

## Judicial Review and Democratization in Francophone West Africa: The Case of Benin

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**Abstract:** Benin has witnessed almost three decades of bloody dictatorship. To overcome that, Benin initiated the resolution of the recurring political conflicts through the holding of a national conference in February 1990. This national conference marked the inauguration of similar national political forums in francophone African countries in the 1990s. In direct response to the repression and brutal abuses of the previous governments, the national conference took a number of major resolutions regarding the reform of key institutions. In fact, the new order of constitutional and democratic transformation has established a constitutional court with broad powers. The Court is a specialized institution and exercises exclusive jurisdiction over: control of constitutionality, general elections and conflict of attribution between public powers. Moreover, the Court was endowed with a singular individual constitutional complaint mechanism in francophone Africa that enables immediate and direct access to all citizens alleging human rights violations. Since its effective establishment in 1993 the Court has contributed to the consolidation of democracy and the respect of human rights in Benin through a very impressive and abundant jurisprudence. The Court empowered itself to provide guidance to political forces, namely the ruling majority and the opposition. Through interpretation of the constitution, the Court discovered its competence on constitutional amendment disputes and stopped many attempts of constitutional revision engaged by some actors of the political spectrum. The big innovation of Benin's constitutional court is the discovery of a kind of supra-constitutional principle, the so-called "national consensus principle" and the enlargement of eternity clause in the constitution of Benin (hereafter: constitution) which protects fundamental values of the new democratic order. The Court has played an influential role particularly in constitutional amendments. It has enhanced some principles in the category of eternity clause in the constitution. All the temptations to amend the constitution in 2006, 2009, 2011 and in 2017 have been failed. So far the 27-year-old constitution of Benin remains until now untouchable.

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## A. Historical and political context

Benin's political history surprises every attentive observer. Since gaining independence, the country went through a series of political changes. Until 1990, the country was, on account of lasting instability and conspicuous unconstitutional changes of power, referred to as a "sick child of Africa".<sup>2</sup> How could Benin transform from this "sick child of Africa" into one of Africa's model democracies? Before illuminating the crucial political events, a brief account of the country's most important periods of political development is needed.

The history of the former Dahomey, presently the Republic of Benin can be summarized in four parts:

- Until 1894, different ethnical groups were continuously fighting for kingship.
- From 1894 to 1960 endured the French colonial rule over the Dahomey.
- From 1972 to 1990, the country was under the dictatorial rule of Mathieu Kerekou, a former army commander. After his takeover, Benin became a socialist state following the example of the former Soviet Union.<sup>3</sup>
- Since 1990, the country has turned towards more democratic structures and the process of democratization came along with the establishment of an independent constitutional court (hereafter: the court).

Indeed, Benin suffered the 17 years of bloody dictatorship by the former head of state Kerekou.<sup>4</sup> The frightful experience of these years played a key role in the democratic movements of the 90s. The changing political circumstances in the country also led to an institutional modification of the constitutional jurisdiction. Essentially, today's existence of a modern constitutional court is due to the "sovereign national conference" (Conférence Nationale Souveraine) in February 1990. This conference was the beginning of a new constitutional order in Benin, the so-called "constitution of the new democratic order" (constitution du nouveau démocratique). The former Dahomey and now Benin undoubtedly underwent a very eventful constitutional development. In only fifteen years (1959-1974) the state implemented a total of eight constitutions. Consequently, the constitution from December 11<sup>th</sup>, 1990 was all in all preceded by ten other constitutions.<sup>5</sup> That historical constitutional instability explains why the Beninese people are very reluctant to any amendment of the constitution of 1990. In fact, since its adoption, the constitution has broken all records with regard to constitutional amendments. The public opinion has developed a kind of "do not touch

2 [http://www.grioo.com/ar,benin\\_de\\_l\\_enfant\\_malade\\_au\\_modele\\_democratique,19522.html](http://www.grioo.com/ar,benin_de_l_enfant_malade_au_modele_democratique,19522.html) (last accessed on September 19, 2014); Horace *Segnonna Adjolohoun*, Country report Benin, available at [http://www.icla.up.ac.za/images/country\\_reports/benin\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/benin_country_report.pdf). (last accessed on 19.9.2014).

3 *Jean-Louis Seurin*, Les régimes militaires, *Revue Pouvoirs* (1983), N° 25, p. 93.

4 *Barnabé G. Gbago*, *Le Bénin et les droits de l'homme*, Paris 2003, p. 31.

5 *Ibrahim David Salami/Diane Oboubé/Melone Gandonou*, *Droit constitutionnel et institutions politiques du Bénin*, Cotonou 2014, p. 201.

my constitution” mentality.<sup>6</sup> Besides, the constitutional court has played a key role by stopping opportunist amendments in 2006<sup>7</sup> and 2011<sup>8</sup>. The failure of the 2017 constitutional reform confirms the “Do not touch” mentality in Benin. In fact, during the presidential campaign of 2016 the incumbent president Talon has put the constitutional amendment on the top of his political agenda if elected. After his election, he has launched a political reform commission with the aim of drafting subsequent provisions of the constitution that should be revised. In March 2017 the president has issued an executive bill on the constitutional amendment. He has introduced the bill in the National Assembly for approval. Unfortunately, the Parliament has rejected the reform bill that was supposed to introduce some substantial provisions guarantying the separation of power. Those provisions concern for example the composition of the Haut Conseil de la Magistrature (High Judicial Council) and the criterion for the appointment of the judges of constitutional court. To justify the rejection of the bill some arguments of procedural and substantive nature have been raised. With regard to procedural arguments, the public opinion as well as some members of the National Assembly raised concerns on no participatory nature of the amendment project. As far as the substance of the bill is concerned, critics consider that the amendment’s project was a veiled introduction of a new republic. Above all critics, it is worth mentioning that the main argument of the rejection of the bill is a fear of opening a Pandora’s Box that dominate in the public opinion in Benin.<sup>9</sup>

## B. Influence of international actors and models

The constitutional as well as the judicial system in Benin are mainly influenced by the French system.<sup>10</sup> But although the legislator of the new constitution (1990) has also decided to implement the European model of a centralized judicial review system, Benin still expressly dissociates itself from the French example of a constitutional council. Instead the country follows the Austrian, Italian and German example.<sup>11</sup> This can be seen in the recognition of individual complaints against human rights violation by state officials before the constitutional court article (hereafter: Art) 122 of the constitution of Benin and Article 24

6 *Sègnonna Horace Adjolohoun*, Benin’s fourth failed constitutional reform effort: the decisive legacy of participatory processes, available at <https://www.constitutionnet.org/news/voices> (last accessed on 26.9.2017).

7 DCC 06-074 of 08 July 2006.

8 Decision DCC 11-067 of 20 October 2011.

9 *Adjolohoun*, note 6, p. 5.

10 After independence, Benin followed the French model for its own judicial system. See: *Ibrahima Diallo*, A la recherche d’un model africain de justice constitutionnelle, *Annuaire international de justice constitutionnelle*, Marseille 2004, p. 100.

11 *Frédéric Joël Aivo*, Le juge constitutionnel et l’état de droit en Afrique, l’exemple du modèle béninois, Paris 2006; *Charlotte Heyl/ Alexander Stroh*, Verfassungsgerichte in Westafrika: Unabhängige Krisenmanager?, *GIGA Fokus, Afrika* (2014) N° 1, p. 3 available at [www.giga-hamburg.de/giga-fokus/afrika](http://www.giga-hamburg.de/giga-fokus/afrika), (last accessed on 28.8.2014).

loi organique (organic law, hereafter: LO). This individual complaint marks at the same time an essential feature of judicial review that distinguishes Benin from other francophone countries in the region: Institutional foundations.

### *I. Model*

Benin's first constitution after independence was adopted on 26 November 1960. In accordance with Art 10 in conjunction with Art 26 of this constitution a so-called "Cour Suprême" was established. One chamber of this Court was competent for constitutional matters. Thus, the chamber served as consultant to the Supreme Court in all questions of constitutional pertinence. But with the takeover of power by the military regime substantial modifications to Benin's judicial system had to be expected. Hence the revolution of 1977 also led to significant changes within the Supreme Court. In particular, the adoption of a new constitution in 1977 not only changed the role of the Supreme Court but also its name. According to Art 104 of the constitution from 16 August 1977 the Supreme Court was henceforth referred to as "Cour Populaire Centrale". Furthermore, this "Cour Populaire Centrale" was responsible towards the Parliament, then called "Assemblée Nationale Révolutionnaire", and towards the President as defined in Art 117 of that constitution. This concept of the judiciary's responsibility towards the political bodies did naturally not allow for the adherence of one of the most crucial principles of the rule of law: the separation of powers. Despite major violations of the principles of rule of law and of human rights, the judiciary was not able to implement effective control mechanisms under these political circumstances. Consequently, the regime did not hesitate to use violence as an instrument of governance.<sup>12</sup> A judicial review of the government's tasks was out of question.

This chaotic situation lasted until the "Conference des Forces Vives de la Nation" in February 1990. On this conference, a new form of judicial review was introduced in Benin. First, the "Haut Conseil de la République" was established on 1 April 1991. It was a provisional council that served as constitutional court. The actual autonomous constitutional court was not set up until 7 June 1993.<sup>13</sup> In providing for an independent constitutional court in the text of the constitution, the legislator of the "new democratic order" followed the continental European model of a specialized judicial constitutional review. Accordingly, Art 114 of the constitution of Benin defines the constitutional court to be the highest body responsible for judicial review. The constitution addresses all relevant provisions concerning the constitutional court in an extra title (title V). It envisages that the constitutional court is not part of the ordinary court system but is an autonomous court. The essential

<sup>12</sup> *Aivo*, note 11, p. 47.

<sup>13</sup> See *Stephane Bolle*, *L'Etat de droit et de démocratie pluraliste au Bénin, La constitution en Afrique*, available on his blog at: [www.la-constitution-en-afrique.org](http://www.la-constitution-en-afrique.org), (last accessed on 26.8.2014).

characteristics of the constitutional court in this democratic order are the combination of constitutional jurisdiction consisting of both, judicial review and human rights protection.<sup>14</sup>

## II. *Composition of the court*

The provisions on the composition of the constitutional court are located in Art 115 of the constitution. It defines the constitutional court to consist of seven judges. The President of the National Assembly appoints four members, while another three are appointed by the President. All judges have a five-year mandate renewable only one time. No Member of the Court is allowed to stay in office for more than ten years. The requirements of membership in the constitutional court are strictly regulated. Apart from the conditions concerning their professional competence, all Members of the constitutional court have to possess moral integrity and righteousness. Moreover, three of the members need to have at least fifteen years of professional experience as judges at other courts. Two of them are appointed by the President of the National Assembly and one by the President of the Republic. Another two judges have to be high-level law professionals either being university professors or legal practitioners with at least fifteen years of professional experience. The State President and the President of the National Assembly jointly exercise the right of appointment. The last two members also have to enjoy a professional reputation to be permitted as candidates. It is noticeable that both the National Assembly and the President of the State have an influential role in the appointment of the judges of the constitutional court. To reduce their role, the current President Patrice Talon has introduced in the Parliament an executive bill in March 2017 aiming at amending the constitution. Among other things some substantive provisions of the amendment's bill are related to the appointment procedure of the constitutional court's judges, which is supposed, according to the spirit of the bill, to be more respectful of the principle of separation of powers.<sup>15</sup> However, the National Assembly has rejected the bill.

## C. *Competences*

Regarding its practical competences, the constitutional court exercises consultative (Art 68 of the constitution of Benin) and judicial competences (Art 114, 117, 118 of constitution of Benin).

The jurisdiction of the constitutional court primarily includes the review of the constitutionality of laws, human rights complaints, conflicts of competences between institutions of the state and constitutional amendments.

14 *Anna Rotman*, Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights, p. 9, available at <http://law.bepress.com/expresso>, (last accessed on 22.8.2014).

15 *Adjolohoun*, note 6, p. 2.

### I. Constitutional review

The practical competences of the constitutional court are listed in Art 117 of the constitution. The Court is thus responsible for the *a priori* review of the constitutionality of organic laws and other laws prior to their promulgation.

This abstract review of constitutionality generally applies to all kind of laws. Nevertheless, the way it is carried out depends on the particular type of law. With respect to organic laws and to the internal regulation of the Parliament, the *Haute Autorité de l'Audiovisuel et de la Communication* and the *Conseil économique et social* the review of constitutionality is systematic and obligatory.<sup>16</sup> The President has the duty to submit all organic laws to the constitutional court pursuant to Art 19 of the organic law (LO). In these cases, the review by the constitutional court takes place in the period between the adoption of the law and its promulgation. The internal regulation of the Parliament and of all the above-mentioned bodies are brought before the constitutional court by the Presidents of each body. The review has to be effected before the entry into force of the respective rules of procedure (Art 21 LO).

As far as ordinary laws are concerned, the President as well as every association, every human rights institution and every citizen has the right to submit a petition for constitutional review to the constitutional court.<sup>17</sup> Professor Aivo considers this *a posteriori* review as an expression of the higher value that the constitutional legislator of the “Renouveau Démocratique” attached to the respect for human rights. In this regard, the constitutional legislator attributed a particular importance to the individual human rights and to the fundamental freedoms. From this follows that, in the first place, the subject-matter of the review is meant to be the assumption of human rights violations by the new law.<sup>18</sup>

Besides, the constitution provides for a concrete review. Since the subject-matter of this review is not the litigation itself but the *incidental control* of the constitutionality of the law, its procedure is called “procédure de l’exception d’inconstitutionnalité”. As a matter of fact, every citizen can contest the constitutionality of a law already in force in the course of litigation. The Court, at which the proceedings are pending, is obliged to refer. In that case, the proceedings have to stay and the question of the constitutionality of the contested law is referred to the constitutional court.<sup>19</sup>

16 Art 123 of the constitution of Benin.

17 Art 22 LO and Art 120 of the constitution of Benin.

18 Aivo, note 11, p. 140.

19 Art 24 LO and Art 122 of the constitution of Benin.

## II. Protection of human rights

### 1. Right of action and conditions of admissibility

The conditions of admissibility to the constitutional court of Benin are regulated in Art 39 of the constitution of Benin. Any natural or legal person has the right of action. This includes not only citizens but also foreigners living in the national territory of Benin.<sup>20</sup>

### 2. Matter of complaint

The protection of democratic principles and especially of human rights play an important role in the constitution. This is closely related to the bloody military dictatorship of the previous regime of Kerekou and the numerous human rights violations that were committed. Already in the preamble of the constitution the constitutional legislator stresses that: “The Beninese people reaffirms its attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights, as well as defined by the African Charter on Human and Peoples’ Rights ratified by Benin on 20<sup>th</sup> January 1986. The provisions of this Charta make up an integral part of the present constitution”. Pursuant to Art 120 of the constitution, the constitutional court rules over complaints of the violation of human rights and of public liberties. The conditions of admissibility of human rights complaints are laid down in Art 121, 122 of the constitution of Benin and in Art 24 of the organic law (LO) according to which any citizen may directly complain to the constitutional court if he considers his/her fundamental liberties or civil rights to have been infringed. Apart from that, the Court shall automatically give its opinion on the constitutionality of laws and any regulatory text deemed to infringe on the fundamental human rights and public liberties.<sup>21</sup>

## III. Monitoring the democratic decision-making process

The presidential and parliamentary elections are of particular importance in the new democratic process. Due to the certainly crucial role of these two elections, the jurisdiction of the constitutional court covers the entire electoral process. This means that the Court ensures that all voting activities and electoral operations take place under respect of the equality of electoral chances not only before, but also and especially during the electoral process. Subsequently, the Court reviews electoral complaints and announces the final election results. The Court decides on electoral disputes in four different ways:

- The challenge of the election results is inadmissible<sup>22</sup>;

20 See *Salami/Oboubé/Gandonou*, note 5, p. 374.

21 Art 33 LO and Art 121 para 2 of the constitution of Benin.

22 The first decision of inadmissibility concerned a premature application: decision N°EL 95-013 of 19 April 1995. The ruling has been confirmed by numerous other decisions. As, for example, the

- The challenge of the election results is unfounded<sup>23</sup>;
- The cancellation<sup>24</sup> or alteration<sup>25</sup> of the election results;
- And the final announcement of the election results.

The review of the election of Members of the National Assembly falls under the jurisdiction of the constitutional court. The Court also supervises the proper conduct of the presidential elections (Art 49 LO). The Court reviews irregularities that it observed itself as well as complaints that an applicant put forward before the Court in the form of a constitutional complaint (Art 117 of the constitution of Benin and Art 97 of the Loi n°2010-33 portant règles générales pour les élections en République du Bénin). On the whole, the Court controls the list of candidates for the presidential election and the election campaign and announces the election results. As for the election of deputies, the Court monitors the regularity of the election and decides independently on the validity of the parliamentary election process (Art 117 para 3 and Art 81 para 2 of the constitution of Benin).

It is pertinent to know that the constitutional court has exclusive jurisdiction with respect to election complaints concerning the presidential and parliamentary elections.

First, the Court examines all complaints regarding the nominations. If necessary, the Court decides within five days over the controversial nominations (Art 46 para 4 Loi N°2013-06 portant code électoral au Bénin). The regularity of the election is examined by the constitutional court 's own observers.<sup>26</sup> After the parliamentary elections, the Court announces the final results within three days (Art 54 LO).

With regard to a referendum, the President has to request the constitutional court for the decision to call a referendum (Art 69 LO). Even if the initiative of holding the referendum comes from the National Assembly, the constitutional court must be formally requested (Art 69 para 2 LO). Pursuant to Art 117 of the constitution in conjunction with Art 68 LO the Court monitors the regular course of the referendum and announces its result.

#### *IV. Conflicts over the attribution of competences between organs of the state*

The rules on the division of competences between the executive and the legislative power are enshrined in Art 94 to 113 of the constitution. According to the allocation of competences in Art 94 of the constitution, the scope of power of the Parliament is strictly defined. Everything, that is not part of the parliamentary responsibilities, falls within the scope of

non-compliance with the procedural requirements of Art 57 para 1 LO of 4 March 1991 lead to the inadmissibility of a constitutional complaint. See: decision N°EL 99-111 of 23 June 1999.

23 Proclamation des Résultats Définitifs des élections Présidentielle du 18 mars 1996, (available at [www.cour-constitutionnelle-benin.org](http://www.cour-constitutionnelle-benin.org), last accessed on 3.8.2014).

24 E.g.: Proclamation des Résultats Définitifs des élections Législatives du 28 mars 1995 available at [www.cour-constitutionnelle-benin.org](http://www.cour-constitutionnelle-benin.org), (last accessed on 03.8.2014).

25 E.g.: Proclamation des Résultats Définitifs des élections Présidentielle du 03 mars 1996 available at [www.cour-constitutionnelle-benin.org](http://www.cour-constitutionnelle-benin.org), (last accessed on 3.8.2014).

26 Art 97 des Loi n°2010-33 portant règles générales pour les élections en République du Bénin.

competences of the executive power. The legislative power and the executive power are required to adhere to the division of competences as it is defined in the constitution. The constitutional court ensures a peaceful and harmonious cooperation between the constitutional bodies. The constitutional court is particularly active in controlling the compliance with these principles of the division of powers. Pursuant to Art 23 LO, either the President of the Republic or the President of the National Assembly may turn to the constitutional Court in case of a dispute over competences between both state bodies. The constitutional court generally decides on disputes over competences between constitutional bodies.<sup>27</sup>

### *V. Constitutional amendments*

The question of whether the constitutional court is competent to rule on the constitutionality of laws amending the constitution is a much-debated issue in francophone literature. The question actually revolves around the general justiciability of such legal rules before the constitutional court. The constitution does not explicitly empower the constitutional court to review the constitutionality of laws amending the constitution, the so-called "lois constitutionnelles". However, the constitutional court declared itself responsible for such a competence.

The constitutional courts in francophone countries in Africa mainly follow the restrictive interpretation of the constitution and the reluctance of the French constitutional Council, as regards the question of review of laws amending the constitution.<sup>28</sup> This has the consequence that the legislature (le pouvoir constituant dérivé) exploits the possibility of constitutional amendments to bypass the control of the constitutional court. Instead of adopting an ordinary law, which would be subject to the review of the Court, the National Assembly makes constitutional amendments to avoid the possible control of the law's constitutionality. Thus significant constitutions have been amended recently in Francophone West Africa without courts control.

### *VI. Other competences*

According to Art 53 of the constitution, the President must take an oath before the constitutional court before taking his office. The oath is especially important for the Beninese constitutional order with regard to its formulation that the new President has to recite word for word. In fact, the guarantee of religious pluralism can be determined through the wording which the constitutional legislator chose in Art 53. Before taking office on 4 April 1996, President Mathieu Kerekou took the oath without mentioning the Manes of the ancestors. This unconstitutional oath-taking was initially not accepted by the constitutional court and

27 Art 117 of the constitution of Benin.

28 See the decision N°2003-469 DC of 26 March 2003. Many Constitutional Courts in African countries follow this restrictive interpretation, e.g. the Conseil Constitutionnel in Senegal in the case N°-C2009 of 18 June 2009.

the Court asked him to repeat the oath. The President responded to this appeal before the constitutional court on 6 April 1996.<sup>29</sup> Moreover, the court has jurisdiction over international Agreements (Art 146 of the constitution).

The constitutional court of Benin has the right to oversee the regularity of the presidential elections of its own motion, i.e. *ex officio* (Art 117 of the constitution). This article is a concretization of the “*ex officio access*” in the Beninese constitution. It may also on its own initiative, decide on violations of human rights that it has found without a previous complaint. Moreover, the Court concretized a so-called “*procedure de saisine d’office*”. This process represents a judge-made legal invention and is also a manifestation of the principle of constitutionality. It is a matter of the Court declaring an application inadmissible, but nevertheless examining the constitutionality of the impugned law. The prerequisite for this is the presumption of a violation of the human rights enshrined in the constitution.<sup>30</sup>

## D. Scope of judicial review, binding effect and implementation

### I. Scope of review

To review the constitutionality of actions taken by state bodies, the constitutional court makes use of the wording and the spirit of the constitution. The standard of review includes the constitution with the preamble, the international human rights instruments that are included into the preamble such as the Universal Declaration of Human Rights and especially the Banjul Charter. The decisions of the constitutional court and the constitutional principles defined by the constitutional court through its case law such as the “*principe de Consensus National, principe a valeur constitutionnelle*”<sup>31</sup> are part of the “*bloc de constitutionnalité*”.

It contains also the electoral laws especially for the presidential and parliamentary elections. It is worth adding that the content of that “*bloc of constitutionality*” is subject to continuous improvements as the court has identified in a recent decision of June 2018 “the principle of constitutional imperative”.<sup>32</sup> The real legal scope of that principle is not yet clear. Moreover, it remains to be clarified if the court establishes a kind of hierarchy within the constitutional bloc.

29 Decision DCC 96-017 of April 1996. See also: *Dietrich Collofong*, Das Verfassungsgericht der Republik Benin als Beispiel für die Durchsetzung von Rechtsstaatlichkeit und Gewaltenteilung im frankophonen Afrika, *Recht in Afrika* 1 (1998), pp. 169-205, p. 193; *Ismaila Madior Fall*, Le sens des pouvoirs présidentiels et l’engagement du président de la République à subir les rigueurs de la loi en cas de non-respect desdits pouvoir, *Annuaire Béninois de justice constitutionnelle* (ABJC) (2013), p. 279.

30 See *Salami/Oboubé/Gandonou*, note 5, p. 377.

31 DCC 06-074 of 08 July 2006.

32 DCC 18-126 of 21 June 2018.

## II. *Binding effect*

The decisions of the constitutional court enter into final legal force with respect to form and substance. They are therefore unimpeachable and irrevocable (Art 124 para 2 of the constitution). They have binding legal effect to all state powers. The civilian and military authority and the judiciary are bound by the decisions of the constitutional court. Logically, the constitution does not provide for an appeal against the Court's jurisdiction. The Court stresses the incontestability of its decisions and declares any action inadmissible, which concerns its previous decisions.<sup>33</sup>

## III. *Implementation*

The full effect of a court decision is reflected in its practical implementation. This raises the question whether the jurisdiction of the Court is followed by its addressees. In the course of the twenty-year anniversary since the creation of the Court as an independent panel of judges, it was found, that the President, the National Assembly, the Courts and the litigants (applicant and opponent) follow and implement the authority of the constitutional court's decision on the basis of Art 124 of the constitution. Nevertheless, some deficiencies in the implementation culture can be observed. The issue is about the non-liberation of unlawfully condemned persons, although the constitutional court has ruled on the unconstitutionality of their arrest.<sup>34</sup> It is also concerned with the failure to satisfy a government obligation to compensate persons who have suffered inhumane treatment by public authorities.<sup>35</sup>

## E. **Judicial practice / case law between 1991 and 2014**

First, this is a general analysis of the number decisions that the Court adopted in the most important areas of competence. Then, the much-discussed decisions of the Court will be analyzed in more detail.

### I. *Number of decisions related to the respective areas of competence*

It can be seen that the jurisprudence of the Court<sup>36</sup> mainly consists of the abstract review of statutes, then followed by human rights cases. This clearly indicates the role that the constitutional court plays in new democracies.<sup>37</sup> Concretely the court has issued between 1991

33 Decision N°DCC 14-038 of 20 February 2014.

34 *Dodzi Kokoroko*, Colloque de Cotonou sur les 20 ans de la Cour constitutionnelle du Bénin, 10 available at <http://www.cedatfadesp.org>, (last accessed on 20.8.2014).

35 In this context, the Constitutional Court regulated the State's duty of a fair compensation for serious human rights violations in its decisions since 2001.

36 Source: <http://www.cour-constitutionnelle-benin.org> (last accessed on 30<sup>th</sup> 7..2018).

37 *Théodore Holo*, Émergence de la justice constitutionnelle, *Revue Pouvoirs*, N°129 (2009), p. 108.

and 2018 approximately 2589 in issues concerning fundamental liberties and human rights. The rulings concerned basically the applications that are admissible as well as those rejected on merits. The major task of the court was focused fundamentally on the review of laws where the court issued a total of 2532. That category includes abstract review, concrete control of constitutionality and control of constitutional amendment. In the management of electoral conflicts, the court has ruled in a total of 830 electoral matters. As far as the electoral disputes concerned, those rulings include presidential as well as parliamentary elections. Altogether, the court has issued in this time frame a total of 5951 decisions.

## *II. Role in recent elections*

Democracy and the principles of the rule of law are fundamental constitutional principles, which are enshrined in the new constitutional order from February 1990. Pursuant to Art 4, 49, 81 and 117 of the constitution, the political legitimacy of all state institutions and authorities is determined through free and fair elections. Therefore, in the constitutional prescribed time periods elections have to take place in Benin. The competence of the constitutional court extends to the presidential and parliamentary elections. As shown above, the Court supervises the regular conduct of the two elections. Altogether, the Court supervises each electoral process.

### *1. Presidential election 1996*

Since the presidential election of 18 March 1996 played a crucial role in the new democratic order in Benin, it is of interest to have a closer look at the constitutional court's contribution to solving the electoral dispute between the outgoing President Nicephore Soglo and his challenger Mathieu Kerekou. After an eventful first round of voting on 3 March 1996, the constitutional court again had to deal with fierce challenges of the election results by both candidates.

On the one hand, the candidate Soglo (outgoing president) criticized serious electoral fraud. He thus denied the validity of the provisional election results of 18 March 1996. On the other hand, the candidate Kerekou doubted the election results of many constituencies. According to his complaint, widely used additional fake ballots were found in those constituencies. Accordingly, he applied the simple cancellation of the election results in the disputed constituencies. The Court went deep into detail of the applicant's objections. In his function as an instance to review the election results, the Court confronted all raised accusations of irregularity by the former President Soglo with its own findings of the electoral processes. In addition, the Court reviewed the complaint in light of the election protocols submitted by the CENA. As a result, the Court rejected the request for the invalidation of the election results submitted by the candidate Soglo on the grounds that he could not present sufficient evidence to his statement. Concerning the action for annulment by candidate Kerekou the Court came to the same conclusion. It stated as follows: « que le retard

anormal invoqué n'est pas établi, pas plus que n'est rapporté la preuve du bourrage d'urnes; qu'en conséquence, ce moyen est inopérant ».<sup>38</sup> Thus, the constitutional court closed the issue by declaring the final result of the presidential election of 18 March 1996.<sup>39</sup> That is how the former dictator Kerekou came back to power, to the deepest regret of President Soglo.

## 2. Presidential election 2001

The second presidential election, on which the constitutional court had to decide, was held in 2001. In this election year, the Court was confronted with fierce motions. After the announcement of the results of the first round of voting, the Court held that there was serious miscalculation. In the appellate decision of the election results, the Court identified numerous inconsistencies. On 12 March 2001, the Court announced the result of the first round of elections. Immediately after the announcement, the candidate Kerekou (outgoing President) appealed to the court for rectification of numerous computational errors in the election results announced by the constitutional court. According to Art 23 of the Rules of Procedure of the constitutional court, the Court may reconsider its own decisions, if its first decision is found to be faulty. In the re-examination of the election results, the court detected many calculation errors in the counting of results caused by technical reasons especially in the constituencies of the polling station of Couffo and Mono. Because of this, it undertook a correction of the announced numbers and the order of the candidates for the second round of voting.<sup>40</sup> According to this new order, the candidates Kerekou and Soglo could make it into the second round. However, Soglo did not agree with the appeal decision of the election results by the constitutional court. In the main proceedings, he applied for a simple cancellation of the entire election results and in the alternative claim, he denied the widespread irregularities in some constituencies.<sup>41</sup> As auxiliary claim, he requested the cancellation of the election results in these polling stations. Overall, he accused the Court that even the appellate decision<sup>42</sup> would have been faulty. In his view, a major deviation remained between the assumed figures of the National Electoral Commission (CENA) and the ones proclaimed by the constitutional court. Thereupon, the court rejected the main plea on the ground that at this state the complainant could not challenge the reliability of these figures anymore, as the court already decided on the voter lists in advance of the election and the necessary corrections of these lists were made. The auxiliary claim for the cancellation of the election results in some polling stations was declared inadmissible. The Court had sanctioned the controversial irregularities even before the promulgation of the first round elec-

38 <http://www.cour-constitutionnelle-benin.org/>, under Proclamation des résultats définitifs de l'élection présidentielle du 18 mars 1996 (last accessed on 20.8.2014).

39 [www.cour-constitutionnelle-benin.org](http://www.cour-constitutionnelle-benin.org/) (last accessed on 3.8.2014).

40 Decision EL-P 01-043 of 13 March 2001.

41 For more detailed information, see: Decision EL-P 01-049 of 15 March 2001.

42 EL-P01-043 of 12 March 2001.

tion results and it could not make a second decision.<sup>43</sup> Outraged by this opinion of the constitutional court, the candidate Soglo, who actually wanted to compete for the second round, resigned from the second campaign.<sup>44</sup> Now, the National Electoral Commission asked the constitutional court to decide on the successor of the resigned candidate. Pursuant to Art 45 of the constitution of Benin, the successor should be the next candidate in the order of the results of the first round. So the court declared Adrien Houngbedji as eligible for the election campaign in the second round. In case of a failure on his part, the next one would have run for election.<sup>45</sup> So the court had to make three decisions on the election within three days.<sup>46</sup> Finally the second round of voting on 22 March 2001 could take place. Mathieu Kerekou came out of the second round as winner<sup>47</sup> against his former Minister of State, who had actually become fourth in the first round.

### 3. Parliamentary election of 28 March 1995

The cancellation of the election results is the most difficult and dangerous decision that the constitutional court can take within its field of competence for electoral issues.<sup>48</sup> Therefore, the decision of 16 April 1995, is of particular importance for the jurisdiction on electoral matters in Benin. After the election of 28 March 1995, the CENA filed all electoral records for review before the constitutional court. Before the announcement of the final election results, the Court found major irregularities in some constituencies. It was essentially about the elections of foreigners, electoral fraud and numerous fake additional votes.<sup>49</sup> Such irregularities raise serious doubts as to the authenticity of the election results. Making use of its reform competence as part of its jurisdiction over electoral matters, the court declared the election in the constituency Borgou void. As for the constituencies of Cotonou, the court came to the same conclusion.<sup>50</sup> The court also made a couple of changes it considered appropriate, and proclaimed the names of the constitutionally elected Members of Parliament according to its own assessment. There were complaints regarding this decision and the manner in which the court listed the number of electoral fraud, without informing the voters and the candidates about details of the actuality of these election offenses and the

43 See the tenor of the Decision EL-P 01-049 of 15 March 2001.

44 See: Decision EL-P 01-051 of 16 March 2001.

45 Decision EL-P 01-054 of 18 March 2001.

46 Decisions: EL-P 01-051 of 16 March 2001; EL-P 01-053 of 17 March 2001 and EL-P 01-054 of 18 March 2001.

47 See the Proclamation des Résultats provisoires de l'élection présidentielle du 22 mars 2001, available at <http://www.cour-constitutionnelle-benin.org>, (last accessed on 9.7.2014).

48 *Bolle*, note 13, p. 16.

49 <http://www.cour-constitutionnelle-benin.org>, (last accessed on 4.8. 2014).

50 Cour constitutionnelle du Bénin, Proclamation des Résultats des élections législatives du 28 mars 1995 (résultat proclamé par la cour le 16 avril 1995), results available at the homepage of the Constitutional Court: <http://www.cour-constitutionnelle-benin.org>, (last accessed on 9.8.2014).

people involved.<sup>51</sup> In the reasons for the decision the court solely refers to its competence of monitoring the regularity of the parliamentary and presidential elections in order to justify its sovereign decisions.<sup>52</sup> The criticism can be justified by the fact that the constitutional court has come to quite different results in similar cases at the election result examination under the 2007 parliamentary elections.

#### 4. Parliamentary election of 31 March 2007

In its jurisdiction over electoral matters, the Court must always ensure that the results it announces correspond with the will of the voters. Therefore, the Court may, as shown above, reform or confirm the election results. There are two cases in which the Court confirms the results: Either the complaints of candidates about irregularities are unfounded, or the Court does find irregularities, but they are not critical enough to lead to the annulment of the elections.<sup>53</sup>

In the parliamentary elections of 31 March 2007, while the Court concluded that there had been many irregularities, it did not draw the same implication as in the elections in 1995. The court implicitly relied on the principle well-known in the French judicial area "the principle of decisive influence". The court limited itself to the actual statement: "While there are widespread irregularities, they are not as crucial to infer the cancellation in the affected constituencies."<sup>54</sup> All this gives the impression that the constitutional court makes its decisions regarding the elections only after a judge-made margin of discretion. It is desirable that, despite its sole jurisdiction, the court should give detailed reasons for its decisions regarding the validity or irregularity of elections.<sup>55</sup>

### III. Role in political conflicts

The constitutional court is not a political body, which had to take political decisions. It basically exercises judicial power. Precisely for this reason, the Court must review political behavior in light of the constitution in order to resolve political conflicts. Rightly, the Federal constitutional court of Germany states that: "Only where constitutional standards for political behavior are codified, the Federal constitutional court may oppose their infringement."<sup>56</sup>

51 *Bolle*, note 13, pp. 17-18.

52 Proclamation des Résultats définitifs des Élections législatives du 28 Mars 1995. Available at <http://www.cour-constitutionnelle-benin.org>, (last accessed on 5.8.2014).

53 *Simon Dako*, Le contentieux électoral dans la jurisprudence de la Cour constitutionnelle du Bénin, *Annuaire Béninoise de Justice constitutionnelle* (2013), p. 685.

54 See Proclamation des Résultats des Élections Législatives du 31 Mars 2007, available at <http://www.cour-constitutionnelle-benin.org>, (last accessed on 8.8.2014).

55 *Bolle*, note 13, p. 17.

56 BVerfGE 62, 1, 51.

Indeed, tensions arose in the National Assembly of Benin in 2003.<sup>57</sup> It was a matter of choosing the Bureau of Parliament. According to Art 15 of the Rules of Procedure of the Parliament, it is the task of the oldest Members to conduct the electoral session for the Bureau of Parliament. But Madame Rose-Marie Vieyra Soglo suspended the meeting on 29 April 2003 on the ground that the Bureau of the National Assembly must correspond to the political composition of the Parliament. Outraged by the suspension of the session, some deputies appealed to the constitutional court. The difficult question was, on which constitutional standard the Court should judge this behavior in order to confront the unconstitutionality of the blockade of the session by the older Members of Parliament. Ultimately, it considered the suspension of the session as a violation of Art 15 of the Rules of Procedure of the National Assembly, and inferred from it a violation of Arts 82 and 35 of the constitution. The tenor of the Court's decision was that the blockade of the electoral session was unconstitutional. Still, the Court did not announce, what the legal consequences thereof are. Therefore, the oldest member of the National Assembly continued the suspension of the session. According to her reasoning, the Court had not said how she would have to act in that case. Thus, there was a renewed appeal to the constitutional court. Now, the applicants demanded a clear statement of the Court. In its second decision (hereafter: DC) of 12 May 2003 (Decision N ° DCC 03-078), the Court ruled that the non-continuation of the election of the Bureau represented non-compliance with to its first judgment. This resistance is a violation of Art 124 para 2 and 3 of the constitution. Thus, the court demanded that the entire election process of the Bureau had to be continued within 48 hours of the decision. In the case of a renewed resistance, the oldest member had to be removed and the Parliament had to find a replacement in accordance with its rules of procedure. By this means, the constitutional court was able to end a highly strained relationship in Parliament.

#### *IV. Most important decisions against the appointing authority and separation of powers*

In its role as the sole judicial body to monitor the proper functioning of State institutions, the Court has taken important decisions against the appointing authorities (1.). In addition, the constitutional court intervened as arbitration with respect to competence disputes between the highest state organs (2.).

##### 1. Decisions at the expense of appointing authorities

It is remarkable how active the court is in regulation of the activities of states organs.<sup>58</sup> The court gave indeed bold decisions against the appointing authorities.<sup>59</sup> Already in the early stages of the constitutional jurisdiction in the democratic era, the Court had to establish it-

<sup>57</sup> Decision DCC 03-077 of 07 May 2003.

<sup>58</sup> *Abdoulaye Soma*, Le contrôle de constitutionnalité des normes supra législatives, *Annuaire Béninoise de Justice constitutionnelle (ABJC)* (2013), p. 99.

<sup>59</sup> DCC 06-074 of 08 October 2006 and DCC 08-72 of 25 July 2007.

self as guardian of the rule of law against the President. In fact, the Court announced the final election result on 1 April 1996 at the expense of the former President Nicephore Soglo. Two years before, the Court had already declared unconstitutional ordinances of the President for formal reasons.<sup>60</sup>

In 2006, the Parliament adopted a constitutional amendment in its own cause. Namely, it was about an extension of the current mandate of the deputies by one year. This required a change in Art 80 of the constitution, which laid down a mandate of four years. This procedure was chosen by the National Assembly in Benin. In fact, the Beninese National Assembly wanted to extend the mandate of the deputies by one year through the adoption of the constitutional amendment.<sup>61</sup> From a formal point of view, the law was in accordance with the constitution, since the requirements of Art 155 had been met. The law was enacted by a majority of four-fifths (4/5) as presupposed by the constitution. Nonetheless, many citizens disputed the constitutionality of this constitutional amendment and, as a result, called the constitutional court to review its constitutionality. Although the constitutional court has no authority to review such a law, the Court still declared itself responsible by means of a functional interpretation of the constitution.<sup>62</sup> The extension of the mandate would have the advantage that the local and parliamentary elections in 2008 could be held jointly. Thus, a cost relief for public finances would be achieved. Regarding the request of the President, the Court ruled on the procedural and substantive constitutionality. Predominantly, it found numerous violations of constitutional procedural requirements, namely of Art 154 and 155 of the constitution and Art 92.1 of the rules of procedure of Parliament.<sup>63</sup> From a substantive law viewpoint, the Court saw a serious violation of the basic consensus of the National Conference of February 1990, which prohibits the arbitrary exercise of authority in the preamble of the constitution. In addition, the constitutional amendment violated the principle of non-retroactivity of laws. As a result, the law was declared inadmissible.<sup>64</sup> The constitutionalization of the "consensus national" as a constitutional principle met with strong criticism of some authors.<sup>65</sup>

60 N°DCC 27-94 of 24 August 1994. On that issue, the commentary of: *Ismaila Madior Fall*, Le Président de La République devant la Cour constitutionnelle, *Annuaire Béninoise de Justice constitutionnelle* (ABJC) (2013), p. 218.

61 The controversial constitutional-amending law was the law N°2006-13 of 23 June 2006.

62 Decision DCC 06-074 of 8 July 2006.

63 See also the decision DCC 06-074 of 8 July 2008, 16.

64 According to the decision N° DCC 06-074 of 8 July 2008, 21. Commentaries: *Alexander Stroh*, Stabilitätsanker Verfassung: kleine Reformen und große Ängste in Benin, *GIGA Fokus Afrika* 4 (2013), online: <https://www.giga-hamburg.de/de/publication/stabilitätsanker-verfassung-kleine-reformen-und-große-ängste-in-benin>, (last accessed on 06.8.2018); auch *Abdoulaye Soma*, Le contrôle de constitutionnalité des normes supra législatives, loi constitutionnelle de prorogation du mandat des députés, *Annuaire Béninoise de Justice constitutionnelle* (ABJC) (2013), p. 99.

65 *Mouhamadou Moustapha Aidara*, Le juge constitutionnel africain et le contrôle des lois portant révision de la Constitution : contribution à un débat, 15, available at <http://afrilex.u-bordeaux4.fr/le>

The Court demonstrated that it is not limited to a merely literal interpretation of its jurisdiction over the review of constitution-amending laws, but that it also uses other means of interpretation in reviewing the material constitutionality of laws passed by the constitution-amending legislature (*pouvoir constituant dérivé*). In particular “that interpretation has to be preferred, which promotes the optimal effectiveness of the constitutional standard.”<sup>66</sup> Thus, the court follows a historical interpretation of the constitution, where it can be clearly seen that the objective will of the constitutional legislator, the “*pouvoir constituant originaire*”, should be given priority, even when making a constitutional amendment. The decision reflects the fact that the guardian of the constitution must respect the original intention of the derivative constituent.<sup>67</sup> Some authors consider this objective will of the “*pouvoir constituant originaire*” to be of a quasi-higher rank in the hierarchy of norms than the constitution itself.<sup>68</sup>

The instituted legislature, i.e. the “*derivative constituent*” must preserve the original will of the *Pouvoir Constituant originaire* (the people). The reservation of sovereignty given to the original constitutional legislator consequently lays the basis for the constitutional court’s jurisdiction over the review of constitutional amendments, which originally lies with the people.<sup>69</sup> The constitutional court was set up in order to prevent or defer infringements of the objectives and basic principles of the constitutional legislator.<sup>70</sup> Even if technically a lot could be said about this groundbreaking decision of the constitutional court, the Court reaffirms its role as guardian of the constitution.<sup>71</sup>

In subsequent years, the court thus reaffirmed its role as a regulatory body in the new constitutional order.<sup>72</sup>

-juge-constitutionnel-africain.html (last accessed on 06.8.2018); see also *Nicaise Mede*, *Les grandes décisions de la Cour constitutionnelle du Bénin*, Sarrebruck 2012, p. 340.

66 *Christoph Degenhart*, *Staatsrecht I Staatsorganisationsrecht*, Heidelberg 2017, p. 21.

67 *Hans Kelsen* is right to emphasize that: „the constitutionality of the law does not imply that the law has been properly enacted, but that it has been enacted at all [die Verfassungsmäßigkeit des Gesetzes besteht zwar nicht darin, dass es nicht gehörig, sondern dass es überhaupt zustande gekommen ist“], see: *Hans Kelsen*, Robert Chr. van Ooyen (Hrsg.), *Wer soll der Hüter der Verfassung sein?* Tübingen 2008 (1<sup>st</sup> edition 1931), p. 18.

68 *Babakane D. Coulibaley*, *La neutralisation du parlement constituant*, *Revue du Droit Public*, N°5 (2009), pp.1493-1515, p. 1496, p. 1508.

69 *Babakane D. Coulibaley*, *La neutralisation du parlement constituant*, *Revue du Droit Public*, N°5 (2009), pp. 1493-1515, p. 1501.

70 *Kelsen*, note 67, p. 5.

71 *Carl Schmitt*, however, referred to the protection of the Constitution against the legislature in this context as „arbitrary“. See *Carl Schmitt*, *Der Hüter der Verfassung*, Berlin 2016 (1<sup>st</sup> edition 1930), p. 4. This view is challenged by *Kelsen* 1931, note 67, p.12.

72 *Kelsen*, note 67, p.5.

## 2. Most important decisions pertaining to the separation of powers: competence disputes between the executive and the Parliament

The principle of separation of powers guarantees that all state power remains within the area of competence allocated in the constitution.<sup>73</sup> In this respect an exceeding of competences is avoided.<sup>74</sup> The dispute concerned an electoral law passed by the Parliament.<sup>75</sup> According to the facts, the President queried:

- The establishment of an electoral commission, the so-called „*Commission électorale nationale autonome (CENA)*” by the Parliament;
- The competences assigned to that electoral commission;
- The extension of the constitutional court’s jurisdiction with regard to parliamentary elections and the announcement of the election results.

The President considered this act to violate the constitutional principle of separation of powers and, at the same time, to infringe the competences of the executive power. The constitutional court was thus requested to declare the law incompatible with Art 54, 98 and 100 of the constitution. After extensive review and evaluation of the law, the court came to the conclusion that the entire field of elections was awarded to the Parliament by the respective constitutional regulations on the division of powers.<sup>76</sup> Consequently, nothing prevented the legislature from creating new institutions in order to preserve the integrity of the election. Thus, the Court found no violation of the constitutional principle of separation of powers enshrined in Art 54, 98 and 100 of the constitution. In the tenor of the decision, the appeal was dismissed, for the most part.

### V. Human Rights Jurisprudence: Pioneering decision in the field of human rights

To start with, it must be noted that, besides the judicial review of laws, human rights complaints make up the majority of the constitutional court’s rulings in Benin.<sup>77</sup> As stated above, the respect for human rights in the new constitutional order enjoys an influential position.<sup>78</sup> The constitutional court is particularly engaged as the guardian and protector of the human rights enshrined in the constitution. In fact, the constitutional recognition of the

73 *Adama Kpodar*, Le contrôle de constitutionnalité des normes infra législatives et des autres „actes“, *Annuaire Béninois de Justice constitutionnelle*, (ABJC) (2013), p. 198.

74 *Abraham Hervé Diompy*, Les dynamiques récentes de la justice constitutionnelle en Afrique francophone, p. 22, available at <http://afrilex.u-bordeaux4.fr/ley-dynamics-recentes-de-la.html>, (last accessed on 06.8.2018).

75 Loi N°94-013 du 21 Novembre 1994 portant règles générales pour les élections du Président de la République et des membres de l’Assemblée Nationale.

76 Decision DCC 34-94 of 23 December 1994.

77 *Anna Rotmann*, Benin’s constitutional court: an institutional model for enforcing human right, p. 15, available at: <http://law.bepress.com/expresso/eps/104/> (last accessed on 06.8.2018.).

78 *Théodore Holo*, Les droits et devoirs des citoyens dans le constitutionnalisme africain, *Revue Béninoise des Sciences Juridiques et Administratives* N°18 (2007), p. 5.

individual human rights complaint to the constitutional court enables the Court to play an active role in the effective protection of human rights. This can be seen by the high number of constitutional court decisions regarding the human rights recognized by the constitution (2589 decisions up to June 2018).

This preliminary observation shows how difficult it is to make a selection for the analysis of the human rights jurisprudence of the constitutional court in Benin. Therefore, the decision DCC 02-058 of 4 June 2002 (case Favi) is not uncommon, as regards the human rights jurisprudence in Benin. Still, it is true that the decision DCC 02-058 of 4 June 2002 was of particular importance for the entire judicial system of Benin in general and especially with regard to the Court's human rights rulings. The impact of the decision on the entire judicial system is related to the question of the enforcement procedure for a right to compensation awarded by the constitutional court.<sup>79</sup> Who is responsible for implementing the decision of the constitutional court when it has awarded compensation to the complainant? In addition, the analysis of the decision is just important because the Court's rulings with respect to inhuman acts committed by state officials in Benin clearly increase.<sup>80</sup>

The case Favi Adèle illustrates the higher value of human rights in the constitutional jurisprudence. At issue was an individual constitutional complaint by Mrs. Favi Adèle. Subject of her complaint was the way how the presidential bodyguards (*garde rapprochée du président*) had violently abused her. The complaint covered all the degrading and barbaric treatment by the police. The bodyguards of the president were sued by the constitutional court for inhuman and degrading treatment. In the grounds, the constitutional court observed a violation of Art 18 of the constitution. In the result, the court did not only find a violation of this provision, but in particular it awarded her the right to an adequate compensation. Even if the court has no means to enforce this judgment, this ruling was referred to as a strong signal against arbitrary state action.<sup>81</sup>

## VI. *Development of principles for the consolidation of democracy*

The constitutional court of Benin distinguishes itself in a francophone context, not only by its decisions against the appointing authorities but also by making a huge contribution to the development of the law. In fact, it has involved fundamental unwritten constitutional principles into its review of constitutionality. Already in 2006, the Court developed this method of interpretation.<sup>82</sup> In its the decision in 2006, the finding of justice by explicit reference to the historical basic decisions of the national conference in February 1990 took a prominent role in the constitutional court's rulings. The constitutional court could now de-

<sup>79</sup> *Aivo*, note 11, p. 197.

<sup>80</sup> *Gilles Badet*, *Sûretés et Tortures*, *Annuaire Béninoise de Justice constitutionnelle (ABJC)* (2013), p. 486.

<sup>81</sup> *Aivo*, note 11, p. 156.

<sup>82</sup> This can be seen in the decision DCC 06-074 of 8 July 2006.

termine the resulting consequences with regard to the constitutional amendment in its decision DCC 11-067 of 20.10.2011.

This case was concerned with an organic law<sup>83</sup>, which affected the conditions for calling a referendum. The President submitted the bill to the constitutional court for review of constitutionality. After the Court affirmed compliance with the formal requirements for the adoption of the controversial law, it observed an infringement of fundamental issues on a substantive level. Some authors see this as modern interpretation of the constitution.<sup>84</sup> Against the will of the President and the National Assembly, the constitutional court decided on the merits, that Art 6 of this organic law concerning the call for a referendum is not compatible with Art 4 and 117 of the constitution. Particularly noteworthy about this ruling is the final opinion of the Court on some constitutional principles that in its view belong to the fundamental decision of the "conférence nationale souveraine".<sup>85</sup>

In summary, the basic statement of the Court reads as follows:

*The basic decisions of the national conference of February 1990 must not be subject to constitutional amendment, namely:*

*The republican and laical form of government*

*The unconditional protection of the territorial integrity*

*The presidential system of government*

*As well as the presidential term limit and age of the President*<sup>86</sup>

This decision, however, has triggered a fierce debate in academic literature, since the Court expressly considered unwritten principles in the interpretation of the constitution. It remains questionable whether the recourse to unwritten fundamental principles of the constitution is part of the constitutional task of the Court.

The great question about this Court ruling is whether the Court is authorized to extend the constitutional eternity clause.<sup>87</sup> Unlike Kpodar, Kokoroko sees this self-empowerment as a threat to the exercise of popular sovereignty.<sup>88</sup> After all, there are no doubts that the Court confirmed the immutability of fundamental provisions of the constitution with this decision.

83 Loi Organique N°2011-27 portant conditions de recours au référendum.

84 *Hilaire Akérékoro*, Le procès constitutionnel au Bénin, *Annuaire Béninoise de Justice constitutionnelle* (ABJC) (2013), p. 90.

85 See the decision N°DCC 11-067 of 20 October 2011.

86 For a summary, see: *Stroh*, note 64.

87 *Adama Kpodar*, La Cour constitutionnelle du Benin peut-elle soumettre aux options fondamentales de la Conférence nationale le peuple dans l'exercice de son pouvoir de révision?, *Annuaire Béninoise de Justice constitutionnelle* (ABJC) (2013), p. 704.

88 *Dodzi Kokoroko*, La Cour constitutionnelle du Benin peut-elle soumettre aux options fondamentales de la Conférence nationale le peuple dans l'exercice de son pouvoir de révision?, *Annuaire Béninoise de Justice constitutionnelle* (ABJC) (2013), p. 717.

The classification of the given constitutional principles as eternity clauses by the constitutional court calls forth a few remarks: The range of this decision is of a particular importance in the African context. It is right about the sensitive areas that suffer constant manipulations in many constitutional systems of the region. Until today, the overlong perpetuation of the President's power generates a great fear in the entire population. In this case, the reform plans of the President were on the one hand his intention to be set free from the limitation of his mandate, and on the other hand to fill in some loopholes in the constitution. However, the change of power constitutes one of the most important characteristics of democracy in the new constitutional order. The constitutional court of Benin thus set the limit, which must not be exceeded with regard to the original intention of the new constitutional order. The above mentioned eternity clauses set by the constitutional court now belong to the conditions of admissibility of a future call for a referendum, even if it is passed by the Parliament as an organic law. Since the Court looked at this Art 6 comparing it to other constitutional provisions of the law in question, it declared the entire law to be incompatible with the constitution.<sup>89</sup>

The Court remains constant in its position with regard to presidential term limit. In fact, in March 2017, parliament has declined an executive bill of the incumbent president Talon to bring the presidential term from two to a single term of six years. On 20 March 2017 a citizen seized the court to control the conformity of Art 42 and 80 of the proposed amendment with its jurisprudence of 11 October 2011.<sup>90</sup> In a new decision of Mai 2017,<sup>91</sup> the constitutional court declares the petitioner's application inadmissible because the law had not yet been passed by parliament. However, the Court took advantage of this decision to reaffirm its position by stating clearly that "the decisions of the Court recalled by the petitioners, fully participate in the constitutionality bloc and are binding on the public authorities under article 124, paragraph 3, of the constitution ". By doing so, the Court made it implicitly clear that even if the National Assembly has passed the law amending the constitution, it would have declared the Art 42 and 80 incompatible with its previous jurisprudence on the term limit.

When deciding on the interpretation of this Charter, the Court defined criteria that lead to a clarification of its content. In the view of the Court, the assessment of the adequacy of the process time depends on the specific circumstances, the complexity and variety of procedures, the conduct of the defendants and the judicial authorities.<sup>92</sup> In subsequent years, the Court's jurisprudence continued in this way.<sup>93</sup> Nevertheless, there are still areas where

89 Decision DCC 11-067 of 20 October 2011.

90 Decision DCC 11-067 of 20 October 2011.

91 Decision DCC 17-095 of 04 Mai 2017.

92 The Court found a violation of Art. 7 para 1 d) of the Charta in its decision DCC 03-119 of 28 August 2003. In contrast with its decision DCC 03-167 of 11 November 2003.

93 See the decision DCC 04-004 of 6 January 2004.

legal development is to be expected. This includes the ambiguous relationship between the constitutional court and the highest ordinary court.<sup>94</sup>

### F. Self-understanding and public perception

The Court sees itself as the guardian of the new constitutional order. In this regard, it is committed to preserving the rule of law, the separation of powers, as enshrined in the constitution, civil and human rights and democracy by a historical and functional interpretation of the constitution. In order to strengthen the rule of law and to consolidate democracy, the Court takes a broad view of its constitutional power of interpretation. This allows the Court to review the constitutionality of organic laws. This is usually beyond the control of constitutional courts in the francophone judicial area. Despite the strong position of the President in the semi-presidential system in Benin, the constitutional court is to be considered the most important instance to control the actions of all state organs. This can be proved by the prevention of constitutional reform intentions of the Parliament or the government, which, in the view of the Court, would jeopardize the basic consensus of the new democratic order. After all, the Court is active in ensuring that every time the functioning of the constitutional tasks of the state bodies encounters an obstacle the solution is found in a judicial response.

To protect human rights,<sup>95</sup> the Court made clear that it is the first and last judicial supervisory body, which is constitutionally empowered to make final binding decisions on human rights. The assumption of this supreme task can be understood by the fact that the political and civil rights had been systematically violated in the decades prior to the establishment of an independent constitutional court. In the interest of an effective protection of human rights, individual complaints are directly admissible before the constitutional court, which constitutes an exception compared with the rest of the francophone judicial area in Africa

The public opinion regards the court as a "patron"<sup>96</sup> of the democratic process and a guardian of human rights. Moreover, in the general opinion sees the court as an arbiter in political conflicts.<sup>97</sup>

Some academic authors even speak of the rampart of democracy in Benin. This undisputed recognition of the Court, not only in public opinion but also among state organs, mainly depends on the behavior of the judges whose behavior guarantees their personal integrity and the independence of the Court.<sup>98</sup> However, since the establishment of the new

94 See: *Conceptia L.D Ouinsou*, Les contrariétés de Décisions entre les Cours administratives, judiciaire et constitutionnelle: Cas du Bénin, présenté lors des Sixièmes Assises Statutaires de L'AOA-HJF Bamako 14 au 17 Juillet 2004, p. 6.

95 It should be noted that, besides the judicial review of laws, human rights complaints make up the majority of the Constitutional Court's rulings in Benin.

96 *Collofond*, note 29, p. 196.

97 *Stroh*, note 64, p. 6.

98 *Aivo*, note 11, p. 184.

members of the court in June 2018, the court announces a kind of reversal of certain decisions and principles of the court in its previous ruling.<sup>99</sup> One cannot exactly predict what will be the impacts of judicial controversy within the constitutional jurisprudence in the opinion in Benin for the future.

### **G. Final assessment**

Since the National Conference in February 1990, Benin developed from the bloody dictatorship of the past three decades to a model country for democracy and human rights in francophone Africa. This National Conference marked the beginning of a new democratic era. Main characteristics in the constitutional order of the "Renouveau démocratique" are primarily the codification of the rule of law and human rights principles in the constitution and the obligations towards all citizens resulting therefrom. The constitutional court contributes to the consolidation and to the full effect of democracy and the principles of the rule of law.

The core element of democracy is the change of power. In this context, the bold decisions of the constitutional court are to be welcomed so far. The five presidential elections since the beginning of the democratization process did not always run without tension, but, due to the electoral jurisdiction of the Court, bloodless changeovers of power were seized.

The Court progressively developed strategies of interpretation that led to the self-empowerment of the Court regarding sensitive issues such as the review of constitutionality of constitution-amending laws and the restriction of the legislative freedom of the National Assembly.

The Court found the right way to help clarifying the essential principles, like the "consensus national", of the sovereign National Conference of 28 February 1990.

Above all, the Court contributed to the strict obligation of all state authorities to only act upon a constitutional basis. The Court's jurisprudence on human rights clearly demonstrates the limitation and framing of governmental action in the new democratic order. Hardly anyone would deny that constitutional legislator of February 1990 was right to entrust the constitutional court with such strong powers. Yet the constitutional court is exposed to some criticism. The critics consider the self-empowerment of the Court regarding the review of constitution-amending laws as activism and disapprove the usurpation of the court. In Mai 2017 the court has recalled its position on the crucial question of presidential term limits, which has been enhanced to the category of eternity clause in the constitution. Despite all the criticism, the constitutional court of Benin is viewed as a model court in francophone African countries. Through the active role of the court the 28 years old constitution of Benin remains until now untouchable. Let us hope that the change of persons at the head of the court will not influence the jurisprudential patrimony registered in the court's assets.

99 DCC 18-126 of 21<sup>st</sup> 2018. In contrast with DCC n° 15-156 of 16<sup>th</sup> July 2015.