armed forces in a rule of law context. As a consequence, the Constitution also prevents members of the armed forces from standing for elective positions,¹¹³ or sitting in the cabinet,¹¹⁴ unless they have retired or resigned well ahead of the considered election.¹¹⁵

This prohibition is emphasised by the most express negative obligation on the armed forces. In terms of article 65, ‘any attempt by armed or public security forces to overthrow the constitutional order shall be considered as a treason-felony and a crime against the Nation and the state and shall be punished according to the law’. To secure the effectiveness of this provision, the Constitution makes it both a right and a duty to ‘constitutional organs’ for recourse to ‘all means, including military

¹¹¹ Art 19(1).

¹¹² Art 19(2).

¹¹³ Art 51, they cannot stand for presidential elections.

¹¹⁴ Art 54(4).

¹¹⁵ Art 64(1). The time frame within which such resignation should be filed is determined by the law.

cooperation or defence agreements' in instances of a *coup*.¹¹⁶ For citizens, 'it is also the most sacred of all rights and most imperative duty to disobey and organise to oppose the illegitimate authority'.¹¹⁷

The clearest illustration of the option to keep armed forces out of public and political affairs is in article 63 which provides that 'the President of the Republic may ... involve the army in the economic development of the nation and any other work of public interest as determined by the law'. This implied role of the army has developed in many ways in Benin, especially since the 1990s. The '*génie militaire*' are renowned for their high standards in public works, for example the construction of roads, schools and health centres.

The military have also been involved in the transportation of electoral equipment which led to a public debate on the independence of the Electoral Commission. On such involvement of the army in 2007 parliamentary election, the Constitutional Court re-affirmed the independence and administrative autonomy of the National Autonomous Electoral Commission.¹¹⁸ However, the court avoided a clear declaration that such involvement was unconstitutional and violated separation of powers and had the potential of the executive interfering with the mandate of the Electoral Commission. Called on to confirm its precedent during 2010 parliamentary election, the Court threw out the application on the basis that its previous decision on the matter was final.¹¹⁹ The army eventually got involved in the process at least to some extent, although amid suspicious circumstances and under tight scrutiny of civil society organisations and opposition parties. The main argument of the executive was the outrageous cost of elections in Benin. For opposition parties and civil society, the issue was the overly strong influence of the Executive on the army, the chief of which is the President. The issue might also be the civilians' distrust for Benin's army which has been too present in the country's public life in the recent past.

5.2.3 *Controversial principes à valeur constitutionnelle*

The *principes à valeur constitutionnelle* are those that are considered to be so central to the supremacy of the Constitution that their amendment or infringement would amount to threatening the survival of the whole Constitution. Therefore, they ought to be amended or revised only through a popular consultation or with the involvement of all branches of government under the most demanding conditions. The principles are formulated from cases in which the Court is called to regulate the

¹¹⁶ Art 66(1).

¹¹⁷ Art 66(2).

¹¹⁸ EL 07-001 of 22 January 2007.

¹¹⁹ DCC 10-116 of 8 September 2010.

functioning of state organs, and precise or complement specific provisions of the Constitution. Most of the cases are concerned with keystones of Benin's constitutionalism.¹²⁰

5.2.3.1 Amendment of the Constitution

Similar to other constitutions, Benin's Constitution of 1990 may under certain conditions be amended. What the fundamental law does not say is whether 'non-consensual' revision is in violation of the spirit of the Constitution. The Constitutional Court of Benin has responded to this uncertainty by carving consensual revision in the textual stone of the Constitution. In 2006 and 2007, the Court dismissed unilateral attempts at amending the Constitution on the grounds that the fundamental law had been adopted by the people through a national consensus reached at the 1990 National Conference. The landmark decision of the Constitutional Court in that regard is the *Amendment of the Constitution by Parliament* case, referred to earlier, where the Court held that such national consensus had become a *principe à valeur constitutionnelle* which ought to take precedence over any amendment of the Constitution. The case concerned an amendment effected by Members of Parliament behind closed doors to extend their term of office from four to five years. In the view of the Court, the principle of 'national consensus' was adopted by the February 1990 National Conference which also gave birth to the December 1990 Constitution; and any amendment of the Constitution should follow the public and open process adopted by the Conference. The Court thus declared the term extension contrary to the Constitution.

Issues surrounding the revision of Benin's 1990 Constitution have evolved beyond just how amendments must be undertaken. In fact, the issue in the first place was whether the Constitution should be amended at all, especially just to serve personal political purposes and ambitions. Civil society and the Constitutional Court initially fought so called opportunistic amendments in 2006 and 2007. The 'Do Not Touch My Constitution' social movement, which was launched as early as in 2004, led to a country-wide rejection of any revision in 2006, the final year of former President Mathieu Kérékou's second term under the democratic regime. Social uprisings led the Constitutional Court to decide in DCC 05-139 and DCC 05-145 that the economic arguments used to seek amendments of the Constitution and extend presidential terms were not constitutionally justified. Subsequent developments around the constitutional revision project 'officially' launched in 2008 attest to the

¹²⁰ R Dossou 'La Cour Constitutionnelle du Bénin: l'influence de sa jurisprudence sur le constitutionnalisme et les droits de l'homme' Paper presented at the World Conference on Constitutional Justice, Cape Town (23-24 January 2009) 10-12. Advocate Dossou is an experienced lawyer, former President of Benin's Bar, Law Professor and the current President of the Constitutional Court of Benin.

importance of the position of the Constitutional Court regarding opportunistic amendments of the supreme law of the land.

5.2.3.2 Political ‘majority – minority’ principle

This principle was developed by the Court in a dispute between the executive and Parliament about how political forces should be represented in the Bureau of Parliament and its commissions. In 2009, the Court decided that the political minority is entrusted with rights in Parliament since the principle of ‘the winner takes all’ is not acceptable in a democratic society. It thus raised the rights of the political minority, which it defines as the party or coalition of parties with the least number of members in Parliament, as a *principe à valeur constitutionnelle* in the Political Minority Rights case.¹²¹ At the time of the decision, Constitutional Court judges were believed to be favourably disposed towards the coalition of political parties supporting the incumbent President of the Republic which had just lost the majority of seats in Parliament.

Unfortunately, the same bench of the Court declined to stick to its precedent two years later under the same circumstances, after the presidential coalition had re-secured the majority in Parliament. In 2011, the Court held in the *Proportionality of Right to Political Representation in Parliament* case that proportionality must be determined *in casu*, and the majority-minority notion must be ‘enlightened’ by the *summa divisio* presidential coalition versus opposition.¹²² This inconsistency led parliamentary opposition – the minority of the day – to blame the constitutional tribunal for devaluating the minority principle to the rank of a *principe à géométrie variable*.¹²³

The move of the Constitutional Court to flesh out the right to political representation in Parliament seems to have caused more problems than it was initially purporting to resolve. Previously, the Court had consistently held, starting from the *Discretionary Parliament Internal Affairs Powers* case,¹²⁴ that Parliament has discretionary powers to decide how its internal elections should be conducted, as long as the ballot is secret and candidates are Members of Parliament. Changing constructions of the Constitution on grounds that are or are perceived to be political may attract the risk of legal and constitutional insecurity. It also has the potential of diminishing citizens’ trust in the Court and the constitutional system as a

¹²¹ DCC 09-002 of 8 January 2009.

¹²² DCC 11-047 of 21 July 2011.

¹²³ The term is used to mean ‘a principle that changes according to the minority or the majority of the day’. Arguably, the principle that majority should not take all was afforded constitutional value by the Court, members of which are believed to be favourable to the executive, which did not have majority in Parliament at the time of the decision. The principle was overturned by the same Court after the same presidential coalition had recovered the majority of seats in Parliament.

¹²⁴ DCC 03-168.

whole. Opposition groups have indeed fiercely criticised the Court for trespassing on the legislature's domain by forcing and basically dictating how the Bureau of the Parliament should be composed.

However, one should embrace caution in a critical analysis of what may well be termed 'political question' cases. The Constitutional Court of Benin had already in 2000 considered political representation and participation as central to pluralist democracy as well illustrated in DCC 00-078. The same concern has led the Court to emphasise the need for pluralist democracy to 'combine political configuration, equity and proportionality' while dealing with representation in any organ established by virtue of the Constitution including National and Departmental Electoral Commissions as was the case in DCC 01-011. More recently, the Constitutional Court has clarified how political parties should be represented in various organs and bodies by elaborating upon its longstanding precedent in DCC 09-002. This decision of the Court is also important in strengthening Benin's democracy as it clearly differentiates between political parties with very few seats and the political coalition which does not have the majority of seats, namely the main political opposition group in Parliament. It is understood that the purpose of the political opposition group in Parliament is to criticise the policies of the executive and propose viable political alternatives.

5.2.4 Interpretation of human rights provisions

Perhaps due to the fact that violations of fundamental rights were frequent in the era preceding the operation of the 1990 Constitution, human rights cases have stolen the lime-light in constitutional litigation. How the Constitutional Court adjudicated some of those issues is therefore of interest.

The Constitutional Court has lacked judicial activism with regard to the protection of the right to life. In the *Constitutionality of the Death Penalty with Unqualified Right to Life* case the Court had to determine whether the provision for the death sentence in article 381 of Benin Criminal Code was in violation of the right of the human person's inviolability and the right to life in Benin's Constitution.¹²⁵ The Constitutional Court answered in the negative.¹²⁶ The Court took the position that there is no express or implicit abolition of the death penalty and concluded that the unqualified constitutional right to life cannot in itself have the consequence of rendering the death penalty provision in the criminal law inconsistent with the Constitution. The argument was that the death penalty is constitutional as long as it is not arbitrary, that it is imposed in accordance with the criminal law. In the subsequent *Preventive Constitutional Review of Death*

¹²⁵ Arts 8 and 15.

¹²⁶ DCC 99-051 of 13 October 1999.

Penalty case,¹²⁷ decided the same year, the accused persons approached the Constitutional Court as they were likely to be sentenced to death by the Assize Court, which they were due to appear before. The Constitutional Court merely confirmed its precedent. Considering its express human rights mandate and related powers, the Constitutional Court ought to have advanced the constitutional right to life by setting a more progressive precedent for other courts, namely the Supreme Court.¹²⁸ In the light of the incorporation of the African Charter in Benin's Constitution, the 'death penalty free' provision for the right to life in the Charter,¹²⁹ and the jurisprudence of the African Commission¹³⁰ should have also informed the Constitutional Court's decision.

However, the Constitutional Court finally succeeded, by means of a *contrôle de conventionnalité* to achieve what it had failed to do through a *contrôle de constitutionnalité*. Constitutional review is traditionally meant for the Constitutional Court to test the conformity of municipal law with the Constitution. The question is whether the Court may check the conformity of municipal law with an international instrument in the absence of express constitutional powers to do so.¹³¹ In 2012, Benin's Constitutional Court responded positively in the *Constitutionality of Death Penalty with International Abolition Obligations* case¹³² by declaring the death penalty provisions of the Criminal Code of Procedure in violation of article 147 of the Constitution which provides that international law has precedence over municipal law. In the opinion of the Court, any municipal provision that refers to the death penalty is henceforth contrary to article 147 of the

¹²⁷ Of 29 December 1999.

¹²⁸ In the *Azonhito* (death penalty) case, the Supreme Court took the view that the provision for the right to life in the ICCPR did not amount to abolition of the death penalty. Counsel for the application did not make any reference to either the unqualified constitutional right to life, article 4 of the African Charter or the jurisprudence of the African Commission. Given the precedence of the Constitutional Court, it may be argued that the Supreme Court would not have withheld such arguments in any case. See *Azonhito and Others v Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000), 29 September 2000. For the full judgement and analysis on the case, see H Adjolohoun 'Analysis of the case of *Azonhito and Others v Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000)' in *International Law in Domestic Courts* http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-1028bj00&recno=4&module=ildc&category=Benin (accessed 28 February 2012).

¹²⁹ Unlike the ICCPR, the African Charter, which is annexed to the Constitution of Benin, makes no reference to the death penalty thus not allowing the imposition of the sentence as an exception to the right to life.

¹³⁰ For instance in *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003), the African Commission took a contrary view to Benin's courts. One should note that none of the Constitutional and Supreme Court in Benin has used the jurisprudence of the African Commission in the numerous human rights cases they adjudicated.

¹³¹ Before it was vested with express powers to undertake constitutional review by the 2008 reform in France, the French Constitutional Council had consistently refrained from checking the constitutionality of domestic law with an international instrument. The landmark decision in this regard relates to the Veil Act and was rendered on 15 January 1975. Ordinary courts filled in the gap by undertaking such review starting with the criminal judge move in the *Jacques Vabre* case of 24 May 1975. The administrative judge subsequently asserted jurisdiction later in the *Nicolo* case decided on 20 October 1989.

¹³² DCC 12-153 of 4 August 2012.

Constitution as Benin had just ratified ICCPR's Second Optional Protocol on 5 July 2012. Although some have challenged its power to undertake such a review,¹³³ it is believed the Court is filling a gap until the on-going process to amend the 1990 Constitution to include the abolition of the death penalty is completed.¹³⁴

The contribution of the Constitutional Court to the improvement of police practices and judicial proceedings is also worth noting. For instance, the Court has made a purposive construction by borrowing from the work of United Nations treaty bodies in cases of cruel, inhuman and degrading treatments. In several instances, starting from DCC 98-065, the Court consistently held that in deciding whether violations have occurred, focus should be placed on intention, effects and duration of the treatment.¹³⁵ With regards to the constitutional obligation for courts to complete proceedings within a reasonable time, the Constitutional Court has, right from DCC 03-119, set the factors of reasonable time as depending on the 'circumstances of the case, complexity and multiplicity of procedures, the applicant's behaviour and the behaviour of jurisdictional authorities'.¹³⁶ In other instances, the Court found undue delay in processes where a 'flagrant case' lasted fourteen months;¹³⁷ no decision was reached in fourteen-year first instance proceedings,¹³⁸ or where criminal proceedings have been on for twenty years without an outcome.¹³⁹

Other important constitutional human rights to the development of which the Constitutional Court has greatly contributed are equality and non-discrimination. In DCC 96-067, while deciding a labour case, the Court defined equality as 'a general principle according to which the law must be the same for all and must not include any discrimination that is unjustified' thus concluding that 'persons of the same category must be treated alike with no discrimination'.¹⁴⁰ It was no surprise that when reviewing Benin's 2004 Family Code, the Constitutional Court held in the *Unconstitutionality of Polygamy* case that 'there is unequal treatment between men and women in that the option provided under article 143(2)

¹³³ I Salami 'La mort de la peine de mort au Bénin' Conference paper on file with author (October 2012). Also available at <http://www.lanouvelletribune.info/index.php/reflexions/opinion/12563-la-mort-de-la-peine-de-mort-au-benin> (accessed 23 October 2012).

¹³⁴ Decree No 2009-548 of 3 November 2009 of the President of the Republic transmitting the amendment bill to Parliament.

¹³⁵ DCC 98-065 of 5 August 1998, DCC 99-011 of 4 February 1999, DCC 03-088 of 28 May 2003, DCC 96-084 of 13 November 1996 and DCC 98-100 of 23 December 1998.

¹³⁶ DCC 03-119 of 28 August 2003 and DCC 03-167 of 11 November 2003.

¹³⁷ DCC 97-006 of 18 February 1997. According to the relevant provisions of the criminal code of procedure, a 'flagrant case' or those in which the offender is 'caught in the act' are dealt with under a more expedited procedure than other cases. See arts 19, 20, 27, 40, 48-75 of Benin's new Code of Criminal Procedure, Loi n° 2012-15 portant code de procédure pénale en République du Bénin, of 30 March 2012.

¹³⁸ DCC 97-011 of 6 March 1997.

¹³⁹ DCC 03-144 of 16 October 2003.

¹⁴⁰ DCC 96-067 of 21 October 1996.

of the Code, allows the man to embrace polygamy while the woman may only be monogamous'.¹⁴¹ In 2009, the Court took the same approach to discrimination as unjustified differentiation. In this case, the Court declared articles 333 to 336 of the Criminal Code unconstitutional for providing that the adultery of a man is constituted only when committed in the marital home while the adultery of a woman was constituted wherever it took place.¹⁴² The Court however allowed positive discrimination when it held in DCC 01-005 that 'the law-maker may derogate the principle of equality for persons with disabilities concerning public service regulations for reasons relating to public interest and the continuity of the public service ... provided that specific measures are undertaken to their benefit'.¹⁴³ In DCC 12-106, decided in 2012, the Constitutional Court confirmed its precedent on non-discrimination and found discriminatory the decision of the Ministry of Labour to reject the visually impaired complainant's application to the magistracy entrance exam. The Ministry had justified its decision by the fact that the positions were not accessible to candidates who use brail.¹⁴⁴

It transpires from the foregoing that Benin has opted in its Constitution of 1990 for a typical form of constitutionalism. While the 1990 Constitution provides for a strong guarantee of fundamental rights and power sharing mechanisms between the three traditional powers of state – the executive, legislature and judiciary – the peculiarity of Benin's constitutionalism lies in the distribution of power among these organs. In practice, the constitutional superiority of the executive, namely the President of the Republic, over the legislature and judiciary, has been used as a means of circumventing checks and balances institutions. As seen earlier, the Constitutional Court, the Union of Magistrates and opposition led majorities in Parliament have acted effectively as checks and balances bodies between the operation of the Constitution and 2006. However, the presidential coalition that took power in 2007 brought about an express will to legalise *presidentialism* through constitutional revision.

As opposed to real problems emerging from more than two decades of constitutional practice, the circumstances surrounding various attempts to revise the Constitution right from 2004 have triggered country-wide anti-revision movements based on the suspicion that revision will open a Pandora's box. Most feared amendments relate to provisions on the presidential term and age limits, but the 2009 Executive Amendment Bill has made it clear that the proposed erosion of legislative and judicial powers to reinforce the executive is also problematic.

¹⁴¹ DCC 02-144 of 23 December 2002.

¹⁴² DCC 09-081 of 30 July 2009.

¹⁴³ DCC 01-005 of 11 January 2001.

¹⁴⁴ DCC 12-106 of 3 May 2012.

6 Dilemmas of whether, when, what and how to revise

As mentioned earlier in the introduction to this chapter, the main concern of the Benin 1990 National Conference delegates was to provide the country with a Constitution that announces in no uncertain terms to the people and Government: 'Never again shall we live these 18 years of dictatorship and ban of freedoms'. This explains the fact that in response to the problems that objectively arose in the early years of Benin's new constitutionalism, as exemplified above by jurisprudence, all actors consistently rejected the proposed revision. The subsequent anti-revision movement born in 2004 has however not eroded the actual need to avoid breaching the contract by fear of not amending it. As discussed below, the debate has moved from whether and when to revise, to what and how to revise.

6.1 'Do not touch my Constitution': Opportunistic or progressive revision?

Whether the 1990 Constitution of Benin should be revised at all has first been an elitist debate that begun in 2003, or even earlier, and was restricted to political and intellectual circles. At that stage, only minor issues such as bringing the supreme law in line with regional community regulations were at stake. Even if the country's electoral system had already experienced deadlocks due to the vagueness of some provisions of the Constitution as mentioned earlier, the revision debate grew in momentum as the stakes grew higher.

The year 2004 witnessed two major events. Two senior members of Benin politics, presidents Nicéphore Soglo¹⁴⁵ and Mathieu Kérékou,¹⁴⁶ were due to retire for constitutional ineligibility as they had both either exhausted the two five-year terms allowed¹⁴⁷ or passed the 70-year age threshold.¹⁴⁸ According to the Constitution, both presidents were therefore out of the race for the 2006 presidential election.

Two years before the election, fierce battles opposed various dauphins of President Kérékou and many of his ministers increasingly agitated the revision of either term or age limits. A first attempt consisted in creating

¹⁴⁵ Who was prime minister of 1991 transition government led by Mathieu Kérékou and president between 1991-1996. He failed to secure a second five-year term in the 1996 election in which he lost to Mathieu Kérékou.

¹⁴⁶ Who was president between 1972-1991 and came back in 1996. He obtained a second and last term until 2006.

¹⁴⁷ Art 42 of the Constitution provides that no president can run for more than two five-year terms in all.

¹⁴⁸ Art 44.

fear among the people by using the slogan 'after and without Kérékou, there will be chaos'. One of the arguments presented the Northern leader as the only president who had the capacity to keep the country together and to effectively handle the North-South divide. Some proponents have gone as far as suggesting him as a 'God sent' or 'God elect'¹⁴⁹ and that not even constitutional term limits could prevent him from staying if he wished to. Kérékou's Minister for Energy's declaration that 'power proceeds from God and that Kérékou is God elect' was then rightly associated with the late Togolese president General Gnassingbé Eyadéma's statement that 'I have always asked God to remove me from power if I do wrong; and let me stay if he deems my governance right'.¹⁵⁰

While President Kérékou cautiously refrained from making his position known in public and left such indirect pro-revision propaganda to his ministers, he could not circumvent the March 2006 electoral *rendez-vous*. Faced with the country-wide 'Do Not Touch My Constitution' movement, Kérékou's revisionists changed tactics arguing that the executive lacked financial resources to organise the election and that in fact, presidential, legislative and communal elections should be merged for cost effectiveness. More clearly, the executive merely refused to avail funds for the Electoral Commission to ensure registration of voters and subsequent steps of the process.¹⁵¹

Two subsequent landmark civil society initiatives confirmed Benin as the 'laboratory of democracy in Africa',¹⁵² despite the huge controversy raised in the aftermath of the 2006 presidential election. In response to Kérékou's succession battle and revision propaganda, civil society coalition ELAN launched a country-wide campaign named *Touche Pas Ma Constitution – Do Not Touch My Constitution*. The main objective was to 'raise awareness among citizens about the lurking dangers of a constitutional revision before the 2006 presidential election considering the socio-economic context of the country'.¹⁵³ Although Kérékou's coalition renounced a direct term extending revision, the country is yet to

¹⁴⁹ P Noudjènoumè *Cours de philosophie du droit* INIREF (ed) (2004) and Les chroniques de TLF 'Il ne sait pas quitter les choses le Général, les choses vont mal le quitter' <http://chronique.blessnet.com/index.php?blog=9&p=104&more=1&c=1&tb=1&pb=1> (accessed 21 March 2012).

¹⁵⁰ As quoted from Noudjènoumè as above 3.

¹⁵¹ 'Le Président Kérékou manœuvre-t-il réellement pour repousser l'élection présidentielle de mars prochain?' Africa Time http://www.africatime.com/benin/sondage.asp?UrlRecherche=archiveasp%3Frech%3D1%26no_pays_sondage%3D1%26IsAfrique%3DFalse%26pageno%3D&no_sondage=369&result=1 (accessed 21 March 2012).

¹⁵² LMK Tshitenge 'Bénin : ébullition dans le laboratoire de la démocratie' in *Jeune Afrique* of 25 March 2010 <http://www.jeuneafrique.com/Articles/Dossier/ARTJAJA2567p038-041.xml0/pauvrete-democratie-independance-nicephore-soglobenin-ebullition-dans-le-laboratoire-de-la-democratie.html> and Slate Afrique 'Bénin, une démocratie qui marche' <http://www.slateafrique.com/215/benin-democratie-liberte-expression-electons> (accessed 21 March 2012).

¹⁵³ 'Campagne de sensibilisation: Touche Pas Ma Constitution' <http://fr.ongelan.org/content/view/full/5/> ELAN (accessed 21 March 2012).

face an alternative play through which revisionists sought to use the economic argument to hijack the electoral process. The economic argument was not ill-founded¹⁵⁴ but pro-revision precedents of the Kérékou coalition left non-governmental actors suspicious.

The second initiative was launched with litigation in the Constitutional Court where two citizens asked the Court to declare the executive in violation of its duty to provide the *Commission Electorale Nationale Autonome (CENA)* with the necessary funds to organise the election. In DCC 05-139, relying on article 114 of the Constitution, the Court asserted its jurisdiction to regulate the smooth functioning of state organs and concluded that it had the duty to prevent a national crisis that would ensue from the paralysis of the proper operation of public institutions.¹⁵⁵ Finding the Executive in violation of the Constitution, the Court therefore ordered that it availed all necessary means to the *CENA*, in the 24-hours of the decision, for the election to be held before the end of the on-going term of the incumbent President.¹⁵⁶

As the executive refused to comply three weeks after the decision of the Constitutional Court, three citizens approached the Court seeking a non-compliance declaration and contempt order. In DCC 05-145,¹⁵⁷ the Court held that 'decisions of the Court are final and bind public powers, civilian, military and judicial authorities'. The Court thus found the executive in violation of that provision but also in non-compliance with the 'obligation for a public organ or official to discharge a public duty with consciousness, competence, devotion, and loyalty in the public interest' as prescribed by article 35 of the Constitution.

Once again, civil society's intervention supported by donors had been scheduled to save Benin's democracy. Along with litigation, civil society groups had organised a national trust fund calling on citizens to contribute cash to the budget of the *CENA*.¹⁵⁸ Benin is remembered for its motor-taxi drivers switching their motorcycles' light to substitute power-cuts allegedly organised by the incumbent political coalition to rig election in the darkness of voting stations. One should also recall that it is now a well-established practice for the same taxi men to escort electoral commission's cars as they transferred results to the headquarters of the *CENA*, to

¹⁵⁴ The *CENA*'s budget had increased from US\$3,6 million in 1996 and US\$14,5 million in 2001, to US\$26 million in 2006 for presidential elections. For legislative elections the figures increased from US\$2,4 million in 1995 and US\$7,5 million in 1999, to US\$14 million in 2003.

¹⁵⁵ DCC 05-139 of 17 November 2005.

¹⁵⁶ While members of the Electoral Commission were sworn in on 25 September 2005, the *CENA* was yet to receive any funds from the executive on 17 November 2005. The last constitutional term of the incumbent President was due to end on 6 April 2006 at midnight.

¹⁵⁷ DCC 05-145 of 1 December 2005.

¹⁵⁸ Some calculations suggested that even a CFA 1000 (US\$2) contribution by each of the then 8 million Beninese would have provided more than what the Commission needed.

guarantee the integrity of the elections.¹⁵⁹ The peculiarity of civil society's recourse to public trust funds as a pressure mounting tool was to have increased costs of non-compliance by asking donors to directly provide for whatever material the *CENA* needed.¹⁶⁰

The fact that the executive eventually released the budget demonstrated that it had acted in bath faith all along. The election took place and led to a clean regime-change, massively voted by Beninese to put an end to president Kérékou's rule under the democratic dispensation. Boni Yayi was voted the third President of Benin, since 1991, with popular support to yield socio-economic development from two decades of civil and political stability. Unfortunately, events that followed seem to give no better assurance that the executive is committed to use its constitutional superiority to achieve the constitutionally intended purpose of strengthening Benin's constitutional model.

Public disappointment was perceptible as it became apparent that the President who was voted in by the 2006 election had sponsored an anti-revisionist civil society coalition. As a matter of fact, several members of the coalition were subsequently co-opted and joined the new presidential coalition as members of the Cabinet or other public bodies. In other words, their anti-revision movement was prompted by political motives while they claimed to be countering 'opportunistic' revisions. This led the public to become even more suspicious about any revision debate coming from either government or from non-governmental organisations. To start with, the new Boni Yayi presidential coalition dragged Parliament before the Constitutional Court for amending the Constitution to extend the term of Members of Parliament. In DCC 06-074, the Court declared the amendment unconstitutional for violating the 'national consensus' which presided over the adoption of the Constitution.¹⁶¹ The amendment was consequently annulled, thus moving the debate from whether and when to *how* and *what* should be amended.

The Constitutional Court's pronouncement against non-consensual amendments suggested a clear answer to how revision must be conducted and arguably left one question, namely what to revise. However, a number of elements suggest that the debate of both how and what is still open. In fact, all actors now agree on the need for revision. In 2002, the West African Economic and Monetary Union (UEMOA) directed member states to create a judicial body to control public finances, which Benin never did as it requires a constitutional amendment. As discussed earlier, another issue is one of the vagueness of the provision for two weeks

¹⁵⁹ 'BENIN/ELECTIONS: des conducteurs de taxi moto empêchés de marcher sur la CENA' *Benin News* <http://beninnews.centerblog.net/rub-actu-des-departements-du-benin-.html> (accessed 21 March 2012).

¹⁶⁰ G Badet *Bénin, démocratie et participation à la vie politique: une évaluation de 20 ans de renouveau démocratique* AfriMAP & OSIWA (2010) 133.

¹⁶¹ DCC 06-074 of 8 July 2006.

between the first round and the run off of presidential elections. The question of 'residence at the time of the election' equally requires constitutional changes. However, these questions are relatively minor and do not demand profound changes or massive revision but only specific limited amendments. In fact, Parliament could deal with the issues through constitutional bills introduced by the executive. The on-going executive led revision yet reveals far wider amendments if not a new Constitution.

6.2 Stronger executive for socio-economic development? Dilemmas of a revision

Praised for its democratic model, Benin has not experienced a civil war or *coup* since it organised the first successful national conference in Sub-Saharan Africa in the post 1989 era. Since then, the country has never missed any of its presidential, parliamentary or communal elections. The country has therefore accumulated democracy and civil and political rights credits in sharp contrast to the persisting poverty of more than half of its population. As a response, the regime of 'change' led by 2006 elected president Boni Yayi, committed itself to yield economic development from Benin's democratic credentials. While such commitment is legitimate, one should question its implementation to ensure the sustainability of the very constitutional model on which it is supposed to capitalise.

The current amendment process is unfortunately all but open, clear and consensual. In 2008 the executive set up a *Commission Technique Ad-hoc de Relecture de la Constitution* whose membership included most renowned Beninese jurists, some of whom were drafters of the 1990 Constitution. The Commission had a mandate to 'read the Constitution in order to correct the imperfections that arose from two decades of practice'.¹⁶² To the satisfaction of other actors, the President made it clear from the very beginning that some provisions are excluded from the project. These legacies of the 1990 National Conference include 'the rule of law, liberal democracy, the Republic, integral multi-party system, presidential regime, presidential term and age limits'.¹⁶³ Moreover, the executive decided that 'whatever changes it will make to the report of the Commission and indifferently of whether the Parliament passes the bill, the President will promulgate the revision only after the people have approved it through a referendum'.¹⁶⁴ Several public statements by the President that none of the foundational principles of the 1990 Constitution will be changed succeeded in convincing all actors of the executive's good faith.

¹⁶² Presidential Decrees No 2008-525 of 18 February 2008 and No 2008-597 of 22 October 2008 setting up the Constitutional Commission.

¹⁶³ Paragraph 6 of the *Exposé des motifs*, Presidential Decree No 2009-548 of 3 November 2009, transmitting to the National Assembly a bill to the effect of revising the Constitution of the Republic of Benin.

¹⁶⁴ As above, para 8.

This was until the executive decided to table the bill before Parliament in 2009. To start with, there is apprehension as to why the executive should have the bill adopted by Parliament before conducting the 'wide national consultation' it refers to in the decree. Popular consultation generally precedes finalisation of the bill and parliamentary discussion.¹⁶⁵ Proceeding so allows a wide dissemination of proposed changes and participation of all sets of the society in the transformation of the Constitution they opted for. The executive-led process that was officially launched in 2009 suggests some malicious intent and in fact lacks transparency. First, the bill put to parliament in November 2009 substantially differs from the report of the Constitutional Commission. Second, the transmission of the bill was kept under wraps and the bill itself was never made public until Parliament scheduled its discussion on 19 March 2012. Civil society and scholars basically obtained the document through informal contacts in Parliament. Three days ahead of the parliamentary session, civil society coalition conducted a seminar on the outcomes of which included a recommendation that any discussion and adoption of the bill by Parliament is postponed for one year.

While civil society recommendations were mainly supported by the need to conduct wide consultation and abide by foundations of the National Conference, the Constitution and pronouncements of the Constitutional Court, more serious issues seem to dwell in the very changes sought by the Executive bill. Discrepancies between the executive's bill and the report of the Commission particularly attract interest.

6.2.1 Constitutionalising existing bodies

The bill includes provisions establishing the Mediator, Electoral Commission and Account Court. As indicated earlier, the Institution of the Ombudsman, the Electoral Commission and an Account Chamber within the Supreme Court already exist under specific legislation. Only the Account Chamber needs to be raised into a full court to comply with UEMOA directive, and this may well be done by having Parliament enact a law on the establishment and functioning of the tribunal. The proposed court will be entrusted with controlling financial orthodoxy of public bodies, companies and other institutions providing public service.

6.2.2 Constitutional Court's involvement in elections

The role of the Constitutional Court in presidential and legislative elections has attracted criticism as the Court was recently perceived to

¹⁶⁵ J Hatchard *et al* *Comparative constitutionalism and good governance in the Commonwealth* (2004) 13-43.

become 'politicised'. In Benin, the Electoral Commission has no mandate to issue even provisional results as it must only compile the results and transmit them to the Constitutional Court. The Court therefore has the first and final word in the outcome of such important elections. In addition, the Court may decide not only on the basis of petitions from the candidates but also of its own accord, on the basis of evidence collected by its own observers. These appear to be too strong powers for one institution be it the Constitutional Court, members of which are appointed by the President. One would have expected a constitutional revision to re-balance powers by providing for a less disproportionate mechanism.

6.2.3 Time limit for Parliament to pass executive bills

As an independent state organ, Parliament has its internal rules and may function independently, although it should keep public interest and respect for the Constitution at heart. This should not however justify that time limits are provided in the Constitution to force Parliament to pass any bill introduced by the executive. The amendment bill proposes that Parliament must authorise ratification of loan agreements within two months of their transmission failing which such authorisation will be granted by the Constitutional Court. As illustrated earlier, crises arose in many instances where the President used its special powers or those of the Constitutional Court to circumvent opposition in Parliament. One example is the refusal of Parliament to authorise a loan agreement for coastal erosion projects. After the executive forced the authorisation through a decision of the Constitutional Court in 2009, the project was yet to be implemented in 2012 just for the issues raised by the Parliament to refuse authorisation. The same applies to the proposed two-week time limit for passing a state budget failing which the President of the Republic will pass the budget by ordinance. One may recall that the executive has on many occasions in the past reverted to special powers of the President to force controversial budgets rejected by unfavourable Parliament.

6.2.4 Using the Constitutional Court to erode the independence of the judiciary?

As indicated earlier, the Constitutional Court of Benin is not part of the judiciary which is headed by the Supreme Court and includes ordinary courts and tribunals. It is consequently surprising that the bill proposes that the Constitutional Court is given jurisdiction to review decisions made by ordinary courts. Even if the wording indicate that such decisions must be related to human rights issues, the executive has the prerogative to claim rights violations which it may well use to undermine the Judiciary. Here, the reader is reminded of President Boni Yayi's decision to suspend the execution of court orders of expulsion which a previous bench of the Constitutional Court annulled. Over the past years, President Yayi's presidential coalition has also faced challenges from the judiciary's moves

to assert its independence. On 2 February 2012, the executive initiated a constitutional suit to limit the right of judges to go on strike.¹⁶⁶ President Yayi's Minister of Justice approached the Constitutional Court on the grounds that the right of judges to go on strike violates human rights, the right of detainees, and access to justice.¹⁶⁷ It remains to be seen how the Constitutional Court will balance executive demands, fundamental rights and the independence of the judiciary.

6.2.5 *Progressive amendments or wasted opportunities?*

Despite unequivocal regressive proposed amendments, the constitutional bill has the interest of resolving some of the key issues of concern to the people of Benin. The bill excludes the two-term limit from revision, and prohibits revisions from any actor that is not endorsed by popular consultation and referendum. The project abolishes the death penalty and makes economic crimes and crimes against humanity imprescriptible, criminal law being retroactive for such offences. Preventive detention is also limited to 18 months.

One controversial progressive change is however that of opening legislation to 'popular initiative'. According to the proposed amendment, 1,000 citizens from each of the 12 provinces of the country may put a bill to Parliament. The feasibility of this provision is questionable as more than half of Benin's population is illiterate and the project sounds like providing a pen to a person who has never been schooled. Another such 'disappointing progress' is the provision that human rights violations found by the Constitutional Court open up a right to reparation to be obtained in ordinary courts. This is no progress, as it restates the jurisprudential development of the Court since 2002 and any progressive amendment should have allowed the Court to deal with human rights cases fully.

In any case, this is not as disappointing as the missed opportunity to tackle a major challenge to the independence of the judiciary, namely the nomination and appointment of the highest court's judges. Benin's constitutionalism would have made a landmark innovation by including provisions for a fully independent *Conseil Supérieur de la Magistrature*, the composition and operation of which might always be challenged before the Constitutional Court. This would have freed the judiciary from the current

¹⁶⁶ Le Matinal 'Suite au dernier mouvement de débrayage dans le secteur judiciaire: Gbèdo pour une restriction du droit de grève des magistrats' in Sonagnon http://www.sonagnon.org/index.php?option=com_content&view=article&id=4148:suite-au-dernier-mouvement-de-debrayage-dans-le-secteur-judiciairegbedo-pour-une-restriction-du-droit-de-greve-des-magistrats&catid=1:actualite (accessed 22 March).

¹⁶⁷ M Zoumènou 'Gbèdo veut attiser un nouveau feu dans le secteur judiciaire' in *La Nouvelle Tribune* 22 March 2012 <http://www.lanouvelletribune.info/index.php/actualite/une/10428-gbedo-veut-attiser-un-nouveau-feu-dans-le-secteur-judiciaire> (accessed 22 March 2012).

patronage of both the President and Minister of Justice who are prominent sitting members of Benin's Judicial Service Commission. The innovation would have been reinforced by the nomination, appointment and election of Supreme and Constitutional courts judges and presidents by their peers under the scrutiny of the Judicial Commission and the check of the Constitutional Court. Such constitutional amendment would have definitely re-balanced separation and distribution of powers by tempering the current strong presidentialism and opened greater avenues for Benin's constitutionalism.

Despite controversial proposed amendments, the constitutional bill has the interest of resolving some of the key issues of concern to the people of Benin. The bill excludes the two-term limit from revision, and prohibits any revision that is not endorsed through popular consultation and referendum. The bill further abolishes the death penalty and makes economic crimes and crimes against humanity imprescriptible, criminal law being retroactive for such offences. Pre-trial detention is also limited to 18 months.

However, the overall analysis of the executive's bill reveals that it seeks to even more of the powers of both the Judiciary and the Legislature to reinforce the powers of the President of the Republic. Instead of balancing distribution of powers to moderate the current strong *presidentialism*, the bill envisages a 'presidential monarchy' or '*monocracy*'.¹⁶⁸ Faced with a country wide campaign led by academia, civil society, trade unions and political opposition groups against what they consider to be a secret and opportunistic revision of the Constitution, the President withdrew the bill in June 2012.¹⁶⁹

7 Conclusion

This chapter has discussed Benin's 'new constitutionalism' as spearheaded by its 1990 Constitution in light of its norms and subsequent practices. As discussed, the version adopted by Benin's National Conference included the three main requirements for constitutionalism, which are: separation of powers among an executive, a legislature and a judiciary; institutions and mechanisms that guarantee checks and balances and ensure that state organs control one another; and institutions and mechanisms that protect and guarantee individual rights from abuse and infringement by any state organ or other actor.

¹⁶⁸ J Djogbénou 'L'idée de réforme de la Constitution béninoise du 11 décembre 1990: entre progrès et regrets' in Fondation Konrad Adenauer *Projet de révision de la Constitution béninoise: portée et limites* (2010) 17-51.

¹⁶⁹ Koaci 'BENIN: Boni Yayi retire la révision de la Constitution du Parlement et rassure sur son départ en 2016' <http://koaci.com/articles-74730> (accessed 21 June 2012).

Even if the 1990 Benin version meets all these requirements, it has the peculiarity of providing for a political regime that allows for the constitutional superiority of the executive, namely the President, over the legislature and judiciary. In fact, while the letter and spirit of the Constitution seek to ensure a smooth functioning of the state through a slightly unbalanced distribution of powers, successive Presidents have used relevant provisions to circumvent other organs. Instead of fostering constitutionalism, led by foundational principles of the National Conference, the executive has progressively given life to *presidentialism* in which both counter-power institutions and individuals are deprived of prerogatives to the benefit of the President. After 22 years of such *de facto presidentialism*, the on-going constitutional revision led by the executive seeks to aim at legalising this presidential ascendancy to the detriment of watchdogs and human rights' organisations.

Although Benin's Constitution of 1990 has raised important issues in its 22 years of practice, this was never to the extent of paralysing the proper functioning of the state. The country has always found it in its essence to overcome major political and institutional crisis. I do not suggest that revision should never be considered but that regressive amendments should be prevented. Such amendments may weaken Benin's model instead of enriching and strengthening the country's democracy. The most dramatic situation would be a revision that erects the President as an absolute constitutional monarch with control over all state powers, organs and individuals rights. There would be no constitutionalism without individual freedoms and segregation of powers; and no segregation of powers may be achieved except with a clear delineation and balanced distribution of powers among state organs. It is indeed illusory to sacrifice foundational principles of constitutionalism and individual rights for socio-economic achievements that, in the context of the proposed revision, remain for now just projections and promises. There is at least an assurance as the history of Benin's democracy suggests that any attempt to erode the fundamental principles of the 1990 National Conference will be challenged by the people. This does not exclude vigilance from the citizenry, civil society and state organs.

The civil society movement is central to ensuring that the will of the people remains paramount at all times in the democratic conversation. Benin's civil society deserves a tribute for spearheading the new constitutional order through its significant contribution to the National Conference.¹⁷⁰ Hundreds of associations and non-governmental organisations were represented at the Conference challenging arrest warrants and other threats from the Marxist regime. After giving birth to an African Charter-oriented Constitution, these organisations also made catalytic use of the various constitutional mechanisms. They took the

¹⁷⁰ Dossou-Yovo (n 3 above) and Heilbrunn (n 13 above).

forefront position in human rights and constitutionality of laws litigation in the Constitutional Court. As discussed earlier, civil society coalitions also stood against opportunistic revisions of the Constitution and led nation-wide fund raising campaigns to substitute the state's unwillingness to organise elections.

However, in the recent years, two main challenges have faced Benin's civil society. First, the movement seems to experience a serious generation change failure. This problem is manifested through the individualistic feature of civil society leadership. Main figures of civil society organisations do not appear to emanate from the grassroots level of the movements but are rather the product of an elitist representation, which would well illustrate the concept of 'GONGO' which stands for 'government non-governmental organisations'.¹⁷¹ Second, the involvement of civil society leaders in political life for example their inclusion in the Cabinet has damaged the reputation of the movement. The most negative illustrations were given in the wake of the first term of President Boni Yayi whose Cabinet included no less than three ministers from the civil society coalition that campaigned against the amendment of the Constitution to ensure that the candidate did not compete against Benin's senior politicians. The consequences of this debacle of civil society's leading voices are not only the loss of popular confidence but also the confusion resulting about the possibility of a progressive revision of the Constitution. Just a few years after campaigning strongly against any revision, civil society leaders turned into proponents of such revision.¹⁷²

In the light of the above, it appears that the contribution of civil society to the sustainability of Benin's constitutionalism will depend on how much effective institutional reform the movement would undergo in the years to come.

¹⁷¹ A Yang & M Taylor 'Relationship-building by Chinese ENGOs' websites: Education, not activation' (2010) 36 *Public Relations Review* 342; and Taber 'Who defines what civil society is?' <http://ta3beer.blogspot.com/2008/03/who-defines-what-civil-society-is.html> (accessed 13 November 2012).

¹⁷² La Nouvelle Tribune 'Reckya Madougou à propos de la révision de la Constitution: "Pour le Chef de l'Etat, ce débat doit être national"' <http://www.lanouvelletribune.info/index.php/actualite/une/10510-pour-le-chef-de-letat-ce-debat-doit-etre-national> (accessed 13 November 2012).