

Benin's Constitutional Court: an Institutional Model for Guaranteeing Human Rights
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Abstract:

This piece is based on field research the author conducted in Benin, West Africa during January 2003. The paper explores how the Court operates as a hybrid institution, by combining the competences traditionally associated with a constitutional court with the mandate of a national human rights commission. The paper argues that the Beninese Constitutional Court could provide an institutional model for guaranteeing human rights through a state-sponsored institution.

I. Introduction

Benin's democratic government, born out of a remarkable National Conference in 1990, has long been considered a bright spot in West Africa. The Beninese Constitutional Court's role in protecting human rights is a landmark feature of Benin's transition to democracy. Conceived in direct response to the repression and abuse of the previous regime, Benin's court is unique in combining its broad subject matter jurisdiction "to rule...on violations of human rights"¹ with liberal standing rules that provide immediate and direct access to all citizens alleging human rights violations. Because its institutional credibility is linked to its capacity to respond to the human rights violations suffered by individual citizens, Benin's Constitutional Court combines the functions of a state-sponsored human rights institution with the prestige and institutional gravitas of a constitutional court.

This paper analyzes the institutional structure and jurisprudence of Benin's Constitutional Court and argues that its unique mandate provides a model for addressing human rights violations through a state sponsored institution. It seeks to understand the institutional and political factors that explain the Court's success, analyze the sources of its challenges, and offer recommendations to further consolidate its capacity to guarantee human rights. Part II of this paper will provide a historical overview of Benin's transition to democracy in 1990 and a brief summary of the Beninese Constitution. Part III will analyze the institutional features of Benin's Court, including the purpose underlying its establishment, its subject matter jurisdiction, rules of standing, requirements for membership, the nomination process, membership perks and institutional independence, the decision making process, judicial opinions, the effects of decisions and remedies. In order to situate the Beninese Court along an institutional spectrum

¹ CONST. Title V, Art. 121, paragraph 2.

and put in relief its hybrid-nature, this section will draw comparisons to both state sponsored human rights institutions and the French and German constitutional courts. With a focus on analyzing the legal rules and rationales underlying the Court's decisions, Part IV will examine the human rights jurisprudence of the Constitutional Court. Finally, Part V will study how the Court's structure has limited its remedial power and thus impeded its ability to protect those who have suffered human rights abuses, and will make recommendations to mitigate this result.

II. Historical overview

A. 1972-1989: Marxist-Leninist Regime

The story of Benin's Constitutional Court begins with the status of human rights before the country's 1990 transition to democracy. Benin, formerly Dahomey, gained its independence from France on August 1, 1960.² In the subsequent decade, Benin endured several coups d'état and five different constitutions.³ General Mathieu Kérékou took power in October 1972 and declared a Marxist-Leninist state under the control of a single authoritarian party, the Party of the Popular Revolution of Benin (*le Parti de la Révolution Populaire du Bénin* - PRPB).⁴

Until its demise in March 1990, the regime actively abused the human rights of its citizens. Kérékou transformed Benin into a police state, sending the opposition underground.⁵ A pamphlet published by the League for the Defense of Human Rights in Benin (*Ligue pour la Défense des Droits de l'Homme au Bénin*) details hundreds of cases of torture and other human rights abuses perpetrated from 1972 through 1991 by government officials ranging from provincial political officials, to police commissioners, to members of the armed forces.⁶ Julien Y. Togbadja, now the president of the League, languished as a political prisoner under the

² AFISE D. ADAMON, LE RENOUVEAU DÉMOCRATIQUE AU BÉNIN: LA CONFÉRENCE NATIONALE DES FORCES VIVES ET LA PÉRIODE DE TRANSITION, 13 (1995).

³ *Id.* at 13-14.

⁴ *Id.* at 13.

⁵ *Id.*

⁶ *See generally*, LIGUE POUR LA DÉFENSE DES DROITS DE L'HOMME AU BÉNIN, NOMENCLATURE DES TORTIONNAIRES DE LA REPUBLIQUE DU BÉNIN 1972-1991 2ND EDITION (1995).

Kérékou regime. In recalling the mood that prevailed at that time, Togbadja emphasized the strong repression suffered by the Beninese population – militarism for the regime was obligatory and no one had the right to complain.⁷ The Honorable Harriet Isom, who arrived in Benin as the U.S. ambassador in late-1989, recalls the regime micro-managing her interaction with the Beninese, forbidding anyone from coming to her receptions or having his picture taken with her without Kérékou’s permission.⁸ Luc-Omer Gandemey, a Beninese human rights activist with the Institute of Human Rights, summed up the reality of life under the previous regime in a single sentence: “The word liberty did not exist.”⁹

The confluence of economic, social and political factors that contributed to the sweeping changes in Benin in 1989 is outside the scope of this paper. The events unfolded as follows. In November, 1989 teachers and civil servants threatened a general strike because of the bankrupt government’s failure to pay salaries and scholarships.¹⁰ Completely discredited, Kérékou renounced Marxism-Leninism on December 5. Nationwide demonstrations began on December 11.¹¹ Kérékou subsequently accepted the principle of multi-party government and issued a decree establishing a committee to organize an assembly of “all the living forces of the nation, whatever their political sensibilities.”¹² On February 19, 1990, a “National Conference” commenced.¹³ The Conference was the first of its kind and its success led to its imitation throughout the African continent.¹⁴

B. Benin’s National Conference

⁷ Interview with Julien Y. Togbadja, the president of the League, in Cotonou, Benin (Jan. 13, 2003).

⁸ Telephone interview with the Honorable Harriet Isom, former US Ambassador to Benin (March 5, 2003).

⁹ Interview with Luc-Omer Gandemey, L’Institut des Droits de l’Homme et de Promotion de la Democratie: La Democratie au Quotidien, in Cotonou, Benin (Jan. 13, 2003).

¹⁰ John R. Heilbrunn, *Social Origins of National Conferences in Benin and Togo*, 31 J. OF MODERN AFRICAN STUDIES, 277, 286 (1993).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 44.

¹⁴ Indeed, as many as seven conferences took place in French-speaking Africa between February 1990 and January 1993. Kathryn Nwajiaku, *The National Conferences in Benin and Togo Revisited*, J. MODERN AFR. STUD. 429, 429 (1994), (noting National Conferences in Benin and Congo, February 1990; Gabon, March 1990; Zaire, February 1991; Togo, July/August 1991; Niger, July 1992; and Chad, January 1993.)

Despite great uncertainty about where the National Conference would lead, three commissions were assembled to assess the country's current condition and provide guidance for its future.¹⁵ The Commission for Economic and Social Problems examined Benin's economic crisis and recommended specific economic adjustments that the country would have to make.¹⁶ The Commission on Education, Culture, the Sciences, Sports and the Environment was tasked with examining the betterment of all Beninese citizens.¹⁷ Finally, the Commission on Laws and Constitutional Affairs was asked to respond to fundamental questions, including:¹⁸ "What regime does a democratic Benin need to succeed the autocratic PRPB regime?" "How soon should the regime be installed?" "What will be the transitional institutions?" and "How long should the transition period last before free elections are held?"¹⁹

Given the enormity of the problems, the ultimate achievements of the 10-day National Conference were inconceivable when it began. A delicate process of consensus building resulted in the disbandment of the PRPB regime, the release of political prisoners, the nomination of conference delegate Nicéphore Soglo to a newly created Prime Minister position, the establishment of a Constitutional Commission to author a new constitution, the elaboration of a precise program to install new democratic institutions, a new economic policy based on liberalism and structural adjustment, and the establishment of the High Council of the Republic (*le Haut Conseil de la République* – "HCR") to guide the country's transition to democracy.²⁰

It would be anachronistic to analyze Benin's triumphant National Conference as an explicit victory for human rights. Although the constitution and institutions such as the

¹⁵ ADAMON, *supra* note 2, at 33.

¹⁶ *Id.* at 73.

¹⁷ *Id.* at 74-75.

¹⁸ Professor Maurice Glèlè-Ahanhanzo directed the Commission on Laws and Constitutional Affairs. Glèlè-Ahanhanzo subsequently participated in the drafting of the Constitution of 1990 and is one of three people who have been members of the Constitutional Court since its installation in 1993. His term on the Court ended in June 2003.

¹⁹ ADAMON, *supra* note 2 at 76.

²⁰ *Id.* at 70.

Constitutional Court that were conceived during the Conference focus on protecting human rights, the Conference was foremost an effort to extirpate the country from the clutches of the outgoing regime. Among the tasks assigned the transitional HCR, whose members were installed by Kérékou on March 9, 1990,²¹ was “the defense and the promotion of human rights, such as they are proclaimed and guaranteed by the African Charter on Human and Peoples’ Rights”.²² In the subsequent period the HCR remained true to its purpose by creating a constitution and institutions that elaborated the results of the National Conference.

C. Human Rights and the Constitution of 1990

Under the Constitution of 1990, Benin’s Constitutional Court is the state’s highest jurisdiction on constitutional matters.²³ To understand the breadth of this mandate, particularly as it relates to human rights, a brief overview of the document is in order. The separation of powers between the numerous political institutions created by Constitution is the linchpin of the political regime it established. Unlike its numerous predecessors, human rights and public liberties are the focus of Benin’s Constitution of December 11, 1990.²⁴ The Constitution directly incorporates the African Charter on Human and Peoples’ Rights²⁵ and the Charter has served as the source for rights invoked in numerous Constitutional Court decisions.²⁶ Title II of the Constitution dedicates 34 articles to human rights.²⁷ The Constitution places a heavy burden

²¹ *Id.* at 94.

²² *Id.* at 112.

²³ CONST. Title V, art. 114.

²⁴ As Johanès Toudonou and Césaire Kpenonhou document, the constitutions of 1959 and 1960 do not address human rights. The constitutions of 1964 and 1968 take up human rights in 11 and 7 articles respectively. The fundamental law of 1977 consecrates 26 articles to human rights. JOHANÈS ATHANASE TOUDONOU & CÉSAIRE KPENONHOUN, CONSTITUTIONS ET TEXTES CONSTITUTIONNELS DE LA RÉPUBLIQUE DU BÉNIN DEPUIS LES ORIGINES DAHOMÉENNES 213 (1997).

²⁵ CONST. Title II, art. 7.

²⁶ See *e.g.* Constitutional Court Decision DCC 16-94 of May 27, 1994 (art. 10 of the African Charter); Constitutional Court Decision DCC 10-04 of May 9, 1994 (art. 10 of the African Charter); Constitutional Court Decision DCC 05-029 (art. 13(1) of the African Charter).

²⁷ Every person has the right to life, liberty, security, and the integrity of his person (CONST. Title II, art. 15); the right to a public trial during which all guarantees necessary to a free defence shall be assured (CONST. Title II, art. 17); the right to his property (CONST. Title II, art. 22); the right to freedom of thought, of conscience, of religion, of creed, of opinion, and of expression with respect for the public order established by law and regulations (CONST. Title II, art. 23). Every person has the freedom to go and come, the freedom of association, of assembly, of procession and of demonstration. (CONST. Title II, art. 25); No one shall be submitted to torture, nor to cruel, inhumane or degrading treatment (CONST. Title II, art. 18). No one shall be arrested except by virtue of a law promulgated prior to the charges against him (CONST. Title II, art. 16). Freedom of the press shall be recognized and guaranteed by

on the state to guarantee these rights,²⁸ culminating in article 40, which declares that the State has the duty to ensure the diffusion and the teaching of the Constitution, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples' Rights of 1981, as well as all the international instruments duly ratified dealing with human rights.²⁹

Thus the Constitution's list of enumerated rights and corresponding state duties is lengthy. Far from a mimeograph of other states' constitutions however, the document directly addresses the history from which Benin had emerged and the particularities it faced, beginning with the Preamble, which acknowledges the country's "turbulent constitutional and political evolution since gaining independence"³⁰ and declares: "the successive changes of political regimes and governments did not dull the determination of the Beninese people to seek in their own spirit, the cultural, philosophical, and spiritual values of civilization that drives their forms of patriotism."³¹ In a dramatic rejection of the previous regime, the Preamble declares the Beninese people's "fundamental opposition to any political regime founded on arbitrariness, dictatorship, injustice, corruption, misappropriation of public funds, regionalism, nepotism, confiscation of power, and personal power"³² and article 16 guarantees that "no citizens shall be forced into exile."³³ The tactics of previous regimes were explicitly outlawed in article 19, which states: "Any individual and any state agent is freed from the duty of obedience whenever the order received constitutes a serious and manifest attack on the respect for human rights and

the State (CONST. Title II, art. 24) Men and women are equal under the law. (CONST. Title II, art. 24). Every person has the right to a healthy, satisfying and lasting environment (CONST. Title II, art. 27).

²⁸ The State shall ensure the equality of all before the law without distinction by origin, race, sex, religion, political opinion, or social position (CONST. Title II, art. 26). The State shall protect the family and particularly the mother and the child and shall take care of the handicapped and the elderly (CONST. Title II, art. 26). The State shall watch over the protection of the environment (CONST. Title II, art. 26). The State shall recognize for all citizens the right to work and shall strive to create conditions which will make the enjoyment of this right effective and will guarantee to the worker just compensation for his services or for his production (CONST. Title II, art. 30). The State shall recognize and guarantee the right to strike (CONST. Title II, art. 31). The State shall protect the rights and legitimate interests of Beninese citizens in foreign countries (CONST. Title II, art. 38).

²⁹ CONST. Title II, art. 40.

³⁰ *Id.* at Preamble.

³¹ *Id.*

³² *Id.*

³³ *Id.* at Title II, Art. 16.

public liberties.” In recognition of the linguistic and cultural diversity of the population, article 11 states: “All the communities that make up the Beninese nation shall enjoy the freedom to use their spoken and written languages and to develop their own culture while respecting those of others” and requires the State to “promote the development of national languages and inter-communication.”³⁴ More generally, the Preamble declares the Beninese peoples’ “firm will to defend and safeguard our dignity in the eyes of the world and to regain the place and role as a pioneer of democracy and human rights that formerly was ours.”³⁵ Just as Benin’s National Conference blazed a trail in its distinctive transition to democracy, the resultant Constitution established a human rights regime that is unique to Benin.

III. Institutional Features of Benin’s Constitutional Court

Tasked with implementing Benin’s transition to democracy, the HCR designed institutions that were familiar in name to those in other states but often functionally different. This section will seek to identify the similarities and delineate crucial differences. As will be expanded on in detail, Benin’s Constitutional Court can be considered a hybrid-institution that encompasses the competencies typically associated with constitutional courts *and* a human rights mandate generally advanced by state sponsored human rights institutions. To provide context for such a view of Benin’s Court, this section will reference the typical features of national human rights institutions, such as human rights commissions. As Human Rights Watch has documented, state-sponsored human rights commissions have become a new vogue among governments, particularly in Africa, where their number multiplied significantly in the 1990s.³⁶ Their proliferation is one response to the challenge that governments face in confronting their

³⁴ *Id.* at Title II, Art. 11.

³⁵ *Id.* at Preamble.

³⁶ Human Rights Watch reports that in 1989 there was one human rights commission. By 2000 there were two dozen in operation or in the process of formation. Human Rights Watch Report, “*Protectors or Pretenders: Government Human Rights Commissions in Africa – Benin Report*” I. Overview 1 (2001) available online at <http://www.hrw.org/reports/2001/africa/overview/factors.html>.

own responsibility to protect the human rights of their citizens from abuse by the government itself. Human rights commissions are established as autonomous government bodies that work for the effective application of the state's laws and practices concerning human rights.³⁷ Their role is to push other state bodies to uphold their responsibilities in protecting human rights.³⁸ Institutional independence seems to be the greatest challenge faced by national human rights commissions, as they struggle to influence the practices of the very government that creates, staffs and funds them.³⁹

Besides these national human rights institutions, this section will also draw comparisons to the French and German constitutional court. The French court is examined because, having colonized Benin for more than 60 years,⁴⁰ France provided the most immediate and familiar example of democratic institutions to the framers of Benin's court, many of whom had been educated or exiled in France. The German court is referenced both because of its status as one of the world's preeminent constitutional courts and because of its human rights mandate.

While the idea for a constitutional court was first forwarded during Benin's National Conference and it was devoted an entire title in the Constitution of 1990, the Court did not open its doors until June 1993. The reasons behind this delay are somewhat muddled. Théodore Holo, who served as a member of the transitional HCR and subsequently as President Soglo's Minister of Foreign Affairs and Cooperation, indicated that the Vatican caused the delay. As the story goes, the suggestion was made that Monsignor Isidore de Souza, the Archbishop of Cotonou and the president of the National Conference, should be a member of the Court. President Soglo had to request permission from the Vatican to include de Souza because of the Court's secular

³⁷ *Id.* at I. Overview 3.

³⁸ *Id.* at III. Important Factors 15.

³⁹ *Id.* at I. Overview 3.

⁴⁰ Dahomey became a French protectorate in 1892 and was absorbed into French West Africa in 1904. Dahomey gained its independence from France in 1960 and was renamed Benin in 1975.

function. The Vatican delayed for some time in responding and ultimately turned down the request in May 1993.⁴¹ Maurice Glèlè-Ahanhanzo, who was also a member of the HCR and served as a member of the Court from its establishment through June 2003, attributed the delay to the type of politicking that might be expected, given the institution's central role.⁴² In any case, during the period when the HCR was rolling out the myriad institutions established in the Constitution, the Court, while not the first to be established, was also not the last.⁴³

A. The Purpose of the Court

During the National Conference, a constitutional court, together with an Economic and Social Council and the High Authority for Audiovisual Media and Communications, were suggested to offset the power of the President and the National Assembly.⁴⁴ Glèlè-Ahanhanzo, who chaired the Commission on Laws and Constitutional Affairs during the National Conference reminds those examining the Court today that, having known arbitrary governance for so long, its framers designed a mechanism to guarantee stability.⁴⁵

Envisioning the court as a balancing institution fits with traditional notions of the purpose of constitutional courts. Hans Kelsen, a leading jurist of his time and the drafter of the Austrian Constitution of 1920 which established the Europe's first constitutional court, recognized the need for an institution with power to control or regulate legislation.⁴⁶ Kelsen saw the institution as a "negative legislature" that supplemented the parliament – the "positive legislator"⁴⁷ because

⁴¹ Interview with Professor Théodore Holo, Holder of the UNESCO Human Rights and Democracy Chair, National University of Benin, former Minister of Foreign Affairs under Soglo; former member of the *Haut Conseil de la République* in Cotonou, Benin (January 7, 2003).

⁴² Interview with Professor Maurice Glèlè-Ahanhanzo, Member of the Beninese Constitutional Court 1993-June 2003, former member of the *Haut Conseil de la République*, former Director of the Commission on Laws and Constitutional Affairs during Benin's National Conference, in Cotonou, Benin (January 7, 2003).
Member

⁴³ The organizing law for the High Authority for Audiovisual Media and Communications (HAAC) was not adopted until August 21, 1992, more than a year after the Constitutional Court's organic law was adopted.

⁴⁴ ADAMON, *supra* note 2 at 77.

⁴⁵ Interview with Glèlè-Ahanhanzo *supra* note 42.

⁴⁶ John Ferejohn, *Constitutional Review in the Global Context*, N.Y.U. J. LEGIS. & PUB. POL'Y 49, 52 (2002-03).

⁴⁷ Bojan Bugarić, *Courts as Policy-Makers: Lessons from Transition*, 247, 256 HARV. INT'L L. J. (2001).

its decisions had the power to make a statute disappear from the legal order.⁴⁸ The breakdown of the pre-war democracies across Europe led jurists and politicians alike to reconsider the role of the judiciary within the balance of power arrangements characteristic of democracies. Instead of relegating the judiciary to secondary status behind the parliament, as had historically been the case, several European countries designed constitutional courts to play a mediating role between the state's institutions. For example, France's *Conseil Constitutionnel*, established in 1958, was originally intended as a mechanism to ensure the strong executive by keeping Parliament within its constitutional role.⁴⁹ As such, its essential function was to protect fundamental rights from encroachment by the *legislature* (not by the administration or the courts).⁵⁰ When Germany decided to create a specialized constitutional court after World War II, it was granted authority over all constitutional disputes including the validity of the laws.⁵¹ The German court also was designated to serve as *the* guardian of the so-called "Basic Rights," fundamental rights guaranteed to all German people.⁵²

The National Conference Commission's conception of Benin's constitutional court as a balancing institution to keep the executive and parliament in check was familiar to the broad purposes underlying the French and German models. In response to the oppression of the previous regime, Benin went beyond their model. Limited standing rules mean constitutionally guaranteed human rights are typically only reviewed by constitutional courts when a *legislative* act under review infringes on those rights or when all other legal remedies have been exhausted. Article 114 of the Beninese Constitution granted the Court the role to "guarantee the fundamental rights of the individual and public liberties" and specified standing rules granting

⁴⁸ Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, U. PA. J. CONST. L. 977, 983 (May 2001).

⁴⁹ ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 47 (1992).

⁵⁰ *Id.* at 46.

⁵¹ VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW*, 520 (1999).

⁵² Donald P. Kommers, *The Basic Law: A Fifty Year Assessment, Conference Report: Fifty Years of German Basic Law: The New Departure for Germany*, *American Institute for Contemporary German Studies, John Hopkins University* 4 (1999) available at <http://www.aicgs.org/publications/PDF/basiclaw.pdf>.

individuals access to the court for alleged violations of human rights.⁵³ As Glèlè-Ahanhanzo describes it, the fear of government that had permeated Benin needed to be replaced with the rule of law and rule of law implied that each citizen possess the right to access the Court tasked with guaranteeing their human rights.⁵⁴

B. *Subject Matter Jurisdiction*

The uniqueness of Benin’s Constitutional Court stems from its subject matter jurisdiction. To ascertain where the “different-ness” begins, it is worthwhile to explore the jurisdictional boundaries traditionally associated with constitutional courts. According to Cappelletti and Cohen, Kelsen held the view that individual rights (‘norms of natural law’) were inappropriate for judicial review. Nonetheless, less than three decades later, the German Constitutional Court rejected a model which purposefully avoided review of matters dealing with human rights. Today, “roughly 95% of the [German] Court’s docketed caseload has been generated from constitutional complaints, which may be filed by any person who claims that government action has violated a right under the Basic Law if the person has exhausted other legal remedies.”⁵⁵ The German Court can also engage in an abstract review of laws at the request of a federal, or state government, or by one third of the members of the Bundestag.⁵⁶ In line with Kelsen’s original vision of the court as a balancing institution, Germany’s Court has jurisdiction to oversee the operations and even the internal procedures of both executive and legislative branches to maintain the required balanced between them, and jurisdiction over disputes between the states

⁵³ CONST. Title I, art. 3 states: “Every citizen has the right to pose himself before the Constitutional Court against the laws, text and acts presumed unconstitutional.”

⁵⁴ Interview with Glèlè-Ahanhanzo, *supra* note 42.

⁵⁵ JACKSON & TUSHNET, *supra* note 51 at 521.

⁵⁶ *Id.* at 522.

and central government, and disputes between the states.⁵⁷ Finally, the Court can declare parties unconstitutional at the request of the Bundestag, the Bundesrat, or the federal government.⁵⁸

The subject matter jurisdiction of the French *Conseil* permits it to be heavily involved in electoral matters: it is tasked with ensuring the proper conduct of presidential elections and declaring their results,⁵⁹ ruling on disputed parliamentary elections,⁶⁰ ensuring the proper conduct of referendum proceedings and declaring their results.⁶¹ Like the German Court, the *Conseil* polices the boundaries of the legislative competences of Parliament and the executive.⁶² In practice, the referral of enacted laws to the *Conseil* has become a procedure for challenging them on substantive grounds, particularly for breaches of fundamental rights.⁶³ The *Conseil* also examines the constitutionality of organic laws and parliamentary standing orders before they are promulgated⁶⁴ and rules on the constitutionality of treaties.⁶⁵ Finally, the *Conseil* advises the President on when to seek to use emergency powers and on the rules made thereunder.⁶⁶

Benin's Constitutional Court draws on both of these models— France's election oversight, for example, and Germany's constitutional complaint procedure - without copying either one. The broad subject matter jurisdiction of the Court is defined in article 117 of the Constitution, which specifies that the Constitutional Court:

- Shall rule obligatorily on:
 - * The Constitutionality of organic laws and of laws in general before their promulgation;
...
 - * The Constitutionality of laws and regulatory acts deemed to infringe on fundamental human rights and on public liberties, and in general on the violation of the rights of the individual;

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ CONST. Title III, art. 58.

⁶⁰ *Id.* at art. 59.

⁶¹ *Id.* at art. 60.

⁶² *Id.*

⁶³ JACKSON & TUSHNET, *supra* note 51 at 507.

⁶⁴ CONST. Title III, art. 61 ¶ 1.

⁶⁵ *Id.* at art. 61.

⁶⁶ *Id.* at art. 54.

* Conflicts of attributions between the institutions of the State

- Shall safeguard the regularity of the election of the President of the Republic, examine the complaints, rule on the irregularities that [the Court] itself is able to raise and proclaim the results of the ballot, rule on the regularity of the referendum and proclaim its results;
- Rule in the event of disagreement, on the regularity of legislative elections;...

Article 146 requires the Court to rule on the constitutionality of treaties and international agreements. In addition, the Constitution grants the Court a number of minor duties, which have seldom been exercised.⁶⁷

While this paper intends to focus on the Beninese Court's human rights competence, a brief discussion of this broad and varied list of jurisdictional heads will shed light on the uniqueness of the human rights role. While delicate systems of checks and balances characterize all democracies, an observer is struck by the extent to which the varied competences of Benin's Constitutional Court pull it in different directions and into a number of potential political landmines. As election arbiter, the Court must verify the elections of the very politicians who nominate its members. As the highest jurisdiction on the constitutional matters, government administrators and parliamentarians are required to submit their organic laws, general laws, and regulations to the Court for review. As regulator of institutional attributions, the Court must sort through turf wars between the component parts of the Republic's institutional framework. As guarantor of human rights, the Court must consult all branches and levels of government administration in order to investigate allegations of abuse.

The broad influence the Court wields through its varied competences may serve to explain its success in adjudicating human rights complaints. As will be discussed in detail, from

⁶⁷ These range from granting authorization before a member of the Executive acquires or rents goods owned by the State (CONST. Title III, art. 52, ¶ 1) to declaring a vacancy in the presidency, (CONST. Title III, art. 50) to noting the *force majeure* that has prevented the National Assembly from holding its sessions in their ordinary location (CONST. Title IV, art. 86, ¶ 1).

an operational standpoint the Court itself investigates alleged human rights violations. A review of past Court decisions on human rights indicates that the alleged violator is almost always a government institution of some sort, be it the gendarmerie in a village or the President of the National Assembly. Although a few decisions note that the government authority failed to reply to the Court's investigative request for information regarding alleged abuses, the Court successfully obtains the necessary information in the vast majority of the cases. Recognizing that administrative cooperation is imperative to the Court's functioning, Clotilde Médégan, a current member of the Court, recounts that one of the first things the second Court did when it was assembled in 1998 was write to President Mathieu Kérékou (who in 1996 returned to Beninese politics declaring himself a "born again Christian," and was subsequently elected president) to have him pressure the administration to be responsive to the Court.⁶⁸ Both Médégan and current Court President Conceptia Ouinsou submit that the government's responsiveness improved during their mandate that began in 1998.⁶⁹ According to Médégan, today administrators "run" when they get investigation questions from the Court. She acknowledges that the Court exercises a "strong influence" over the other branches of government because these branches want the Court to view them favorably in regulating the institutions.⁷⁰ Thus administrative responsiveness in dealing with allegations of human rights violations is likely linked to the not unsubstantial power the Court influences over these same institutions through its other competences. Regardless of whether this was intended, the end result is welcome insofar as it has bolstered the Court's efficacy in investigating alleged human rights violations.

⁶⁸ Interview with Clotilde Médégan, Member of the Beninese Constitutional Court 1998-present, in Cotonou, Benin (Jan. 14, 2003).

⁶⁹ Interview with Conceptia Ouinsou, President of the Beninese Constitutional Court 1998-present, in Cotonou, Benin (January 16, 2003).

⁷⁰ Interview with Médégan, *supra* note 68

There is a dark side to this rosy analysis of the Court's jurisdictional mixing bowl. A plausible risk exists that a misstep by the Court in one of its competences could severely undermine its authority and legitimacy in the other areas. Election verification is the most likely area in which such a misstep could occur. Its role of election verifier places the Court squarely in the center of a political minefield. It is fair to say that the Court stepped on a few mines during the two-round presidential elections of 2001, in which a record 19 candidates faced off. As Théodore Holo put it, the Court's behavior during the election had "very little credibility".⁷¹ Its troubles began when it apparently proclaimed the results of the first round of voting without including the ballots cast in the entire Mono province.⁷² When the additional 231,314 votes (some 9.69% of the total cast) were added to the tally, all the top candidates enjoyed some gains but the gap widened between first place candidate, President Mathieu Kérékou, and second place candidate, former President Nicéphore Soglo.⁷³ Soglo cried conspiracy and denounced the assassination of democracy, before pulling out of the race.⁷⁴ With the runoff scheduled in only four days, third place candidate Adrien Houngbédji also refused to compete against Kérékou. Bruno Amoussou, who had finished fourth in the first round and had already called on his supporters to vote for Kérékou, agreed to participate in the run off, "to save the democracy", as he put it.⁷⁵ Explaining that he "[did] not want to participate in the disorganization of the country nor the ruin of its image overseas," Amoussou appealed to voters to elect the best man.⁷⁶ Nine members of the Independent National Electoral Commissions (CENA), including its president, resigned.⁷⁷ Kérékou was ultimately re-elected with 83.64% of the votes, although 46.38% of

⁷¹ Interview with Holo, *supra* note 41.

⁷² Hippolyte Amouzouvi, *Le Chic, le choc et le chèque d'une election démocratique: Mots et maux des présidentielles de 2001 au Bénin*, AFRIKA SPECTRUM, 358, 366 (2000).

⁷³ *Id.*

⁷⁴ *Id.* at 367.

⁷⁵ *Id.*

⁷⁶ *Benin: Electoral commission maintains 22 March run-off date*, Paris Agence France Presse (World Service), March 20, 2001.

⁷⁷ *Id.*

eligible voters stayed home.⁷⁸ The role played by the Constitutional Court in the debacle called its independence and legitimacy into questions. No one, however, has gone so far as to assert that the damage is permanent, or that the election controversy has affected the public's trust in the Court's role in adjudicating human rights violations. On the other hand, if the Court continues to find itself at the center of disputed results, its closely guarded independence could be severely damaged, and its repercussions could affect its legitimacy in areas beyond elections.

C. Rules of Standing

More than any other factor, liberal rules of standing have facilitated the active role assumed by Benin's Constitutional Court in addressing human rights violations. A comparative perspective again assists in analyzing the uniqueness of the Beninese model. In Germany, an individual citizen can call on the Constitutional Court to review any act of a public authority as to its conformity with the human rights enumerated in the Basic Rights, provided that the petitioner has exhausted all available means to find relief through the ordinary courts.⁷⁹ Scholar Donald Kommers notes that in response to the flood of complaints received by the German Constitutional Court, which reached around 3,500 annually by the mid-1980s, each of the Court's two senates established three screening committees to filter out frivolous complaints.⁸⁰ In addition, in 1963 the German Court was authorized by law to impose a nominal fine upon petitioners who "abuse" the constitutional complaint procedure.⁸¹

In France, citizens may only access the *Conseil* in the event of an electoral dispute.⁸² Originally only the President of the Republic, the Prime Minister and the Presidents of the National Assembly and the Senate could call on the *Conseil* in any matter concerning the

⁷⁸Amouzouvi, *supra* note 72 at 367.

⁷⁹ Dieter Grimm, *Human Rights and Judicial Review in Germany*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 267, 271 (David M. Beatty ed., 1994).

⁸⁰ JACKSON & TUSHNET, *supra* note 51 at 633.

⁸¹ *Id.*

⁸² HENRY ROUSSILLON, LE CONSEIL CONSTITUTIONNEL 31 (4th ed. 2001).

constitutionality of laws or treaties.⁸³ Since 1958, this authority to access the *Conseil* for matters of legislative review has gradually expanded to permit access to members of parliament.⁸⁴

However, French citizens are granted no role in this aspect of the *Conseil*'s work.

The fundamental role the Beninese Court plays in guaranteeing human rights in Benin is born of the fact that any individual or non-governmental human rights organization or association, as well as the President of the Republic, has immediate standing before the Court for matters involving laws or regulatory acts that threaten the fundamental rights of the individual and public liberties, and in general, the violation of human rights.⁸⁵ Unlike Germany's Constitutional Court, citizens need not exhaust other legal remedies before calling on the Beninese Court, nor does Benin's Court employ a filtering process to prevent its full membership from considering the constitutional validity of an individual citizen's complaint. In addition, the Beninese Court can act on its own motion to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties.⁸⁶

In several decisions, the Court has further stretched its adjudicatory reach over human rights violations by allowing citizens to allege human rights violations against *each other* as well as against the state. The Court presumably has based its authority in cases involving allegations against private parties on the Constitution's requirement that the Court must "rule more generally on violations of the rights of individuals."⁸⁷ For example, in Decision DCC 02-065, a citizen invoked his right to a healthy, satisfactory and durable environment under article 27 of the Constitution in a complaint that alleged violations by the Ministry of Public Health, the

⁸³ *Id.* at 26.

⁸⁴ *Id.* at 28-29. In 1974, Article 61 of the French Constitution of 1958, which grants the *Conseil Constitutionnel* authority to examine the constitutionality of organic laws before they are promulgated, was revised to permit a group of 60 deputies from the National Assembly or 60 senators to access the Court. In 1992, Article 54, which grants the *Conseil* authority to examine the conformity of treaties to the Constitution, was revised in the same fashion.

⁸⁵ Organic Law of the Constitutional Court of Benin, Law 91-009 of Mar. 4, 1991, Art. 22.

⁸⁶ CONST. Title V, Art. 121, ¶ 2 (Benin).

⁸⁷ CONST. Title V, Art. 122. (Benin).

Environment, and Housing and Urban Development as well as his neighbor, a private citizen. The Court found that the Ministry had not violated the Constitution, noting it had taken all measures within its powers to address the environmental and health hazards caused by the neighbor's henhouse. Nonetheless, the Court concluded that the neighbor had violated the Constitution by installing the henhouse in the particular location in question, and granted the petitioner the right to reparations.⁸⁸ Putting aside the question of whether private party disputes should become a substantial part of the Court's jurisprudence, its willingness to consider such a dispute shows an entity willing to go beyond the traditional mandate of a constitutional court.

Benin's Court can address human rights violations only when citizens are willing to take the state to Court without fearing negative repercussions.⁸⁹ Given the repressive tactics of the previous regime, this would seem to require a cultural shift in terms of how citizens perceived their government. The data show that the number of human rights decisions handed down has gradually increased since the Court's establishment.⁹⁰ The first few years brought just a handful of human rights decisions: two in 1993, nine in 1996 and 12 in 1995. In 1996 that figure more than tripled to 40 decisions. Although year-over-year increases only have been sustained since 2000, 2002 saw a record 83 decisions dealing with human rights. Unfortunately, there is little data to account for why, for example, 1997 only saw 19 decisions on human rights after 1996 saw 40, or why in 1999 the Court only handed down 14 human rights decisions, after adjudicating a then-record 53 cases in 1998. It has been suggested that most of the citizens who file are urban dwellers,⁹¹ although there is no precise data to support this. The available data

⁸⁸ Beninese Constitutional Court Decision, DCC 02-065.

⁸⁹ Telephone Interview with Cyrille Oguin, Beninese Ambassador to the U.S., 2001-present (Nov. 19, 2002). Also note that Benin's Court has never acted on its own motion without a complaint first being filed by an individual with some political institution other than the Court. Thus there is no indication that Benin's Constitutional Court is in the business of tracking down human rights violations itself and then adjudicating them by acting on its own motion.

⁹⁰ All of the numbers discussed through the end of the paragraph were researched and calculated by the author, based on a thorough review of all of the Constitutional Court's decisions from June 1993 through Dec. 31, 2002.

⁹¹ Interview Holo, *supra* note 41.

permit only a basic profile of who accesses the Court in human rights cases. Between 1991 (when the HCR began to hear the types of cases that would be heard by the Court once established in June 1993) and December 31, 2002, the Court handed down 350 decisions on human rights.⁹² Of these, 227 decisions had at least one male petitioner, just shy of seven times more than the 38 decisions that had at least one female petitioner. 17 petitioners were not-for-profit organizations, while 23 complaints were filed by individuals representing organizations. 22 petitioners were represented by counsel. Seven complaints were filed by foreigners. Of the remaining decisions, three arose from a trial in the judicial system in which a determination of constitutionality was necessary for the disposition of the case, three were raised by the President of the Republic, one was raised by a deputy at the National Assembly, one was raised by the Minister of Commerce, and 11 found the Court acting on its own motion.

The dearth of available data likewise prevents conclusive analysis of why citizens have chosen to file complaints with the Court. A number of factors may serve as preliminary explanations for the steady increase in human rights complaints. Anecdotal evidence suggests that the Beninese were quick to cast aside the old regime and embrace their new freedoms. U.S. Ambassador Isom describes a night and day change between the oppression of the previous regime and the openness of the post-National Conference era.⁹³ Given that almost three years passed before the Constitutional Court officially was established in mid-1993, one could argue that the public had already grown confident in its democratic institutions. Yet it may be naïve to accept that after decades of repression, both the perception and reality of the government had so

⁹² The following types of cases are classified as dealing with human rights by the Constitutional Court's Documentation and Publication Service: freedom of association; freedom of conscience, religion, and expression; freedom from cruel, inhumane, and degrading punishment and threats to physical and moral integrity; the right to a private life; the right to the environment; the right to a defense; the right to be judged within a reasonable delay by an impartial jurisdiction; economic and social rights, the right to property; the right to health; the right to come and go; the principle of equality; the principle of separation of powers; violation of provisional detention standards; and decisions applying article 35 of the Constitution, which requires all citizens charged with or elected to a public function to complete it with conscience, competence, probity, devotion and loyalty in the interest and respect of the common good.

⁹³ Telephone interview Isom, *supra* note 8.

changed that the Beninese would boldly bring their human rights complaints before a government institution. As evidenced by the scores of provisional detention complaints that citizens have filed with the Constitutional Court,⁹⁴ Benin's police have not yet assumed the role of the protector of individuals rather than the arbitrary enforcers of authoritarian will.⁹⁵ In addition, vigilantism and mob justice have become prevalent over the past several years, perhaps born of frustration with the criminal justice system.⁹⁶ More than a decade into democracy, human rights activists continue to speak of Benin's democracy in terms of its "fragility."⁹⁷ Thus the relationship between the entrenchment of Benin's democratic government and the willingness of citizens to seek redress from the Court is not yet clear.

Increased human rights education may be an alternative or additional factor that has encouraged citizens to take advantage of the Court's liberal standing rules. The past thirteen years have seen the proliferation of human rights NGOs.⁹⁸ While only a selection of these organizations focus exclusively on human rights education, their work would seem to have reached a large segment of the population. Two-term Constitutional Court member Glèlè-Ahanhanzo, who also serves as President of the Institute for Human Rights and the Promotion of Democracy, has undertaken one unique education effort by hosting a weekly radio program to teach the public about human rights and discuss decisions of the Constitutional Court.⁹⁹ His NGO has published several short books to educate the public on human rights, including one entitled: "The Constitutional Court and Human Rights," which includes a selection of decisions

⁹⁴ 115 decisions on provisional detention were handed down by the Constitutional Court between June 1993 and Dec. 31, 2003.

⁹⁵ Bruce A. Magnusson, *Transitional Flows, Legitimacy, and Syncretic Democracy in Benin*, in CONSTRUCTIVISM AND COMPARATIVE POLITICS (Daniel M. Green, ed., 2002) available at

<http://www.maconsortium.org/Past/SummerInstitute2002/Papers/Magnusson.htm> (last visited Aug. 30, 2003).

⁹⁶ U.S. State Department, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices: Benin, released Mar. 4, 2002 available at <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8252.htm> (last visited Aug. 30, 2003).

⁹⁷ Interview with Gandemey, *supra* note 11. Interview with Togbadja, *supra* note 9.

⁹⁸ At a symposium held in May, 2002 entitled "Benin and International Human Rights Conventions," no fewer than forty-one domestic and international NGOs were identified by name as actively involved on the ground in the defense and promotion of human rights. Huguette Bokpe Gnacadja, *Les ONG béninoises et l'application des conventions internationales relatives aux droits de l'homme*, in ACTES DU SÉMINAIRE: LE BÉNIN ET LES CONVENTIONS INTERNATIONALES RELATIVES AUX DROITS DE L'HOMME, 86-88 (2002).

⁹⁹ Interview with Glèlè-Ahanhanzo, *supra* note 42.

where the Court found the petitioners' constitutionally protected human rights had been violated.¹⁰⁰ The Association of Women Jurists of Benin, an NGO led by current Court member Clotilde Médégan, has as its mission to educate the public on the rights accorded to them by the Beninese Constitution, and the international conventions and charters to which Benin adheres.¹⁰¹ The Beninese Section of Amnesty International has conducted educational seminars for school teachers in the capital-city area to teach them how to instruct students on human rights.¹⁰² Finally, the Court itself threw its hat into the civic education ring when it published a pamphlet in February 2001 entitled: "The Constitutional Court of the Republic of Benin: At the Citizens' Service," in which it explained its subject matter jurisdiction and standing rules.¹⁰³ Current Court member Médégan recalls this book was conceived in 1999 because the Court felt it was too separated from the citizens and needed to make itself better known to the public at large.¹⁰⁴ Despite these efforts, it is impossible to empirically substantiate a connection between the increase in human rights education and the increase in citizens' petitioning the Court. Indeed, Court member Médégan asserts that citizen awareness of the Court is the result of the Court's mandate to verify national election results, not its adjudication of human rights violations.¹⁰⁵ If Médégan's hypothesis is correct, it would serve to confirm the thesis that the Court's varied competences – in this case its role in presidential and parliamentary elections – bolsters its institutional standing and thus its capacity to fulfill its human rights mandate.

The simplicity of the Beninese Court's filing procedure may serve as a final insight into increasing numbers of human rights complaints. A complaint filed by a private person only requires the individual to submit a letter with his or her name, surname, address, and signature or

¹⁰⁰ Book on file with the author.

¹⁰¹ Interview with Médégan, *supra* note 68.

¹⁰² Interview with Jules Zounho, Director of Amnesty International – Beninese Section, in Cotonou, Benin (Jan. 14, 2003).

¹⁰³ Copy of pamphlet on file with the author.

¹⁰⁴ Interview with Médégan, *supra* note 68.

¹⁰⁵ *Id.*

fingerprint.¹⁰⁶ No lawyer is required. Besides the price of a stamp for those outside of Cotonou,¹⁰⁷ filing is free. Once the letter is submitted, nothing more is required of the citizen. The simplicity of this procedure recalls the German Constitutional Court, where the proceedings are free.¹⁰⁸ As in Benin, complaints to the German Court must be filed in writing¹⁰⁹ and the person filing must be personally affected by the act in question. The essential difference is that German citizens must exhaust all other legal remedies before calling on their Court, whereas Beninese citizens can access their Constitutional Court without exploring other legal remedies.

Citizen access to Benin's Constitutional Court is *the* key feature that permits the Court to fulfill its mandate of guarantor of human rights. It marks a radical departure from the French model and an evolution of the German model. It is worth noting that the German Court and French *Conseil*, as well as any constitutional court that counts among its competences reviewing the constitutionality of legislation or fielding constitutional complaints, could have granted their citizens access to that part of their work, thereby drawing the institution nearer to the general population. But constitutional courts, as an institution, have seldom viewed their role as a resource or a recourse for citizens threatened by their own government. Thus their credibility is not a function of their capacity to respond directly to the general population. The framers of Benin's Court wished to create this link between the institution and the people.

The unique role played by Benin's Court in protecting human rights leaves one to consider where similar institutional models exist. Given its competences and standing rules, one can conceive of Benin's Court as a traditional constitutional court with the added functionality of a state-sponsored human rights commission. While national human rights commissions are typically designed to complement, rather than replace the judiciary's adjudication of human

¹⁰⁶ Organic Law of the Constitutional Court of Benin, Law 91-009 of Mar. 4, 1991, Article 24.

¹⁰⁷ The current price to mail a letter within Benin is 135 CFA, valued at approximately \$0.21.

¹⁰⁸ §34 Nr. 1 BVerfGG.

¹⁰⁹ §23 Nr. 1 BVerfGG.

rights abuses, their accessibility allows them to offer institutional protections otherwise unavailable. Like Benin's Court, human rights commissions are typically mandated with the responsibility to protect human rights by investigating allegations of human rights abuses.¹¹⁰ Like Benin's Court, human rights commissions typically allow complaints to be brought on behalf of an interested party and only require that they be in writing and not be anonymous.¹¹¹ Finally, like Benin's Court, human rights commissions allow direct citizen access.¹¹²

The analogy between Benin's Constitutional Court's human rights mandate and that of national human rights commissions is not perfect. For example, the work of human rights commissions often includes human rights education and publicity,¹¹³ which does not fall within the explicit mandate of Benin's Court, although its 2001 civil education effort reflects its recognition that its human rights mandate brings with it educational responsibilities not typically associated with a constitutional court. Also, unlike Benin's Court, which can hear complaints brought against officials at any level of government, the competence of national human rights commissions is usually limited to national authorities, although a number of states (including Ghana, Belgium, Austria and the Netherlands) have designed systems where national institutions have some relationship to local and regional matters.¹¹⁴ Furthermore, unlike Benin's Court, which has heard complaints for human rights violations perpetrated by private citizens, it is rare that private entities be investigated by a human rights commission, although Costa Rica and Colombia are exceptions.¹¹⁵ In the African context, the mandate of virtually every state-

¹¹⁰ Richard Carver & Paul Hunt, *National Human Rights Institutions in Africa*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 733, 734 (Kamal Hossain et. al. eds., 2000).

¹¹¹ Leonard F.M. Besselink, *Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 157, 161 (Kamal Hossain et. al. eds., 2000).

¹¹² *Id.*

¹¹³ *Id.* at 159.

¹¹⁴ *Id.* at 160.

¹¹⁵ *Id.*

sponsored human rights institution is limited in some way.¹¹⁶ For example, in most countries, the human rights commission cannot review the decision of a court or tribunal.¹¹⁷ Some institutions may investigate abuses involving the police and security forces; others may not.¹¹⁸ These limitations within which national human rights commissions must operate put in relief the potential power of the Beninese model. By combining a mandate to protect constitutionally guaranteed human rights with the institutional prestige and legitimacy of constitutional court, Benin's institution is optimally situated to address human rights violations. Moreover, the Court's competence in regulating the competencies of other government institutions may reinforce the willingness of those institutions to cooperate in the Court's human rights investigations. This leveraging power is impossible within the framework of a national human rights commission, whose only interaction with other government bodies occurs when inquiring about alleged abuses.

D. Membership

According to Hans Kelsen's conception of judicial review, constitutional courts should be populated by law professors rather than by ordinary judges.¹¹⁹ Indeed, Kommers notes that Germany's decision to create a constitutional court was influenced by the notion that Europe's career judiciaries were not well suited to constitutional adjudication and by the "conservative reputation and public distrust" of the regular courts. The French *Conseil* incorporated this line of thinking in its requirements for membership. Besides having reached the age of 18, there exist no formal membership prerequisites, no nomination or confirmation procedures, and no means to block appointments.¹²⁰ Prior judicial service or legal training is not required. According to

¹¹⁶ Carver & Hunt, *supra* note 110, at 738.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Ferejohn, *supra* note 46, at 50-51.

¹²⁰ STONE, *supra* note 49, at 50.

Stone, “the single most important criterion for appointment is political affiliation, and the *Conseil* has been dominated by professional politicians.”¹²¹

Benin’s Constitutional Court has seven members, called Councilors, who serve five-year terms that may be renewed once.¹²² These membership terms stand in contrast to the French *Conseil*, which consists of nine members who serve nine year, nonrenewable terms and where one third of the membership is renewed every three years.¹²³ Benin’s Court is made up of three magistrates with at least fifteen years experience, two high-level jurists, professors, or legal practitioners with at least fifteen years experience, and two “personalities” of great professional reputation.¹²⁴ Thus unlike the French *Conseil*, Benin’s Court does require a high level of legal competence from the majority of its members, but also incorporates the participation of individuals with no legal training (and indeed, no political experience). These “personalities” are lauded for the new perspective they bring to the issues. Indeed, current Court President Ouinsou, herself a jurist, characterizes the participation of personalities as a “good thing”¹²⁵ and Councilor Médégan, a magistrate, emphasized that their non-legally trained colleagues quickly become “neo-jurists”, while introducing a new dimension into the decision-making process.¹²⁶ Besides their professional competencies, article 115 of the Constitution requires members to be of good morality and great probity.

¹²¹ *Id.* Former President Francois Mitterand said in 1978: “It is the institution that I indict, because the *Conseil* Constitutionnel is a political institution, the political instrument of the executive, nothing more, nothing less.” JACKSON & TUSHNET, *supra* note 60, at 512.

¹²² CONST. Title V, art. 115. There was some question as to whether Idrissou Boukari was eligible to be nominated in 2003. While he has only served three years, Hubert Maga, the Court member he replaced, would have been ineligible for renomination because no member of the Court can serve for more than 10 years. Ultimately, he was nominated and confirmed for a second term.

¹²³ *Id.* at art. 56.

¹²⁴ *Id.* at art. 115. On the Court that served from 1993-1998, these “personality” slots were filled by Alexis Hountondji, a respected professor of medicine at the National University of Benin, and Hubert Maga, who had served as President of Benin from 1960 to 1963 and again from 1970 to 1972. Both were named to a second term in 1998. When Maga died in 2000, Idrissou Boukari, a businessman who is also a jurist, was named to the vacant “personality” slot. In June, 2003, Boukari was named to a second term. Hountondji retired, having served two-terms, leaving open one personality slot, which was filled by Pancrace Brathier, a retired military general who had also served as Minister of the Interior under Mathieu Kérékou before the National Conference.

¹²⁵ Interview with Ouinsou, *supra* note 69.

¹²⁶ Interview with Médégan, *supra* note 68.

With Benin Court's second term only having ended in June 2003 and with just fourteen individuals having served since its establishment, it is too soon to analyze the general professional profile of Court members. It is worth noting that, in a country often divided by north-south political rivalries, these members were drawn from all over the country. The members also come from a range of ethnic backgrounds. All of the members had dedicated most, if not all, of their careers to public service. The members with legal backgrounds typically held very high level positions within the Beninese judicial system. Most studied, worked, or received training outside of Benin, usually in France.

One striking fact about the Court's membership is that both of the Court's two presidents have been women who were born outside of Benin. Elisabeth Pognon, who presided from 1993-1998, is Togolese by birth and Conceptia Ouinsou, who took over the presidency in 1998, was born in Haiti. Both women are Beninese by marriage (Ouinsou is now divorced) and built their careers in Benin. Two-term member Glèlè-Ahanhanzo points out that the idea of citizenship is not taken particularly seriously in Benin, perhaps due to general instability in the region; if one's career takes place in Benin, one is Beninese.¹²⁷ Both current female members of the Court emphasize the important of having females Councilors. Clotilde Médégan pointed out that Beninese population is used to seeing men in positions of power, which only underlines the importance of getting women into leadership positions.¹²⁸ Current President Ouinsou echoed Médégan's concern by citing the inequality problem in the other areas of the government.¹²⁹

E. The Nomination Process, Membership Perks, and Institutional Independence

The intention to guard the institutional independence of the Constitutional Court vis-à-vis the judiciary is illustrated by the Constitution's separate treatment of the Court (Title V) from the

¹²⁷ Interview with Glèlè-Ahanhanzo, *supra* note 42.

¹²⁸ Interview with Médégan, *supra* note 68.

¹²⁹ Interview with Ouinsou, *supra* note 69.

judiciary (Title VI). Virgil A. Akpovo, Dean of the Faculty of Law and Political Science at the National University of Benin, stresses that the focus on separating from constitutional court from the rest of the judiciary was a reaction by the framers of the 1990 Constitution to the problems with the existing judicial system, whose structure dated back to 1960.¹³⁰

The nomination process to Benin's Court seeks to maintain balance between and independence from the executive and the parliament. Of the three magistrates, two are named by the Bureau of the National Assembly and one is named by the President of the Republic.¹³¹ The Bureau and the President name one jurist and one personality each.¹³² This process is similar to that employed in France, where three *Conseil* members are appointed by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. In France, unlike in Benin, former Presidents of the Republic are lifetime members.¹³³

There are dramatic illustrations of the Beninese Court asserting its independence vis-à-vis other government institutions. For example, in March 1996, the Court was lauded for its courage in announcing the official outcome of the highly contested presidential elections, during which members of the court and their families received death threats following the first round of elections and unidentified gunmen fired shots at the home of Court member Maurice Glèlè-Ahanhanzo shortly before the final results were announced.¹³⁴ Two weeks later, in response to a complaint filed by two citizens, the Court's decision found the oath taken by newly elected

¹³⁰ Interview with Virgil Akpovo, Dean of the Faculty of Law and Political Science, National University of Benin, in Cotonou, Benin (Jan. 8, 2003).

¹³¹ CONST. Title V, art. 115.

¹³² *Id.*

¹³³ CONST. Title III, art. 56.

¹³⁴ After the shooting, Glèlè-Ahanhanzo was reported as saying: "[The gunmen] carried out their threats. They will get nowhere. We will continue our work. We know God and the people are with us," he said "The people of Benin have embraced democracy, and whatever happens it will move forward." Anne Le Coz, "Constitutional Court Member Unharmed in Shooting," Agence France Presse, March 22, 1996.

President Kérékou did not conform to the Constitution because the new head of State had omitted a passage of the sacred text.¹³⁵ The President subsequently retook the oath.

The goal underlying Benin's nomination design was to balance the political persuasions of the Court's members to allow it to reach its decisions without undue political influence and is thus best achieved when the politics of the Bureau are different from those of the President. Such was the case at the time the Court was first assembled in 1993 because President Soglo lacked a political party of his own in the National Assembly and shifting coalitions among the 14 parties represented guaranteed him only an occasional majority.¹³⁶ As one scholar notes, "had a single political party been in control of both the presidency and the National Assembly, it is unlikely that the court, by its very composition, would have asserted the independence that it did or acquired the aura of national legitimacy that became its most important attribute."¹³⁷ That political division was no longer present in 1998 and 2003 when the second and third mandates were assembled.¹³⁸ In both cases, Kérékou controlled the presidency and his political party controlled the National Assembly. At the time of the 2003 nominations, there was some commentary in the national press about the fact that five of the seven members were re-nominated; only those members whose terms had expired left.¹³⁹ Regarding the blanket re-

¹³⁵ Constitutional Court Decision DCC 96-017 of April 5, 1996.

¹³⁶ Bruce A. Magnusson, "Testing Democracy in Benin: Experiments in Institutional Reform", in *State, Conflict, and Democracy in Africa* 217, 225 (Richard Joseph ed., 1999).

¹³⁷ *Id.*

¹³⁸ At the end of the first, five-year term in 1998, three members were re-nominated to serve a second term (Maurice Glèlè-Ahanhanzo, Alexis Hountondji, and Hubert Maga) and four individuals were nominated for the first time, of which two were women (Conceptia Ouinsou and Clothilde Médégan). The Court's first president, Elisabeth Pognon, was not reappointed. Recall that although the Constitution establishing the Constitutional Court was implemented in 1990, the Court itself was not set up until 1993. It is said that Pognon retired as a magistrate because she grew tired of waiting for the Constitutional Court to be established. There was some debate as to whether she could be nominated as a magistrate, given that she was retired. Ultimately, Pognon was nominated as a magistrate in February 1992. Five years later, the Bureau of the National Assembly re-nominated Pognon on May 22, 1998, but this time as a jurist. Her nomination became the subject of the Court's Decision DCC 1998-0-52, reported by Maurice Glèlè-Ahanhanzo, which found that Pognon's nomination as a jurist was contrary to the Constitution. The decision explained that because this was a renewal of Pognon's mandate, the nomination could be submitted only in the quality of magistrate that she had at the time of her first nomination. The three members who left the Court in 1998 have either retired or entered other government positions: Elisabeth Pognon retired; Bruno Ahonlonsou went on to serve as a member of the High Authority for Audiovisual Media and Communications (HAAC); Alfred Elegbe went on to serve as the Technical Juridical Councilor to the Minister of Relations with the Institutions, Civil Society and the Beninese Abroad.

¹³⁹ The Court began its third, five-year term began June 2003. The five members who were re-nominated to serve a second term are Idrissou Boukari, Jacques Mayaba, Clothilde Médégan, Conceptia Ouinsou and Lucien Sebo. The two members who departed were two-term members Maurice Glèlè-Ahanhanzo and Alexis Hountondji.

nominations, one newspaper asked “Merit prize or compensation for favors?”¹⁴⁰ Another wrote, “[s]everal reasons could explain these nominations: the efficiency of the current Councilors or perhaps compensation for favors granted.”¹⁴¹ Adding to the din is the fact that the two new members nominated to the Court in 2003 both appear to have ties to Kérékou and his political supporters.¹⁴²

Nevertheless, the prevalent view over the past decade is that the Court’s decisions reflect no discernable political allegiance. Given the similarities between the human rights mandate of these state sponsored institutions and Benin’s Constitutional Court, one should inquire into the factors that aid the Beninese Court in guarding its independence, even while most national human rights commissions are plagued by conflict of interest concerns.¹⁴³ To begin, political independence is emphasized in all of the laws that regulate the court, beginning with the first article of the presidential decree that establishes the members’ obligations, which states:

*“Members of the Constitutional Court have the general obligation to abstain from anything which could compromise the independence and dignity of their functions.”*¹⁴⁴ During their mandate, members are forbidden from simultaneously serving in the government, holding any elected position, holding any public civil or military job, participating in any other professional activity as well as representing the nation at a function.¹⁴⁵ Councilors are also forbidden from mentioning their Court membership in any document which could be published and relates to

¹⁴⁰ Maurice K. Tossou, *Prix du mérite ou recompense pour services rendus?* La Nouvelle Tribune, May 20, 2003, 9.

¹⁴¹ *Les raisons de la reconduction des Conseillers*, Le Matin, May 20, 2003, 6.

¹⁴² Pancrace Brathier, a retired military general who had also served as Minister of the Interior under Mathieu Kérékou before the National Conference was nominated by the National Assembly. Christophe Kougniazodé, a juriste, was nominated by President Kérékou himself.

¹⁴³ Harley Johnson, *Ombudsman – Essential Elements*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 785, 786 (Kamal Hossain, et. al., eds. 2000).

¹⁴⁴ Presidential Regulations, Decree number 94-11, January 26, 1994, art. 1 Note that the Court itself eliminated one professional constraint. The original Presidential decree regulating its function forbade Court members from belonging to a political party. In Decision DCC 33-94 handed down in November 1994, the Court struck down the provision, noting that freedom of association is guaranteed in article 11 of the Constitution, and declaring that the Court cannot with regard to its own members violate one of the liberties it must protect. Decision of the Constitutional Court DCC 33-94.

¹⁴⁵ CONST. Title V, art. 115.

any public or private activity.¹⁴⁶ In practice, the spirit of these provisions is adhered to more than the text. The current president of the Court teaches constitutional law at the National University of Benin. Two-term member Alexis Hountondji, who left the Court in June 2003, continued to serve at the department of internal medicine at the University's Faculty of Health Sciences and publish in the field of medicine through his tenure.¹⁴⁷ Current member Médégan and former member Glèlè-Ahanhanzo are presidents of their own non-governmental organizations. One observer commented that the concept of "conflict of interest" is not very developed in Benin.¹⁴⁸ Glèlè-Ahanhanzo views "incompatibility" as limited to making money in a political job, and claims that there is no conflict when a member says what he thinks.¹⁴⁹

The Constitution grants members of the Court special protections and privileges, perhaps to make members less susceptible to outside influences. It prohibits the removal of members of the Court during the duration of their mandate and forbids bringing charges or arresting them without the joint authorization of the Court and the Bureau of the Supreme Court, except in the case of a flagrant offence.¹⁵⁰ The question of compensation was taken on by the Court itself in a 2002 decision where it found that the legislative decrees that set its benefits and indemnities created significant categorical differences between members of government and members of the Court, in violation of article 10 of the Organic Law on the Constitutional Court which required that the members' benefits and indemnities not be inferior to those accorded to the members of government.¹⁵¹ In so concluding, the Court found that such organic laws make up part of the

¹⁴⁶ Presidential Regulations, Decree number 94-11, January 26, 1994, art. 2.

¹⁴⁷ Under article 11 of the Constitutional Court's Organic Law 91-009 of March 4, 1991, which establishes the framework of the Court, publications of a scientific character are permitted provided that "the conclusions of these publications are in the spirit and the sense of the decisions of the Constitutional Court..."

¹⁴⁸ Interview with Rueben Johnson, USAID Democracy and Governance Strengthening Program, in Cotonou, Benin (January 7, 2003).

¹⁴⁹ Interview with Glèlè-Ahanhanzo, *supra* note 42.

¹⁵⁰ CONST. Title V, art. 115.

¹⁵¹ Decision of the Constitutional Court, DCC 00-016. Three former members of the Court - Bruno O. Ahonlonsou, Pierre E. Ehoumi, and Alfred Elegbe, each of whom served on the Court from 1993-1998 - who had served from 1993 to 1998 subsequently filed a complaint with the Court asking that they be permitted to benefit from the new law that rectified the differences in compensation. In its response, the Court relied on article 30 of the Constitution, which requires the state to try to create conditions that guarantee

“constitutional block” that the Court is empowered to review, thus decisively deciding a question still debated in the French *Conseil*.¹⁵²

Besides the professional constraints and membership perks, there are a number of procedural factors that bolster the Court’s political independence. First, the naming of the Court’s president (an important position because the president generally controls procedure and designates the reporter for each decision) is the prerogative not of the nominating institutions but of the other members of the Court, their only constraint being that the president be either a magistrate or jurist.¹⁵³ This process stands in sharp contrast to the French *Conseil* whose President is appointed by the President of the Republic,¹⁵⁴ an issue that has historically been treated as a matter of high politics,¹⁵⁵ and the German Constitutional Court where the Bundestag and Bundesrat alternately elect the President and Vice-President of the Court.¹⁵⁶ Second, depending on the matter under consideration, the Constitution specifies the maximum time allowed for the Court to hand down its decision after being seized. For example, article 120 requires the Court to hand down a decision within fifteen days of being called upon with a complaint of human rights violations.¹⁵⁷ Former HCR member Holo, who was partially responsible for the Court’s institutional framework, commented that quick decisions are vitally important because slowness can be equated with doubt.¹⁵⁸ The rapidity with which the Court hands down its decisions has enhanced its credibility,¹⁵⁹ particularly in light of the fact that the

that workers receive adequate compensation for their services, and found that the new law’s effects should cover the period before its promulgation, thereby extending its benefits to the former members of the Court. Decision of the Constitutional Court DCC 00-106.

¹⁵³ CONST. Title V, art. 116. Both of the members who have been named president of the court by their colleagues were nominated by the National Assembly. Elisabeth Pognon served from 1993 to 1998. Conceptia Ouinsou has served from 1998 through the present.

¹⁵⁴ CONST. Title III, art. 56.

¹⁵⁵ JACKSON & TUSHNET, *supra* note 51, at 512.

¹⁵⁶ §9 Nr. 1 BVerfGG

¹⁵⁷ CONST. Title V, art. 120.

¹⁵⁸ Interview with Holo, *supra* note 41.

¹⁵⁹ Interview with Médégan. *supra* note 68.

Beninese judicial system is widely criticized for its delays and inefficiency.¹⁶⁰ However, a review of the scores of cases filed annually with the Court reveals that in fact the precise constitutionally mandated timelines between filing and decision are seldom respected. The Court's documentarian, Coffi Amoussou, attributes the divergence to a lack of the resources required to adhere to such strict deadlines.¹⁶¹ This resource deficit will likely worsen as time goes by.¹⁶² In addition, the complaints filed by citizens appear increasingly sophisticated. Court President Ouinsou notes that while early in her tenure many citizen complaints were rejected because they raised issues outside of the Court's jurisdiction, today jurisdictional issues seldom dictate the outcome.¹⁶³ The institution could increasingly struggle to respond to the sheer volume of complaints, let alone meet the strict deadlines imposed by the Constitution. It remains to be seen whether this will diminish its credibility.

A third procedural mechanism that boosts the Court's independence is article 121 of the Constitution, which permits the Court to act on its own motion (*l'auto-saisine*) to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties. The Court has exercised this mechanism when a procedural technicality would otherwise require the Court to reject the case. A typical scenario is illustrated by Decision DCC 96-031, in which the Court noted that the complaint was not admissible because it was not signed by the petitioner (as required by article 29 of the Interior Regulation of the Court), but went on to act on its own motion, citing that it had been made aware that the petitioners had been

¹⁶⁰ The Constitutional Court has handed down several decisions in response citizens' complaints that the delays in the judicial system violated their right under article 7 of the Constitution to be judged within a reasonable delay. For example, Decision DCC 97-006 found a delay of 14 months and 10 days by the trial court in Cotonou in violation of the Constitution; Decision DCC 98-058 found an 11 year delay before the trial court in Abomey transmitted the dossier to the Appeals Court in Cotonou in violation of article 7; and Decision DCC 01-008 found an 8 year trial without any conclusion to be "abnormally long" in violation of article 7. Substantially judicial reform is currently underway to modernize the current trial and appeals court system, which was established following independence in 1960.

¹⁶¹ Telephone interview with Coffi Amoussou, Jurist from the Documentation and Publication Service of the Constitutional Court, (March 27, 2003).

¹⁶² Thus far, 1999 was its busiest year – including the legislative election decisions, the Court handed down 233 decisions and one proclamation. 2002, a non-election year, saw some 148 decisions. Interview with Coffi Amoussou, Jurist from the Documentation and Publication Service of the Constitutional Court in Cotonou, Benin (Jan. 13, 2003).

¹⁶³ Interview with Ouinsou, *supra* note 69.

arbitrarily detained in violation of their constitutional right to come and go.¹⁶⁴ Two other common “auto-saisine” scenarios include the failure of the complainant to obtain the necessary juridical capacity to file with the Court¹⁶⁵ and the addressing of a complaint of alleged human rights abuses to a state institution other than the Court, be it the President of the Republic¹⁶⁶ or the prosecutor of the Republic.¹⁶⁷ This is a prime example of the Court leveraging a mechanism typically associated with a constitutional court to respond to the human rights abuses suffered by individual citizens.

Without diminishing the relevance of the aforementioned procedural and constitutional mechanisms, there is a general sense in Benin that the political independence and legitimacy achieved thus far by the Constitutional Court is largely attributable to the respect that is commanded by the individuals who have served thus far. Two-term member Glèlè-Ahanhanzo is considered the father of the 1990 Constitution; former president Elisabeth Pognon was heralded in the international press as the “iron lady”¹⁶⁸ and was awarded the German Prize for Africa in Bonn in November 1995 for her rigor; two-term member Hubert Maga (who died in 2000) was a respected statesman. None is still on the Court. Although the Constitution specifies few requirements for Court members, current members and observers have identified a litany of qualities exhibited by its membership ranging from “objectivity”,¹⁶⁹ “complete neutrality”,¹⁷⁰ and “honor”,¹⁷¹ to “general culture”,¹⁷² “a democratic spirit”,¹⁷³ and a “sense of solidarity” among the

¹⁶⁴ Decision DCC 96-031 of June 26, 1996.

¹⁶⁵ Decision DCC 96-056, August 29, 1996; Decision DCC 01-108 of December 19, 2001; Decision DCC 98-030; Decision DCC 01-097 of November 7, 2001.

¹⁶⁶ Decision DCC 01-046 of June 21, 2001.

¹⁶⁷ Decision DCC 01-063 of July 26, 2001.

¹⁶⁸ Jean-Luc Aplogan, “*Bénin: une démocratie apaisée*”, *Le Monde Diplomatique*, November 1997, available at <http://www.monde-diplomatique.fr/1997/11/APLOGAN/9489>.

¹⁶⁹ Telephone Interview with Oguin, *supra* note 89.

¹⁷⁰ Interview with Médégan, *supra* note 68.

¹⁷¹ Interview with Glèlè-Ahanhanzo, *supra* note 42.

¹⁷² Interview with Zounho, *supra* note 102.

¹⁷³ Interview with Holo, *supra* note 41.

members.¹⁷⁴ Members of the Court take pride in their independence and recognize the significance of their responsibility. Glèlè-Ahanhanzo characterized the Court's philosophy as "nothing but the law"¹⁷⁵ and current member Clotilde Médégan emphasized that members are aware of their responsibility to keep the peace.¹⁷⁶

This focus on the members as individuals raises the broad questions as to whether, as one observer suggested, the current value of the institution is a function of those working on the Court¹⁷⁷ or whether the institution itself is sufficiently entrenched to fulfill its mandate were the members of the Court less respected as individuals. Court observers raise fears that as members' terms expire, the Court could become increasingly politicized and its credibility will erode. Interestingly, this fear functions in the opposite direction with regard to the parliament and presidency where, despite the dramatic events of the 1990s, the same politicians and personalities continue to dominate. Here, observers wish for change. In any event, the next test of the Constitutional Court's independence and legitimacy will develop in the months ahead as the Court adjusts to the departure of two-term members Glèlè-Ahanhanzo and Alexis Hountondji and integrate two new members into their ranks.

F. Decision making in the Court

The Court's decision making process varies in small ways depending on the matter under consideration. All complaints alleging human rights violations are dealt with identically. The president of the Court distributes complaints among the Court's seven members. The designated member, called the *rapporteur*, investigates. During this investigation, the complaining party can be assisted by any competent person, provided all submissions are signed by the

¹⁷⁴ Interview with Médégan, *supra* note 68.

¹⁷⁵ Interview with Glèlè-Ahanhanzo, *supra* note 42.

¹⁷⁶ Interview with Médégan, *supra* note 68.

¹⁷⁷ Telephone interview with Oguin, *supra* note 89.

petitioner.¹⁷⁸ The investigation may encompass any individual hearings that seem appropriate or written solicitation of information that the *rapporteur* deems necessary.¹⁷⁹ Several decisions indicate the Court's investigation included a visit to the location of the alleged violation.¹⁸⁰ On rare occasions, a decision notes that an individual witness testified to the Court.¹⁸¹ This process has no equivalent at the French *Conseil* since individual complaints are not permitted. Rather, the investigation process is similar to that undertaken by national human rights commissions, where procedures exist for formal examination of witnesses¹⁸² and quasi-judicial powers may be exercised to subpoena witnesses or papers and conduct on-site visits.¹⁸³

The *rapporteur's* report analyses the defenses raised and enumerates the key decisions the Court must take.¹⁸⁴ The report is submitted to the Secretary General, who immediately delivers it to the members of the Court.¹⁸⁵ The members review the reports prior to deliberation meetings,¹⁸⁶ which are called by the president whenever several reports are ready for deliberation.¹⁸⁷ At least five members are required for deliberations.¹⁸⁸ As at the French *Conseil*,¹⁸⁹ deliberations are held in secret and no one can ask to be heard by the Court at these meetings.¹⁹⁰ According to Councilor Médégan's, the *rapporteur* is required to read her report

¹⁷⁸ Interior Regulation of the Constitutional Court, July 5, 1993, art. 28. In rejecting a complaint without consideration filed by counsel for its failure to include the signature of the petitioner, the Court pointed out in Decision DCC 96-043 that "the assistance allowed in article 28 [of the Court's Interior Regulation] is not representation" Constitutional Court Decision DCC 96-043 of July 25, 1996.

¹⁷⁹ Interior Regulation of the Constitutional Court, July 5, 1993, art. 27.

¹⁸⁰ *See, e.g.*, Constitutional Court Decision DCC 02-002, where a delegation from the Court traveled to a prison to see the conditions in which the petitioner prisoner was being held.

¹⁸¹ *See e.g.*, Constitutional Court Decision DCC 01-070, indicating that the Court held a hearing at its headquarters to question the Director of Tests, Exams, and Competitions from the Ministry of Public Service, Employment, and Administrative Reform as to whether the employment competition under consideration took place at the national or provincial level.

¹⁸² Carver & Hunt, *supra* note 110, at 742.

¹⁸³ *Id.*

¹⁸⁴ Interior Regulation of the Constitutional Court, July 5, 1993, art. 27.

¹⁸⁵ *Id.*

¹⁸⁶ Interview with Médégan, *supra* note 68.

¹⁸⁷ Interior Regulation of the Constitutional Court, July 5, 1993, art.18.

¹⁸⁸ A procedure outlined in the Court's organic law to bypass this requirement has been utilized on occasion. *See, e.g.*, Decision DCC 01-085 of August 29, 2001, reported by Professor Alexis Hountondji, in which only four members participated in the decision. The decision notes that members Clotilde Médégan-Nougbo and Jacques D. Mayaba were on vacation and Maurice Glèlè-Ahanhanzo was on a mission outside the country. The provision is found in Organic Law of the Constitutional Court of Benin, Law 91-009 of Mar. 4, 1991, Art. 16.

¹⁸⁹ Roussillon *supra* note 82, at 36.

¹⁹⁰ Interior Regulation of the Constitutional Court, July 5, 1993, Art. 28.

and then the case is discussed by all members.¹⁹¹ The Court's Regulatory Text specifies that decisions are taken by a simple majority of the participants and that abstention is not permitted.¹⁹² However, as at the French *Conseil* it appears that consensus is the name of the game. Current President Ouinsou commented that in her five year tenure the Court has never voted on a case.¹⁹³ If consensus cannot be reached, the *rapporteur* is tasked with additional investigation.¹⁹⁴ This would indicate that the debates are contradictory. However, dissenting opinions have never been published.

H. Judicial opinions

The influence of the French civil law tradition on the judicial opinion writing of Benin's Constitutional Court is unmistakable. The starting proposition is that the only issue being decided in the opinion is the case itself. Thus, to the common law lawyer, the judicial opinions have some peculiarities. In *The Oracles of the Law*, John Dawson noted that “[i]n the opinions of the [French Cour de cassation]¹⁹⁵ what is mostly missing is any reference whatever to prior decisions, either to its own prior decisions or those of any other court.”¹⁹⁶

Beyond influencing the Beninese Court's understanding of what a judicial opinion should be, the form and structure of the French civil judicial opinion have provided a template for the decisions handed down by Benin's Court. A common law lawyer is struck by the brevity of the opinions, particularly because the Court is the highest jurisdiction in constitutional matters. The common law lawyer also discerns that the grammatical flow of the opinions prevents both the possibility of alternative perspectives and virtually any policy discussion. Like French judicial

¹⁹¹ *Id.* at Art. 27.

¹⁹² *Id.* at Art. 19.

¹⁹³ Interview with Ouinsou, *supra* note 69.

¹⁹⁴ Interview with Médégan, *supra* note 68.

¹⁹⁵ The Cour de cassation is the French Supreme Court in private law matters.

¹⁹⁶ JOHN DAWSON, *THE ORACLES OF THE LAW* 407 (1968).

discourse,¹⁹⁷ the Internal Regulation of Benin’s Court requires that the opinion specify the motives on which it is based.¹⁹⁸ However, the Court’s opinions on human rights violations rarely offer any analysis on the content of the human rights guaranteed by the Constitution. As in French judicial opinions, the constitutional provision invoked is seldom recited, let alone discussed or analyzed nor is the way in which Benin’s Court has applied that provision to the facts of the case is made explicit. For example, in DCC 02-113, a citizen complained that specified recruitment guidelines for the National Police were unconstitutional insofar as they excluded candidates holding a diploma superior to a BEPC,¹⁹⁹ the rough equivalent of finishing tenth grade in the United States. The citizen argued that “obtaining a superior diploma must not constitute a handicap to accessing a lower-level [recruiting] competition.” The Court acknowledged that articles 8, 26, and 30 of the Constitution – which address the citizen’s rights to equal access to work, the equality of all before the law regardless of social position, and the right to work -- were under consideration. However, its holding simply stated that in setting the BEPC ceiling, “the Minister [...] has taken account of the functions that the National Police are called on to assume; [and] that this choice does not contain any discrimination.” There is no analysis of the substance of the Constitutional provisions in question. The Court does not address why, for example, this does not amount to discrimination based on social position, which is forbidden in article 26 of the Constitution. No policy argument is set forth on whom the provision is meant to protect. In short, the Court’s only explanation is that the Ministry can set its own guidelines.

As previously noted, the Court does not publish dissents. While dissenting opinions are closely tracked in the United States as a window on future rulings and a glimpse into the battles

¹⁹⁷ Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 88 (2001).

¹⁹⁸ Interior Regulation of the Constitutional Court, July 5, 1993, Art. 20.

¹⁹⁹ BEPC is short for *Brevet d’enseignement du premier cycle*.

waged behind closed doors, their absence in Benin's Court accords with a consensus method of decision making and may be the mark of a fledging democracy as much as a civil law tradition. Germany's Constitutional Court also followed an unwritten rule of no dissents from its founding until 1971, and the court still unanimously decides over 90 percent of its reported cases.²⁰⁰ Théodore Holo warned that dissenting opinions could weaken the relevance of the Court's opinion.²⁰¹ President Ouinsou explained that the Court must make a proper decision because there is no appeal.²⁰² Such a view, while contrary to a common law conception of the adversarial system, accords with the civil law idea that the correct answer exists and is in principle deducible from the applicable legal authority.²⁰³ From this standpoint, the court is not concerned with building a constitutional jurisprudence; rather, they are focused on being correct. In addition to the strong civil law tradition in Benin, divided decisions on human rights violations may simply be unpalatable in a country that has known repressive governments. On the other hand, the lack of dissents may result in opinions that fail to analyze the complexity of the issues under consideration. Dissents could force the majority opinions to explicitly state the reasons, rationales, and legal interpretation underlying their conclusion. It is legitimate to fear undermining the moral victory gained by an individual whose rights have been violated. But the Court must recognize that it is called on to adjudicate is the *content* of the human rights guaranteed by the Constitution. This task will undoubtedly be controversial. But as the highest jurisdiction of constitutional matters including human rights, it seems not only appropriate but also important that the Constitutional Court strive to enter into a jurisprudence focused on defining the substance and limits of the litany of rights ensured in the Constitution.

G. Effects of decisions

²⁰⁰ JACKSON & TUSHNET, *supra* note 51, at 639.

²⁰¹ Interview with Holo, *supra* note 41.

²⁰² Interview with Ouinsou, *supra* note 68

²⁰³ Curran, *supra* note 197, at 93.

The decisions of Benin’s Court are notified to the concerned parties and take effect as soon as they are announced.²⁰⁴ The Constitution provides that the Court’s decisions are binding “on public authorities and on all civil, military, and jurisdictional authorities as well as all physical or moral people.”²⁰⁵ Court decisions can be rectified in the case of material error²⁰⁶ but they may not be appealed.²⁰⁷ This implies that once the Court has declared an organic law, regulatory text, or general law “conform with the Constitution” its constitutionality may not longer be questioned. The jurisprudence seems to indicate that this prohibition on appeals makes inoperative the standing rule of article 24 of the Court’s Organic Law that permits a citizen to request the Court to determine the constitutionality of laws when the determination is necessary for the disposition of a case that concerns him, whenever the Court has already declared constitutional that law in question. The issue arose in DCC 99-954, in which the Court joined three complaints, two filed by citizens and one filed by the Court of Assizes before which the citizens were on trial. Having achieved standing through article 24, the citizens asked the Court to declare the Penal Code provision which prescribed the death penalty in cases of armed robbery contrary to the Constitution’s guarantee of the individual’s right to life, liberty, security, and integrity. The Court cited to DCC 99-051, where it had declared that the provision in question conformed to the Constitution and held that the provision had the authority of “something judged” and thus could not be ruled on.²⁰⁸

H. Remedies

²⁰⁴ Interior Regulation of the Constitutional Court, July 5, 1993, Art. 21.

²⁰⁵ CONST. Title V, Art. 124, ¶ 2.

²⁰⁶ Interior Regulation of the Constitutional Court, July 5, 1993, Arts. 22, 23. An example of a “material error” is illustrated by a 2000 decision in which the petitioner alerted the Court to the fact that his claim, disposed of in a previous decision, was registered by the Secretary of the Court on December 29, 1998 and not on December 29, 1999 as had been recorded in the decision itself. The Court noted that rectifying this material error did not affect the authority of the issue judged in the decision and thus was not contrary to article 124 which prevents appeals of Court decisions. Constitutional Court Decision DCC 00-068, November 15, 2000. The irony in the Court’s error is that the original decision turned on a question of dates. In investigating a complaint of unconstitutionally long provisional detention, the Court found the judicial police officer involved had violated article 35 of the Constitution by furnishing the Court with false information on the dates in which the petitioner had been held in provisional detention. Constitutional Court Decision DCC 00-065 of October 13, 2000.

²⁰⁷ CONST. Title V, Art. 124, ¶ 2.

²⁰⁸ Constitutional Court Decision DCC 99-054.

While the judgments of Benin’s Constitutional Courts are legally binding, the institution is a jurisdiction of attribution, which means the Court’s authority is limited to a determination of when the Constitution is violated. This power is identical to that exercised by other constitutional courts. The difference, however, is that other constitutional courts do not typically grant immediate and direct access to citizens alleging violations of human rights. It is one thing for a constitutional court to hold a provision of a law contrary to the constitution before it is declared. It is another thing for a court to hold that a human right constitutionally guaranteed to a citizen has been violated. In the former scenario, the decision brings about immediate change in the form of changed legislation. In the latter, the violation has usually already been endured, so absent concrete remedies, the decision only amounts to a moral victory for the citizen.²⁰⁹ The only human rights decisions where adjudication of constitutionality may result in remedies are those cases in which the abuse was not physical. These cases tend to deal with economic or property rights where the matter under review is whether or not an asset is owed to the citizen. Here, when the Court decides the Constitution has been violated, the offending institution is bound by the decision and presumably must remedy the situation.

The remedies issue raises a fundamental question: is Benin’s Constitutional Court ill-equipped to deal with human rights abuses, despite its constitutional mandate to guarantee the fundamental rights of the individual and public liberties? Presently, to “guarantee” fundamental rights means to publicly observe that rights have been violated. From this perspective, opinions serves to uphold the integrity of the right by publicizing its violation, awarding a moral victory to the victim, and shaming the perpetrators by publishing their names and the nature of their abuse.

²⁰⁹ On occasion, the case is filed while the alleged abuse is still underway. *See, e.g.*, Constitutional Court Decision DCC 02-002, a prison torture case filed while the petitioner was still incarcerated. A delegation from the Court went to the prison where they saw that the prisoner wore leg shackles, and had been wearing them for 14 months. The Court found that despite the precarious security conditions and the “unbearable character of the prisoner”, the prison could not justify that someone be in shackles for so long. Presumably, upon being notified of the decision the prison was required to modify the conditions in which the prisoner lived.

Indeed, Court members talk about the effect of their decisions in terms of shaming the perpetrators.²¹⁰ By identifying the individual perpetrator by name (as opposed to merely naming the government entity for which the individual works) the Court aims to confer the public shame and stigmatization associated with a criminal. Councilor Médégan remarked that in 1998 when the current Court began its mandate, one of its goals was to use their jurisprudence to change behavior and noted the Court which ended its mandate in June 2003 intended to publish a list when its term ends naming all those who have violated human rights in the decisions handed down during its five-year tenure.²¹¹ However, the Court is realistic about the deterrence effect of its decisions. Glèlè-Ahanhanzo submits that behavior changes in response to a Court decision and then they start to see abuse again.²¹² As one observer commented, the political authorities have changed their behavior in response to Court decisions, but administrative and police authorities have not changed as much.²¹³ This outcome is unsurprising when one recalls that Benin's political authorities are subjected to balance of power mechanisms that the Court controls, whereas local administrators and police are far removed from the Court's reach.

The struggle for adequate remedies served as the impetus behind the most significant evolution in the Court's jurisprudence since its inception. In Decision 02-052, handed down in June 2002, the Court examined what appeared to be a standard complaint of provisional detention and inhumane treatment. The Court relied on medical certificates delivered by the petitioner to establish that the petitioner had endured cruel, inhumane, and degrading treatment.²¹⁴ It also found that the petitioner had been held in detention beyond the constitutional limit. In the following paragraphs the Court stated:

²¹⁰ Interview with Glèlè-Ahanhanzo, *supra* note 42. Interview with Médégan, *supra* note 68.

²¹¹ Interview with Médégan, *supra* note 68. It is unclear whether such a list was actually published.

²¹² Interview with Glèlè-Ahanhanzo, *supra* note 42.

²¹³ Interview with Akpovo, *supra* note 130.

²¹⁴ Constitutional Court Decision DCC 02-052 of June 4, 2002.

“Considering that **it results** from the preamble of the Constitution of December 11, 1990 that “...*fundamental human rights, public liberties, the dignity of the individual and justice are guaranteed, protected and promised...*”; that according to articles 8 and 15 of the same Constitution “*Human beings are sacred and inviolable.*” “*The State has the absolute obligation to respect them and protect them...*”; “*Every individual has the right to life, liberty, security, and the integrity of his person*”; that the African Charter on the Human and Peoples’ Rights in its articles 4 and 5 reaffirms: “*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right*”; “... *All forms of exploitation and degradation of man particularly...torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*”

“Considering that it emerges as much from a combined and cross-reading of these provisions as from international doctrine and custom that from the harms endured by any person opens the right to reparations; that in the instant case, [the petitioner] has the right to reparations for the harm that he endured.”²¹⁵

With that, the Court redefined its responsibility to guarantee fundamental individual rights to include providing the victim the opportunity to collect reparations. In the human rights decisions that immediately followed, the Court explicitly cited to DCC 02-058.²¹⁶ This reliance on precedent is almost unheard of in prior court decisions. The immediate impetus behind this change in strategy is unclear. In Decision DCC 02-037, which was published in the weeks preceding the first reparations decision, the Court confronted relatively similar facts in a provisional detention case. In response to the citizen’s claim for 10,000,000 CFA (about \$15,625) from the State in reparations for the harm suffered, the Court cited the fact that articles 114 and 117 of the Constitution to not grant the competence to the Court to allocate damages and reparations interests for harm suffered.²¹⁷ Perhaps this explicit demand for monetary damages spurred a discussion within the Court on how to address the persistent question of remedies. The result was the unusual language of DCC 02-058 in which the Court “opens” up the right to reparations for petitioners whose rights have been violated.

²¹⁵ Constitutional Court Decision, DCC 02-052 of June 4, 2002.

²¹⁶ See, e.g., Constitutional Court Decision DCC 02-058; Constitutional Court Decision DCC 02-064; Constitutional Court Decision DCC 02-065.

²¹⁷ Constitutional Court Decision DCC 02-037.

During its presentation at a ceremony on January 6, 2003 to present New Years' wishes to the President, the Court reminded the government that "it must enforce the law that obliges all persons who, in one way or another, violate human rights to pay reparations."²¹⁸ However, the breadth and reach of this reparations jurisprudence has yet to be seen. For one thing, the Court did not explicitly "open up the right" to reparations in all of the human rights cases that followed. After DCC 02-058 (published in June 2002) through the end of 2002, the right to reparations was recognized in provisional detention cases,²¹⁹ inhumane and degrading treatment cases,²²⁰ and a right to the environment case.²²¹ The right to reparations was not specified in any subsequent case where the Court found that violations had occurred in the area of the right to a defense²²² and the right to equal treatment by the State.²²³ Nor was it specified in one subsequent case where a provisional detention occurred but no inhumane or degrading treatment was found,²²⁴ although shortly thereafter, almost identical facts were presented and this time the Court did specify the right to reparations.²²⁵ Thus, despite broad language that "the harms endured by any person from the violation of his fundamental rights open the right to reparations,"²²⁶ the Court has not specified reparations in all subsequent decisions that find human rights violations. In addition, although the Court has found a way to indicate in its decisions that the right to reparations is "open" to an individual petitioner, the Court itself does not specify or allocate the sum. Moreover, the Court's decisions provide no guidance to the victim as to the process of claiming the reparations. Discussions with the Court's documentarian, Coffi Amouso, reveal

²¹⁸ *Présentation par les institutions de la République des vœux du nouvel an au chef de l'Etat: s'investir à fond dans le travail*, La Nation, January 7, 2003, at 3.

²¹⁹ *See, e.g.*, Constitutional Court Decision DCC 02-093 and Constitutional Court Decision DCC 02-121.

²²⁰ *See, e.g.*, Constitutional Court Decision DCC 02-058; Constitutional Court Decision DCC 02-114, Constitutional Court Decision 02-131; Constitutional Court Decision 02-136.

²²¹ Constitutional Court Decision DCC 02-065.

²²² *See*, Constitutional Court Decision DCC 02-088.

²²³ *See, e.g.*, Constitutional Court Decision DCC 02-081; Constitutional Court Decision DCC 02-082.

²²⁴ Constitutional Court Decision DCC 02-089.

²²⁵ Constitutional Court Decision DCC 02-114.

²²⁶ Constitutional Court Decision 02-065.

that Benin’s judicial system has the competence to provide damages based on article 114 of the Bouvenet Penal Code, which states: “*When a public functionary, an agent or an employee of the government has ordered or committed an arbitrary or threatening act, to either the individual liberties or civil rights of one or multiple citizens, or to the Constitution, he will be condemned to the punishment of civil damages.*”²²⁷ Unfortunately, Benin’s judicial system has none of the features that make the Constitutional Court so accessible to the public. Notoriously slow, requiring the petitioner to negotiate the judicial system is asking him to incur time and expenses that are likely not at his disposal. More than a year after the first reparations decision, no one could cite an instance in which petitioners have pursued this right granted to them by the Constitutional Court.

V. The Substantive Human Rights Jurisprudence of Benin’s Constitutional Court

Between 1991 and 2002, Benin’s Constitutional Court handed down 350 decisions on human rights and public liberties. The range of scenarios and violations the Court has been called on to investigate is partially due to the fact that the Court regularly invokes the rights guaranteed by the African Charter on Human and Peoples’ Rights, which is integrated into Benin’s Constitution and law. This explicit reliance on the African Charter as a source of rights enforceable by a supreme constitutional authority is unique across the African continent.

The fact that almost one third of the Court’s human rights decisions deal with provisional detention serves as an appropriate starting point for analysis of the human rights jurisprudence of the Court. The Constitutional provision at issue is article 18, paragraph 4 of the Constitution which establishes, “no one shall be detained for longer than 48 hours without the decision of a magistrate before whom he must be brought. That delay shall not be prolonged except in

²²⁷ Telephone interview with Amoussou, *supra* note 161. Text taken from *Recueil annoté des textes de droit pénal applicable en Afrique occidentale française*. Paris. Éditions de l’Union Française, 24.

exceptional cases provided by the law and shall not exceed an eight day period.” Thus the Court’s analysis focuses on whether in fact the petitioner was held longer than 48-hours. Whenever the deadline is exceeded, the Court finds that the provisional detention violated the Constitution. Sometimes the deadline is exceeded by a number of hours, as in DCC 98-098 where the Court calculated the detention to have lasted 50 hours and 30 minutes.²²⁸ Most often, the detention lasts a number of days, as in DCC 98-007 where seven days passed before the petitioner was brought before the magistrate.²²⁹ Excuses offered by the offending party, ranging from the magistrate’s absence,²³⁰ to custody stretching through the weekend,²³¹ have never dissuaded the Court.

The detention decisions are striking for several reasons. First, the petitioner almost always has already been released from detention. The fact that citizens nonetheless file with the Court, even when the detention limitation was exceeded by a few hours, seems to validate the moral value accorded by citizens to the Court’s decisions. Second, the number of cases deliberated has increased steadily since 2000, with a record 28 provisional detention decisions handed down in 2002. Viewed negatively, the increase undermines the argument that shaming abusers deters abuse. Viewed positively, the increase indicates expanded awareness among the population of the Court’s human rights mandate. Third, and perhaps most striking, is that Benin’s highest Court on constitutional matters is devoting a significant amount of time to these incidents.²³² One might argue that investigating whether a deadline was exceeded by a few hours is not a matter with which the Court should concern itself. But the Court has shown itself willing to seriously consider any Constitutional violation, no matter how minor. In fact, Councilor

²²⁸ Constitutional Court Decision, DCC 98-098.

²²⁹ Constitutional Court Decision DCC 98-007.

²³⁰ Constitutional Court Decision DCC 02-027.

²³¹ Constitutional Court Decision DCC 02-116.

²³² The 28 provisional detention cases in 2002 made up almost 20% of the Court’s docket for that term.

Médégan commented that when the second court began its mandate in 1998, members considered taking surprise trips to the villages where the gendarmerie had been found to hold citizens in custody illegally because they thought surprising them would change the behavior. “Negligence on our part” was Medegan’s explanation for why the trips never happened.²³³ Still, the anecdote illustrates that the Court believes its task to “guarantee human rights” includes reducing violations. In fact, it could be considered a point of pride for Benin that the Court principally confronts violations of “everyday human rights,” to use Glèlè-Ahanhanzo’s term.

Through the years, the Court has analyzed numerous incidents that are particular to Benin’s history and culture. For example, in 2002 a citizen’s complaint alleged that a local religious figure who called himself a king was deciding the fate of the accused of crimes. The so-called king admitted that he carried out these punishments, but declared that “man has no rights but only duties that require bodily punishment when they are not respected.” The king further explained that he based his activities on his religious powers. In declaring the king’s activities in violation of the Constitution, the Court emphasized that Benin is a republic, in which the church is separated from the state, and judiciary power is exercised exclusively by the Supreme Court, courts and tribunals, and stressed that royalty is not a republican institution and thus has no judicial power.²³⁴

Likewise, the majority of cases invoking article 22’s right to property involve claims for property confiscated by the State before Benin’s democratic transition. The Court’s analysis of the issue was articulated in one decision, where it held: “the Constitution of December 11, 1990 is only retroactive if the dispute indicated involves a principle of constitutional value. It has not

²³³ Interview with Médégan, *supra* note 68.

²³⁴ Constitutional Court Decision DCC 02-014.

been established that the conditions of implementing expropriations for public utility have acquired constitutional value; consequently article 22...must not be applied.”²³⁵

Finally, in late 2002 the Court was called on to consider the constitutionality of a new “Person and Family Code”. Rosine Soglo, wife of the former president and a deputy at the National Assembly, complained that the principle of equality of the sexes was violated by an article that stated: “Monogamous and polygamous forms of marriage are recognized. However, the future spouses must decide between the two before the marriage celebration.” The Court agreed with Soglo when it recognized that the article permitted the man to be polygamous while the woman can only be monogamous, in violation of article 26 of the Constitution, which pronounces that: “*The man and the woman are equal in the law.*”²³⁶ No mention was made of whether the Code could be corrected by granting the woman the right to be polygamous. One university student commented to the author that this would seem to be culturally impossible.²³⁷

The key to understanding the Court’s decisions is to recognize that its human rights jurisprudence involves the same fact/law analysis that is required in a traditional judicial body as opposed to a traditional constitutional court. For example, a number of decisions addressing the right to a defense make clear that the Court’s analysis centers on whether the petitioner had an opportunity to be heard before action was taken.²³⁸ Regarding the right to be judged within a reasonable delay, the Court has engaged in case by case review, deeming as unconstitutional delays ranging from 14 months to 14 years.²³⁹ In determining what constitutes inhuman, cruel, or degrading treatment, the Court explicitly set out a multifactor test that considers not only the effect on the physical or mental health of the individual but also the length of the treatment, its

²³⁵ Constitutional Court Decision DCC 01-051.

²³⁶ Constitutional Court Decision DCC 02-144.

²³⁷ Email from Fidèle Iko Afe, Candidate for DEA (*Diplôme des Etudes Aprofondies*) in Human Rights, National University of Benin, to the author (February 22, 2003, 12:57:28 (on file with author)).

²³⁸ See, e.g., Constitutional Court Decision DCC 96-045; Constitutional Court Decision DCC 99-024; Constitutional Court Decision DCC 00-056.

²³⁹ See, e.g., Constitutional Court Decision DCC 97-006; Constitutional Court Decision DCC 97-014.

deliberate character, and the circumstances in which it was inflicted.²⁴⁰ Unfortunately, more often than not, the Court fails to formulate tests, articulate the factors it considered in determining a right, or justify its decisions based on policy arguments. For example, while some 55 decisions involve article 26's guarantee of equality before the law without distinction based on origin, race, sex, religion, political opinion or social position, on only one occasion did the Court provide its interpretation of the article, which was limited to stating: "The notion of the equality of all before the law ... must be analyzed as a general principle by which the law shall be the same for all in its adoption and in its application, and shall not contain any unjustifiable discrimination."²⁴¹ No explanation of "unjustifiable discrimination" is presented.

Because detailed analysis of the content of rights is rare, seemingly contradictory outcomes occur. For example, in DCC 02-049 a citizen contended that the state treated her unequally from her colleagues by failing to pay her a pension upon her retirement in July 1999. The Court's investigation uncovered a bureaucratic error that had prevented her retirement from being processed.²⁴² Contrast DCC 01-058 in which a citizen complained that he was not permitted to participate in a state entrance exam while a colleague with equal qualifications was. The ministry under investigation admitted that it had inadvertently authorized the petitioner's colleague to compete in the exam and underlined that action was taken to cancel that authorization as quickly as possible.²⁴³ Although both scenarios present clerical mistakes, the Court concluded that "there was no unequal treatment" in the former, but in the latter decided the ministry had violated the Constitution in allowing only one of two equally qualified candidates to compete.²⁴⁴ More detailed analysis of the factors used by the Court to determine when to raise

²⁴⁰ Constitutional Court Decision DCC 99-011.

²⁴¹ Constitutional Court Decision DCC 96-067.

²⁴² Constitutional Court Decision DCC 02-049.

²⁴³ Constitutional Court Decision DCC 01-058.

²⁴⁴ *Id.*

rights that are not invoked by the parties would also serve to square decisions. For example, in DCC 01-024, the Minister of Artisan Commerce and Tourism complained to the Court about an article on her published in the satirical newspaper *Canard du Golfe*. In noting saucy cartoons and commentary, the Court found the article violated the constitutional protection of personal integrity.²⁴⁵ How this squares with the Constitution's guarantee of freedom of expression is never discussed. Contrast DCC 02-142 in which the Court found that none of the rights invoked by the petitioner were applicable but decided to examine whether his right to a defense had been safeguarded because disciplinary sanctions had been inflicted on the petitioner.²⁴⁶

The Court's new reparations jurisprudence should be the impetus to force the Court to engage in more reasoned decision-writing that provides analysis of the nature, limits, and interaction of the human rights under consideration. As explained previously, the judicial system will necessarily be involved in paying out the reparations to which the Constitutional Court has awarded a right. The Court must provide precise facts and rationales that justify reparations, lest the judicial system be awarding damages simply because the Court told it so.

In sum, the jurisprudence of Benin's Constitutional Court shows an institution dedicated to its mandate to guarantee human rights. Having handed down over 350 human rights decisions, it is clear that the Beninese Court has successfully negotiated the challenges presented by its unique mandate and that the Beninese have responded by calling on the Court. From among the disappointments of national human rights commissions, the Beninese Court has emerged as a model of the central role a state institution can play in enforcing human rights. While the Court's liberal standing rules have enabled it to fulfill its mandate, its status as a court of attribution has impeded its capacity to provide remedies for abuses. The final section will

²⁴⁵ Constitutional Court Decision DCC 01-024.

²⁴⁶ Constitutional Court Decision DCC 02-142.

offer a brief summary of the limitations on the Court in carrying out its human rights mandate, and several recommendations for creatively negotiating them in order to further the Court's effectiveness in guaranteeing human rights in Benin.

VI. Limitations and Recommendations

A. Limitations

Benin's Constitutional Court could be characterized as part-constitutional court, part-human rights commission. Two institutional features that hit at the very core of what it means to be a *constitutional* court impede the Court's effectiveness in its human rights mandate. First, the Court does not dispose of the remedial powers of a traditional court. Although its reparations jurisprudence is a significant attempt to offer a remedy to petitioners whose rights have been violated, the impossibility of direct reparations underlines that the Court is ill-equipped to offer traditional forms of redress. Second, Benin's Court can only address questions arising under its constitution. Although the 1990 Constitution grants citizens a litany of rights, there are certain rights and liberties guaranteed by international conventions that Benin has ratified that do not have their equivalence in the Constitution. Examples range from the prohibition on imprisonment on the ground of inability to fulfill a contractual obligation (article 11 of the International Covenant on Civil and Political Rights) to the right of every child to acquire a nationality (article 24 of the same Protocol). Because the Beninese Constitution does not include these rights, the Court lacks the competence to address their violation. Presuming Benin continues to ratify international human rights conventions, this gap between rights enumerated in the constitution and those guaranteed in international documents could only continue to grow.

Before further exploring how the Court could adopt creative enforcement mechanisms to mitigate the impact of its jurisdictional and structural constraints, two caveats are in order. First,

it is important to acknowledge what the Court has already achieved. Andreas Schedler has proposed that political accountability includes an “answerability” element, defined as “the power given to an institution to ask ‘accountable actors’ to give information on their decisions and explain the facts and reasons upon which these decisions are based.”²⁴⁷ While the Court’s move towards broader remedial powers should be applauded and must continue, it is important to recognize that the power of Benin’s Court to exact “answerability” from the state (and indeed from private persons) marks a fundamental leap forward from the repression of the previous regime. Second, it is useful to remember that the Court’s human rights mandate is about guaranteeing human rights and not promoting a damages culture. Thus the primary result the Court should seek is the reinforcement of a positive human rights culture so that the occasions in which human rights are violated are reduced.

B. Recommendations

1. Remedies and Punishment

With the previous caveats in mind, recommendations to improve the effectiveness of the Court must continue to focus on the question of remedies and punishment. Nothing in the Constitution or the Court’s regulations would seem to prevent it from incorporating into its decisions detailed suggestions, or even instructions, on how the instance of abuse could be remedied through legislative or perhaps even executive action. The public interest litigation phenomenon in India’s Supreme Court provides an example of how a court of last resort has broadly interpreted its human rights mandate in the area of remedies. Over a ten year period, the Court’s jurisprudence developed from gradually granting compensation for severe violations of human rights to laying down a principle of law that the state is liable to pay compensation for

²⁴⁷ Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, HARV. HUM..RTS. J., 1, 28 (2000).

such violations. The jurisprudence began in *Rudal Sah vs State of Bihar*, decided in 1983, when the Supreme Court considered a case in which a prisoner was detained for 14 years beyond his sentence due to negligence by state authorities. The Court invoked article 32 of India's Constitution, which confers power on the Supreme Court to issue directions or orders or writs for the enforcement of any human rights conferred by the Constitution. While acknowledging that the article "cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary process of courts..."²⁴⁸ the Court decided to directly grant him damages, in part because in light of the facts of the case the Court "[had] no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed..."²⁴⁸ The jurisprudence of reparations solidified in 1993 in *Nilabati Behera vs. State of Orissa*, when the Supreme Court examined a case in which a young man was murdered by the police who had taken him from his home for questioning about a robbery. Relying again on article 32, the Court held that the state was liable to pay compensation for the violations and that the principle of sovereign immunity did not apply.²⁴⁹ While Benin's Constitution offers less direct authorization for enforcement than the Indian document, article 122's vague provision that the Constitutional Court "*must rule more generally on violations of the rights of the individual*" could be broadly interpreted to permit the Court to rule on the required state response to grievous human rights violations. For example, the Court could instruct the legislature to adopt laws that require the return of property seized without compensation, or an automatic reduction in sentence when a defendant's right to be released from provisional detention after 48 hours was violated, or a declaration of immediate eligibility

²⁴⁸ *Rudal Sah vs. State of Bihar* AIR 1983 SC 1086.

²⁴⁹ *Nilabati Behera vs. State* AIR 1993 SC 1960.

for parole when a defendant's due process rights were violated.²⁵⁰ When the Court finds that a claimant's right under article 4(d) of the African Charter to be tried within a reasonable time has been violated it could instruct the judiciary to shorten the trial as an emergency measure.²⁵¹ The Court could even move beyond its ambiguous language of "opening the right to reparations" and explicitly suggest to the state that it pay reparations for the violation. It is difficult to say whether this change of tone (from adjudication to suggestion) would undermine the legitimacy of the Court. It has been argued that the Court's influence over the government through balancing the powers of the institutions has bolstered its capacity to investigate human rights abuses. It is possible that the government would comply with the Court's suggestions because of its interest in working with the Court in other matters. However, non-binding language could mean that reparations would not be consistently paid out but rather depend on political considerations, ranging from the eminence of the perpetrator to the pity provoked by the victim.

The sometimes creative remedies administered by national human rights commissions could also be incorporated into the Court's arsenal. Although these institutions are often criticized for their ineffectiveness, the institutional status and legitimacy already achieved by Benin's Court provide it with a far superior platform from which to operate. Thus, upon finding a violation of the constitution, the Court's decision could explicitly require that criminal charges be brought by the ordinary judiciary against the perpetrators. Again, there is nothing that would seem to limit the Court's capacity to mete out such a response, although the effectiveness of this remedy will depend on the judicial system to which the criminal is referred. At a minimum, the

²⁵⁰ These remedial options were drawn from those used by the Supreme Court of Canada when adjudicating under the Canadian Charter of Rights. See generally, Frank Iacobucci, *Judicial Review by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms: The First Ten Years* in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE (David M. Beatty, ed.) 93-134 (1994).

²⁵¹ This remedial option was drawn from the adjudication of the Japanese Supreme Court in *Japan v. Pak* (1972), 26 (10) Keishu 631, Supreme Court Grand Bench judgment of 20 December 1972, as documented in Itsuo Sonobe, *Human Rights and Constitutional Review in Japan* in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE (David M. Beatty, ed.) 135, 172 (1994).

state must ensure that its penal code incorporates violations of the rights guaranteed in the Constitution and provides for punishments commensurate to the violation.

A further step along the path of punishing violators of human rights would be the establishment of an administrative human rights tribunal, tasked exclusively with handing down the appropriate sentence, fine, or other punishment for violators. The advantage of having one tribunal deal with the issue of punishment would be its capacity to mete out consistent penalties. One downside could be that such a tribunal would only receive the case after the Constitutional Court had made its determination and thus not be sufficiently familiar with the facts to make an accurate judgment of the relative severity of the violation. Alternatively, in the line of procedural innovations devised by the Indian Supreme Court,²⁵² the Court could appoint commissions to investigate persistent violations of human rights. The Court seemed to have this approach in mind when it set out to visit the prisons that consistently violated the Constitution's provisional detention guidelines. A Court-appointed commission would investigate why the right is violated with such frequency and recommend action by the state to end the abuse.

B. Jurisprudential Development

Each of the aforementioned recommendations would require the Constitutional Court to rely on other state institutions to implement its decisions. However, it bears repeating once more that it is well within the Court's current competence to hand down decisions that analyze the content of the norms under review. A decisive move in that direction would serve to provide a deeper understanding of the litany of human rights guaranteed in the Constitution – an understanding that is vital to the efforts of the scores of NGOs that are involved in educational efforts throughout the country. The importance of analytical, as opposed to conclusory,

²⁵² See e.g., *Mukesh Advani v. Union of India* AIR 1985 SC 1363; *Sheela Barse v. Union of India* (1983) 2 SCC 96; *Mohan Lal Sharma v. State of U.P.* (1989) 2 SCC 600; *Delhi Judicial Services Association v. State of Gujarat* (1991) 4 SCC 406.

decisions would become only more important were other institutions to get involved in remedying the violations identified by the Court. Before other bodies be made responsible for handing down punishments or distributing reparations, the Court must provide them with thorough analysis to justify their actions.

C. Judicial Reform

Beyond the realm of the Constitutional Court, Benin must continue with all speed down the path of structurally reforming its judiciary. The ordinary judge must be well equipped to adjudicate on human rights violations, and particularly those rights that are not enumerated in the Constitution. Unfortunately, research shows that judges in Benin seldom refer to international conventions on human rights, be it at the level of the Administrative Chamber of the Supreme Court or the judicial tribunals.²⁵³ This may partially be explained by the fact that the lawyers themselves rarely invoke these covenants.²⁵⁴ Regardless, the fact remains that these courts are singularly equipped to address such violations and must be encouraged to do so.

VII. Conclusion

This paper has argued that Benin's Constitutional Court is a hybrid-institution insofar as it has within its competences the functions typically associated with national human rights commissions. Even while the Court's institutional prestige has allowed it to assume its role as guarantor of human rights to an extent outside the reach of most national human rights commissions, its institutional structure has stifled its capacity to provide remedies to those who have suffered human rights violations. This conclusion seeks to draw attention to the *complexity* of assessing why or how this Court is important or significant in Benin. The author has identified five broad questions that remain unanswered.

²⁵³ Bernadette Codjivo, *La Place des Conventions Internationales dans le Droit Béninois: le Juge Béninois devant les Conventions Internationales*, 55, 64 Actes du Séminaire: "Le Bénin et les Conventions Internationales relatives aux Droits de L'Homme", May 2-3, 2002, Cotonou, Benin.

²⁵⁴ *Id.* at 65.

First is the fundamental question of whether respect for human rights are part of the fabric of Benin. While Court member Glèlè-Ahanhanzo speaks in terms of “everyday human rights” and the Constitutional Court’s docket is filled with relatively innocuous provisional detention violations, the President of the League for the Defense of Human Rights, Julien Togbadja, whose work involves representing individual victims of human rights abuses before the Beninese judicial system, was sharply critical of the idea that human rights are by and large respected in Benin, and was quick to provide League press releases detailing examples of violations ranging from the deprivation of the property of poor citizens through a complex system of land taxes, to repressive tactics designed to prevent the moto-taxi (*zémidjan*) drivers from forming a union, to the mounting clashes between vigilante militias and alleged thieves.²⁵⁵ A tangential query is whether the types of human rights abuses that are invoked before the Constitutional Court are an accurate reflection of those suffered by the population. Théodule Nouatchi, the Vice President of the Benin’s National Consultative Council of Human Rights – a group representing some 45 NGOs in their relations with the State – provided a run down of the human rights abuses that local NGOs frequently confront, including female genitalia mutilation, “levirat” (a social rite whereby a woman whose husband has died must marry his younger brother to keep her children because marrying outside the family means the new husband is not expected to accept the woman’s children into his home), and the system of convents (part of the religious system of Animism, practiced by up to fifty percent of the population, whereby some parents send their very young children to live in religious convents instead of participating in primary or secondary education).²⁵⁶ Despite the focus of the local NGO community on these violations, *none* has been addressed in any of the Court’s 350 decisions. Equally mysterious is

²⁵⁵ Press releases on file with the author.

²⁵⁶ Interview with Théodule Nouatchi, Vice President, *Conseil National Consultatif des Droits de l’Homme*, in Cotonou, Benin (January 7, 2003).

why several of the fundamental rights guaranteed in the Constitution have not made their way into Court's decisions. For example, while in 2002 Benin was ranked 21st in a worldwide ranking of press freedoms, conducted by the NGO "Reporters Without Borders",²⁵⁷ no decision has ever been handed down on the subject. Nor has the Court ever explored the individual's right "to development" guaranteed in article 9 or the meaning of the individual's "right to life" guaranteed in article 15. These gaps in the jurisprudence are raised to emphasize the complexity of assessing the importance of the Court in Benin's human rights landscape.

A second unanswered question is just where the protection of human rights ranks among the hierarchy of important issues confronting the Beninese and their government. Talking with human rights activists may lead one to believe that protecting rights is a top priority. But there appears to be tacit recognition that government stability is more important. While many lamented the fact that the Court's decisions do not recourse in the form of specified compensation, *no one* suggested that amending the 1990 Constitution was the right path to follow. Luc-Omer Gandemey at the Institute for Human Rights cautioned that amending the Constitution would open a Pandora's Box of political agendas that could dismantle the achievements of the past thirteen years.²⁵⁸ Chief among the fears is that Soglo or Kérékou would try to amend the constitutional age limit of 70 years for serving as President, which should prevent both from running in 2007.²⁵⁹ A similar scenario would see Kérékou attempt to overturn the constitutional two term presidential term limit.²⁶⁰ One unexplored aspect of this question is how the importance assigned to human rights in Benin has evolved since the National Conference. Certainly the civil and political violations of the previous regime made human rights a top item on the post-Conference agenda. But if Benin has moved into an era of

²⁵⁷ "Premier Classement Mondial de la liberté de la Presse" Les Echos du Jour, Oct 24 2002.

²⁵⁸ Interview with Gandemey, *supra* note 9.

²⁵⁹ CONST. Title III, art. 44.

²⁶⁰ CONST. Title III, art. 42.

relatively infrequent *gross* human rights violations, one could argue that in a country as poor as Benin, economic and social rights should top the agenda rather than “smalltime” civil and political rights abuses. A better grasp on the importance of human rights to the politicians, the pundits, and the population of Benin would serve to assess the specific issues on which the Court should spend its own political capital when confronting human rights abuses.

A third issue that clouds the analysis of the Court’s human rights mandate is the importance of this competence relative to the other roles played by the Court. In the Court’s view, are the human rights cases inconsequential compared to reviewing the constitutionality of legislation or verifying elections? Even Glèlè-Ahanhanzo, whose life’s work has been dedicated to the promotion and protection of human rights, glibly quipped “too much, already” in response to a question as to whether citizens call on the Court with their human rights complaints.²⁶¹ If the number of human rights claims continues to rise, will the Court become weary of the task of investigating the abuse of a rural gendarme when important matters of institutional balancing also deserve its attention? These questions are nothing but conjecture, designed to illustrate another dimension that could influence whether the Court ultimately plays a significant role in guaranteeing human rights.

A fourth question that remains unexplored is the role, if any, the ordinary judiciary plays in confronting human rights abuses in Benin. As has been highlighted, no one disagrees that the judicial system is in need of serious reform. Thus the author was somewhat surprised when the President of the League for the Defense of Human Rights suggested they meet at the Appeals Chamber in Cotonou where he was litigating a case, as opposed to the Constitutional Court. The traditional justice system would seem to offer some recourse to victims of human rights abuses. On the other hand, a recent report by Bernadette Codjivo, a Beninese magistrate, indicates that

²⁶¹ Interview Glèlè-Ahanhanzo, *supra* note 42.

Benin's lawyers and judges lack experience and training in arguing and litigating human rights cases.²⁶² These considerations highlight why a nuanced understanding of the current division of labor between the Constitutional Court and the judicial system would contribute to an analysis of why the Court is significant among Benin's institutions.

A final question that adds to the complexity of assessing the importance of the Court is ascertaining whether the Court is ahead of its time or behind the times. Dean Akpovo at the University of Benin's Faculty of Law suggests that the population knows the Court from an anecdotal point of view stemming from its occasional election monitoring. For him, the fact the Court was *not* widely known for its human rights competence demonstrates that it is ahead of its time.²⁶³ Théodore Holo, one of those responsible for the Court's institutional framework, acknowledges that while the Court was designed to respond to particular needs (namely, the repression and political instability of the past) its human rights jurisprudence may be beyond the concerns of most citizens. Holo is quick to point out, however, that the Court should be viewed as educating the people on what *should* be. On the other hand, the fact that a paltry number of Court decisions involved complaints lodged by human rights NGOs leaves the impression that the Court is not considered an adequate forum to address the on-the-ground human rights violations these organizations confront. Perhaps this is because of the lack of reparations; perhaps this is due to a general distrust by NGOs of state sponsored human rights institutions; perhaps this is simply due to the educational mandate (as opposed to litigious mandate) of most of the NGOs. The fact remains that there appears to be some disconnect between the Court and those involved in human rights protection on the ground.

²⁶² Codjivo, *supra* note 253, at 64-65.

²⁶³ Interview with Akpovo, *supra* note 130.

These five questions only serve to shine spotlights from various angles on the complexity of ascertaining in what way Benin's Court is significant. Exploration of their answers could serve to deepen this paper's analysis of the unique role the Beninese Constitutional Court decidedly does play in protecting human rights.