

## SPECIAL ISSUE: JUDICIAL REVIEW AND DEMOCRATIZATION IN FRANCOPHONE WEST AFRICA

### Judicial review and democratization in francophone West Africa

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#### A. Introduction

In July 2012, a research team led by *Prof. Dr. Thilo Marauhn, M.Phil.* and *Prof. Dr. Brun-Otto Bryde* launched a comparative legal research project on judicial review and democratization in French-speaking West Africa at the University of Giessen. Over a period of two years (2012-2014), the project - funded by the Deutsche Forschungsgemeinschaft (DFG) - has explored the link between effective judicial review and democratization processes in eight countries.<sup>2</sup>

The 20<sup>th</sup> century has witnessed growing support for constitutional courts in many parts of the world. Realizing that a progressive constitutional text alone is not enough to guarantee the rule of law and democracy, many countries strengthened the constitutional review mechanisms to uphold and enforce the constitutional provisions. Just as in other parts of the world, countries in francophone West Africa introduced centralized constitutional review mechanisms with autonomous and specialized courts or councils in the context of the “third wave of democratization” in the early 1990s. They often replaced passive or dysfunctional constitutional chambers of supreme courts. The idea was that strong constitutional review mechanisms would help to establish and consolidate the new democracies in (West) Africa just as in Eastern Europe or Latin America.

Discussions about the influence of constitutional courts for democratization increased since the 1990.<sup>3</sup> However, French-speaking countries in West-Africa have not featured

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2 On the project and its objectives see *Lisa Heemann, Chadidscha Schoepffer, Anne Winter* “They do something!” Verfassungsgerichtsbarkeit und Demokratisierung im frankophonen Westafrika, *Recht in Afrika* 17 (2014), p. 87f.

3 *Thomas Ginsburg*, Judicial review in new democracies: constitutional courts in Asian cases, Cambridge 2003; *C Neal Tate/ Torbjörn Vallinder*, The global expansion of judicial power, New York 1997; *Alec Stone Sweet*, Governing with Judges: Constitutional Politics in Europe: Constitutional Politics in Europe, Oxford 2000; *Martin M Shapiro/ Alec Stone Sweet*, On law, politics, and judi-

prominently in European and international research (outside of francophone academia<sup>4</sup>). While these countries may have undergone the same democratization processes as for instance their Anglophone neighbors they are coming from a different constitutional and legal tradition. Analyzing the developments in these countries can thus provide valuable insights into research on constitutional review mechanisms worldwide. The project therefore aimed to close this gap by taking into account not only the institutional set-up but making a contribution to the debate on the role of constitutional courts in democratization.

In 2014, eight case studies have been published in German/French language within the Franz von Liszt Institute Working Paper series as main results of the study.<sup>5</sup> In order to make the most relevant outcomes of the study available to international research, four case studies have now been translated and partly updated and will be presented in this issue (case studies on Benin, Burkina Faso, Mali and Senegal). Abstracts on the case studies on Ivory Coast, Guinea, Niger and Togo complete the overview.

All case studies are based on a questionnaire that served as a common structure for the study. After considering the historical and political context and formal set-up (including the rules on composition, access and competences) of the court or council, the case study authors analyzed the jurisprudence of the review body in the respective country. The case studies provide a selection of relevant cases on the separation of powers, on election adjudication and decisions against the interests of the executive. The analyzed decisions have been selected from the time of establishment of the relevant institution until September 2013 (end of study period). Following the analysis of the decisions, the studies address the role the respective court or council plays in solving political conflicts or developing constitutionalism in their country through interpretation of constitutional principles. The case study authors also discuss the perception of the bodies in the respective countries in the public. The project team has drawn on the expertise of regional and international partners.

cialization, Oxford 2002; *Herman Schwartz*, The Struggle for Constitutional Justice in Post-Communist Europe, Chicago 2000; *Lee Epstein/Jack Knight/ Olga Shvetsova*, The Role of Constitutional Courts in the Establishment and Maintenance of democratic Systems of Government, Law & Society Review 35 (2001), pp. 117ff.; *Wojciech Sadurski*, Constitutional Justice, East and West, Den Haag 2002; *László Sólyom*, The role of Constitutional Courts in the Transition to Democracy, International Sociology 18 (2003), pp. 133-161.

- 4 In particular: *Gérard Conac*, Les institutions constitutionnelles d'Afrique Francophone et la République malgache, Paris 1979; *Ibrahima Diallo*, À la recherche d'un model africain de justice constitutionnelle, Annuaire international de justice constitutionnelle XX (2004), pp. 93-120; *Théodore Holo*, Émergence de la justice constitutionnelle, Pouvoirs Nr. 129 2/(2009), pp. 101-114; *Frédéric Joël Aivo*, Le juge constitutionnel et l'état de droit en Afrique: L'exemple du modèle béninois, Paris 2006; *Adama Kpodar*, Réflexion sur la justice constitutionnelle à travers le contrôle de la constitutionnalité de la loi dans le nouveau constitutionalisme: Les cas du Benin, Mali, Sénégal et Togo, Revue Béninoise des sciences juridiques et politiques et administratives (R .B.S.J.A) Nr. 16 (2006), pp.104-146.
- 5 Available at <http://intlaw-giessen.de/verfassungsgerichtsbarkeit-und-demokratisierung-im-frankophonen-westafrika/publikationen/working-papers/> (last accessed on 23 October 2017).

## B. Study results

The study results have undergone review by researchers from adjacent fields, notably political sciences and can be summed up as follows:

### I. Institutional set-up

Remarkably, in the 1990s, countries in francophone West Africa opted for a model of constitutional review that is partly different from the French model (at that time). Most of the “new” courts and councils became more accessible and were given more competences than the French *Conseil Constitutionnel* (at that time). A broader range of institutions and in Benin even individuals now have right of standing in West African countries.<sup>6</sup> With regard to competences, a number of countries in the region added a concrete review (control of constitutionality of laws *a posteriori*) in the 1990s whereas the French model is limited to abstract or preventive review (control before promulgation, i.e. *a priori*). The process of appointing members to the courts and councils became also less political and the bodies formally more independent than in France because the executive lost the exclusive right to appoint the members: Parliament, judicial councils or professional associations are now often involved in the nomination process, too. Furthermore, different from France, former state presidents were not included *ex officio* in most West African constitutional review bodies and the number of law professionals among the members was increased. In brief, the main differences between the French *Conseil Constitutionnel* and the new constitutional review bodies in West Africa lie in the diversified composition, increased competences of and wider access to the review bodies. Some of the francophone countries in the region like Benin, Guinea, Mali, Niger and Togo have also changed the name from “council” (as in France) to “court”, highlighting the autonomous character of the review body.<sup>7</sup> Constitutional review bodies in francophone West Africa have in sum departed in parts from the French model.<sup>8</sup> Because they made an effort to develop an African model of constitutional review it was felt that these new review mechanisms could play a significant role in the consolidation of democracy in the region.

### II. Case law

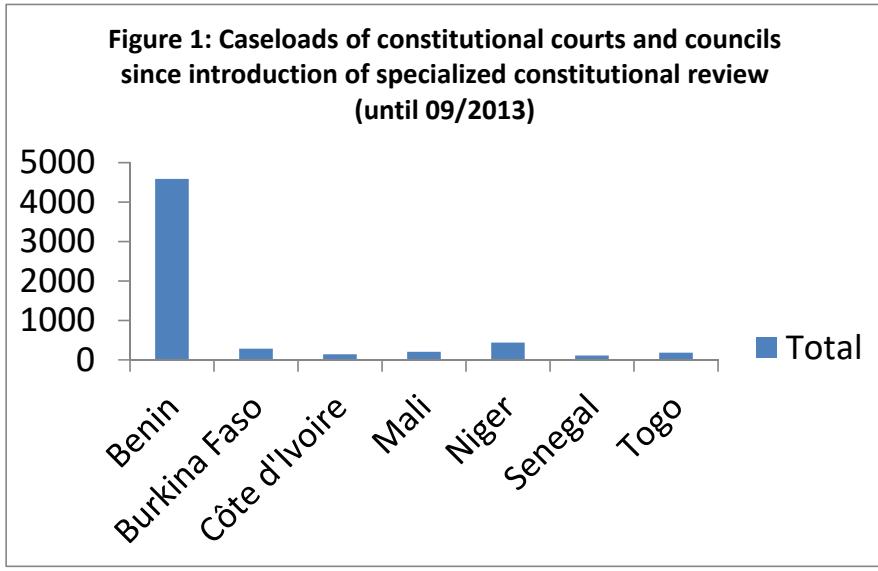
The total numbers of decisions of constitutional courts and councils in West Africa shows that the courts have been fairly active since the introduction of specialized autonomous con-

<sup>6</sup> *Yuhniwo Ngenge*, International Influences and the Design of Judicial Review Institutions on Francophone Africa, *American Journal of Comparative Law* 61 (2013), pp. 433-460.

<sup>7</sup> *Sory Baldé*, La convergence des modèles constitutionnels. Etude de cas en Afrique subsaharienne, Paris 2011.

<sup>8</sup> *Ibrahima Diallo*, A la recherche d'un modèle africain de justice constitutionnelle, *Annuaire international de justice constitutionnelle* XX (2004), p. 93.

stitutional courts. This is noteworthy because it is a clear break with the past of often passive if not altogether dysfunctional constitutional review mechanisms in the years and decades following independence up to the 1990s. This is true for all courts under study and allows for a first conclusion: Constitutionalism has taken root in the region. It has become routine for constitutional courts or councils to rule on the regularity of elections and control the constitutionality of laws. Their decisions are more or less well received but mostly accepted and adhered to.<sup>9</sup>



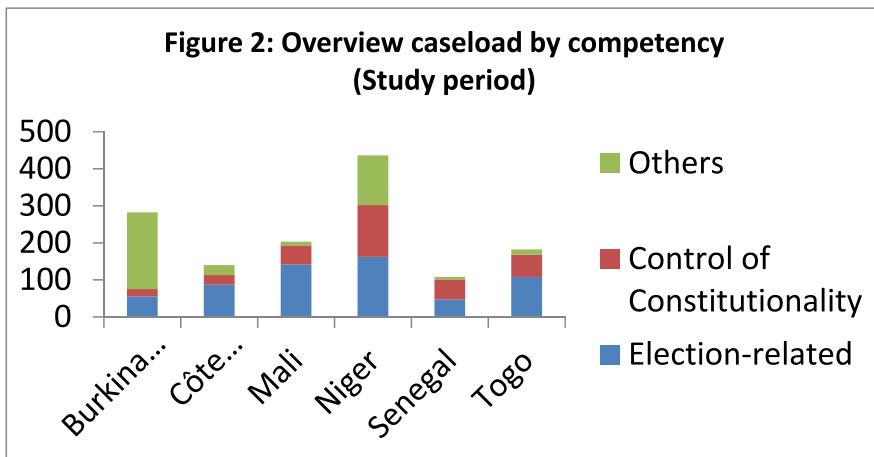
While all courts have been active, some of them more than others: Especially Benin is standing out with roughly 10 times more decisions (4586) than the second most active court in the region, Niger (436). This is due to the broader range of competences as well as the self-perception of the court as ultimate guardian of the constitution. From the start in the 1990s, the court in Benin was in a position to play a decisive role. It has more competences than any of the other courts including an individual complaint mechanism and the right of

<sup>9</sup> In accumulating the overall numbers of decisions as well as the number per competence, we had to rely on various sources. None of the courts or councils under study provides a complete archive of all decisions rendered in the past years. Moreover, official data and other available sources do not always match. Thus official data can rarely be verified. A first conclusion on the jurisprudence is thus the serious lack of accessibility that affects the transparency of the work of the courts and councils in the region. Yet, using all available sources we were able to collect most decisions. After cross-checking with other sources we have compiled this graph from seven country studies that we published in our comparative law project on judicial review and democratization in francophone West Africa.

self-referral or *auto-saisine*. Moreover, the court draws legitimacy from the national consensus and its role as “guardian of the revolution” (see country study Benin, in this issue). At the other end of the scale we find the constitutional council of Senegal: In relation to its long lifespan, it has rendered relatively few decisions. Again, this is due to a mix of factors: The council was indeed equipped with a narrow set of competences to start with. Moreover, one of the key competences (in terms of numbers), the control of organic laws, has been eradicated in 2001 and has only been reintroduced by a recent reform in 2016. Secondly, the council has been very careful not to interfere with politics. Schoepffer explains this with its history: The constitutional council was not the product of a revolution and fresh commitment to constitutional democracy like the court in Benin was. It rather evolved slowly in a far less revolutionary political context. Due to this it never had the same legitimacy to guard the constitution as hard fought achievement and never exerted the same authority (see country study Senegal, in this issue).

The study found that the courts and councils are particularly active before, during and after elections. The data shows that decisions on election-related matters make up more than half of the decisions of the courts and councils in Côte d’Ivoire (62%), Mali (65%) and Togo (59%) and almost half of the decisions in Senegal (43%). Also in Burkina Faso, this holds true as well, as the total of 282 decisions includes 199 decisions on international agreements that should be considered separately here. If we omit them for now, we find that of the remaining 83 decisions by the Constitutional Council in Burkina Faso, 55 are election related (66%). An exception could be Niger (37%) but it is only the high number of advisory opinions that slightly distorts the overall picture.<sup>10</sup> Benin, on the other hand, is a clear exception to the rule.

10 Mamadou Dagra, Judicial Review and Democratization in Francophone West Africa, Country study Niger, 2014, available at <http://intlaw-giessen.de/verfassungsgerichtsbarkeit-und-demokratisierung-im-frankophonen-westafrika/publikationen/working-papers/> (last accessed on 23 October 2017).



This large portion of election-related decisions was to be expected. The pre-occupation with elections is already inscribed in the institutional set-up of the courts. The high number of decisions in election-related matters corresponds with the high percentage of election-related decisions in France. In this sense, all of the West African constitutional review mechanisms are in line with the French model. Because elections are a key element of democracy, at the time of the establishment of the autonomous courts in the 1990s, it was seen as important to provide for mechanisms to guarantee free and fair elections. This is reflected in the high number of decisions on election-related matters.

The control of constitutionality make up the large portion of the remaining case law. Within this category, we looked at obligatory and facultative constitutional review separately. Constitutional review is obligatory for certain laws such as organic laws, rules of procedures of state organs like the higher courts or national assembly as well as international agreements in most countries. The exception here is Senegal where organic laws were for a long period of time excluded from obligatory control as already noted above.<sup>11</sup> Generally, the president, the prime minister or sometimes the president of the national assembly will by law forward all these laws to the Court. Facultative or optional review, on the other hand means that institutions or persons with standing may seize the court to review any other ordinary law. Obligatory review is the norm whereas cases of optional review remain the exception in almost all countries in francophone West Africa (the main exception being again Benin). Decisions on the functioning of institutions thus make up the day-to-day work of the courts in years without elections.

<sup>11</sup> See *Ismaila Madior Fall*, *Les révisions constitutionnelles au Sénégal. Révisions consolidantes et révisions déconsolidantes de la démocratie sénégalaise*, Dakar 2011, p. 138.

### *III. Main findings*

The results from the project show that the constitutional courts and councils in West Africa have played a role in democratization over the past 25 years:

- At least on the books, all of the constitutional courts are equipped to play a role in democratization processes.
- Strengthened judicial review mechanisms actually did facilitate conflict resolution and contributed to the regular functioning of the state organs in many countries.
- Due to their origins, the analyzed constitutional courts and councils mostly became active with regard to elections. Their judgements often concerned parliamentary elections as these are still less sensitive than the election of the head of state in the presidential systems of West Africa.
- Even if generally little noted, constitutional courts and councils also made use of their competence to review the constitutionality of laws (often in cases of mandatory control of organic laws or international treaties) to control executive and legislative powers and to elaborate constitutional principles.
- One of the most challenging tasks of constitutional courts and councils is still the juridification/framing of presidential elections and constitutional reforms.
- Recent reforms or reform projects show a tendency towards strengthening of judicial review mechanism, especially in the context of political crises (e.g. in Senegal, Burkina Faso).
- About 20 years after the establishment of specialized institutions, questions of effectiveness and independence of constitutional courts or councils have become increasingly part of public and legal discussions in West Africa.