www.vrue.nomos.de

VRÜ | WCL

Verfassung und Recht in Übersee
World Comparative Law

Managing Editors
Fabia F. Carvalho
Philipp Dann
Michael Riegner

Editorial Board
Jürgen Bast
Brun-Otto Bryde
Aparna Chandra
Martha Gayoye
Anuscheh Farahat
Isabel Feichtner
James Fowkes
Michaela Hailbronner
Florian Hoffmann
Heinz Klug
Axel Tschentscher
Arun Thiruvengadam

3 2025
58. Jahrgang
Seite 261–475
ISSN 0506-7286

Nomos

Symposium: Towards an Endogenous African Constitutionalism and Legitimate Government: Rethinking the Foundations of Constitutional Law in Africa edited by Adem Abebe, Abdou Khadre Diop and Johannes Socher

Jorge Carlos Fonseca
Prefácio: Da Ilha ao Continente – Perspectivas para o Constitucionalismo Africano a partir de Cabo Verde, com base em uma Experiência Pessoal de Vida Política

Seema Shah I Alexander Hudson
An African Model of Democracy?

Paule Suzanne Ngo Nguimbous
Autochtonie et Démocratie, entre Tradition et Modernité

Aubran Donadoni Ntolo Nzéko
La Cour Africaine des Droits De L'homme et des Peuples: Une Solution aux Contestations des Élections en Afrique

Moustapha Ndiaye
La Constitutionnalisation de l'Ethnie dans les États d'Afrique Subsaharienne de Succession Coloniale Française

Satang Nabaneh
The Colonial Architecture of Exclusion

Jan Erk
Recognising and Empowering Homegrown Constitutionalism

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

VRÜ | WCL 3 2025
58. Jahrgang
Seite 261–475

Begründet von Prof. Dr. **Herbert Krüger** (†)

Managing Editors

Prof. Dr. **Fabia Fernandes Carvalho**, Fundação Getulio Vargas São Paulo, Prof. Dr. **Philipp Dann**, Humboldt-Universität zu Berlin, Prof. Dr. **Michael Riegner**, Universität Erfurt

Editorial Board

Prof. Dr. **Jürgen Bast**, Justus-Liebig-Universität Gießen, Prof. Dr. **Brun-Otto Bryde** (em.), Justus-Liebig-Universität Gießen, **Aparna Chandra,** National Law School of India University, **Martha Gayoye,** Keele University, Prof. Dr. **Anuscheh Farahat**, Friedrich-Alexander-Universität Erlangen-Nürnberg, Prof. Dr. **Isabel Feichtner**, Julius-Maximilians-Universität Würzburg, Prof. Dr. **James Fowkes**, Universität Münster, Prof. Dr. **Michaela Hailbronner**, Justus-Liebig-Universität Gießen, Prof. Dr. **Florian Hoffmann**, Pontifícia Universidade Católica do Rio de Janeiro, Prof. **Heinz Klug**, University of Wisconsin-Madison, Prof. Dr. **Axel Tschentscher**, Universität Bern, Prof. Dr. **Arun Thiruvengadam**, National Law School of India University

Beirat: Prof. Dr. **Rodolfo Arango**, Bogota, Prof. Dr. **Moritz Bälz**, Frankfurt, Prof. Dr. **Ece Göztepe**, Ankara, Prof. Dr. **Kittisak Prokati**, Bangkok/Fukuoka, Prof. Dr. **Atsushi Takada**, Osaka

Schriftleitung: Prof. Dr. Michael Riegner, Email: michael.riegner@uni-erfurt.de

Inhalt / Table of Contents

SYMPOSIUM

Adem Abebe, Abdou Khadre Diop, Johannes Socher
Towards an Endogenous African Constitutionalism and Legitimate Government: Rethinking the Foundations of Constitutional Law in Africa 263

Jorge Carlos Fonseca
Prefácio: Da Ilha ao Continente–Perspectivas para o Constitucionalismo Africano a partir de Cabo Verde, com base em uma Experiência Pessoal de Vida Política ... 270

Seema Shah, Alexander Hudson
An African Model of Democracy? Evidence from Treaties and Frameworks, Constitutional Preambles, and Public Opinion 279

Paule Suzanne Ngo Nguimbous
Autochtonie et Démocratie, entre Tradition et Modernité: Le Compromis Africain, l'Exemple du Cameroun 306

Aubran Donadoni Ntolo Nzéko
La Cour Africaine des Droits De L'homme et des Peuples: Une Solution aux Contestations des Élections en Afrique 328

Moustapha Ndiaye
La Constitutionnalisation de l'Ethnie dans les États d'Afrique Subsaharienne de Succession Coloniale Française 350

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Satang Nabaneh
The Colonial Architecture of Exclusion: The Personal Law Exemption and the Institutionalisation of Gender Subordination in West Africa and the Caribbean 369

Jan Erk
Recognising and Empowering Homegrown Constitutionalism: The Challenges and Opportunities Accompanying the Changing Global Order 390

ARTICLES / ABHANDLUNGEN

Giovanni Martins de Araújo Mascarenhas, João Paulo Lordelo, Geisa Cunha Franco, Jessica Lima Rocha, Sophia Fonsêca Morais
Reconciling Opposites: The Original Conflict on Mining, Indigenous Lands and Development 408

Tomasz Milej, Alvin Kubasu
East African Court of Justice and the Supreme Court of Kenya – A Case of Two Judicial Monologues 435

BOOK REVIEWS / BUCHBESPRECHUGEN

Simon Butt, Judicial Dysfunction in Indonesia *(Abdul Halim)* 465

Tom Daly and Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways *(Surbhi Karwa)* 470

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

SYMPOSIUM

Towards an Endogenous African Constitutionalism and Legitimate Government: Rethinking the Foundations of Constitutional Law in Africa

By *Adem Abebe*[*], *Abdou Khadre Diop*[**] and *Johannes Socher*[***]

African constitutionalism stands at a pivotal moment in its evolution.[1] After more than six decades of independence for most African states, it has become imperative to examine the nature, foundations, legitimacy, and institutional architecture of the constitutional systems governing the countries making up the continent. This symposium engages in this critical reflection and proposes to explore pathways toward a truly endogenous constitutionalism, rooted in Africa's socio-political, cultural, economic and historical realities.

The central question running through this symposium concerns constitutional authenticity: How can African states develop constitutional frameworks that reflect their own values, traditions, and aspirations while addressing contemporary challenges of democratic and effective governance? This inquiry is not merely academic. It touches the very core of political legitimacy and institutional stability across the continent.

The timing for this reflection is particularly opportune. The global order is undergoing profound transformations that offer African states new room and agency to rethink the underlying values and institutional underpinnings of their political systems, even as real risks remain that Africa's already muzzled voices in the international arena may fade

* Vice President (East Africa), African Network of Constitutional Lawyers; Senior Advisor, International IDEA; Extraordinary Lecturer, Centre for Human Rights, University of Pretoria, South Africa, Email: adem.abebe@gmail.com.

** Vice President (West Africa), African Network of Constitutional Lawyers, Associate Professor, Université Numerique Cheikh Hamidou Kane (Senegal), President Senegalese Association of Constitutional Law (ASDC), Email: abdoukhadre.diop@unchk.edu.sn.

*** Associate Membership Officer, African Network of Constitutional Lawyers; Fellow, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria; Academic Coordinator, Centre for Advanced Studies: Reflexive Globalisation and the Law, Faculty of Law, Humboldt University of Berlin, Germany, Email: johannes.socher@hu-berlin.de.

1 *Berihun Adugna Gebeye*, A Theory of African Constitutionalism, Oxford 2021, p. 35; *Charles Manga Fombad*, Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions, African and Asian Studies 13 (2014), p. 429; *Boubacar Ba*, L'évolution constitutionnelle des pays africains de succession française, Annales Africaines, Nouvelle Série 2 (2020), p. 27.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

further. Recurrent constitutional crises across the continent, coups d'état,[2] ethnic conflicts,[3] and a lack of trust in public institutions and frameworks, particularly in relation to multiparty democracy and elections,[4] also testify to the urgency of refounding the constitutional compact on more solid and legitimate bases. In many ways, emerging and converging global realities present a "jurisgenerative moment" to create new meaning, norms and institutional architecture that are both legitimate and effective and confidently owned by African societies.

This symposium brings together contributions that collectively offer a multidimensional perspective on the quest for an endogenous African constitutionalism. These contributions do not seek to offer simple solutions to the formidable constitutional, institutional governance challenges facing the countries on the continent. Instead, they urge decision makers, intellectuals and civil society at large to engage in deliberative processes, and continuously, to ensure that our fundamental institutional and normative foundations are the results of collective reflection rather than merely accidents of history and sticky colonial mimicking. To this extent, the contributions seek to advance debates around "de-colonialising" thinking, design and practice in the specific field of constitutional and democratic governance. They offer ideas that are not merely nostalgic, even apologetic, longing for some inexistent "utopian" pre-colonial African oasis of governance, nor an excuse to defensively dismiss ideas and structures originating from other parts of the world. Instead, the contributions endeavour to show that African countries can and must imagine constitutional systems based on collective and continuous deliberation.

The contributions emerged from the 2024 Biennial Congress of the African Network of Constitutional Lawyers (ANCL) held under the theme "Towards an Endogenous African Constitutionalism and Legitimate Government: Epistemological and Empirical Perspectives" in Dakar, in partnership with the Senegalese Association of Constitutional Law, the Cheikh Anta Diop University, and the Université numérique Cheikh Hamidou Kane. We are grateful for the trust and tremendous support of the International Institute for Democracy and Electoral Assistance, the National Democratic Institute, and the Senegal and Gambia office of the Konrad Adenauer Stiftung in organising this event, bringing together consti-

2 *Charles Manga Fombad*, Countering the Scourge of Unconstitutional Changes of Government in Africa, IACL-AIDC Blog, 16 June 2022, https://blog-iacl-aidc.org/transformations/2022/6/16/countering-the-scourge-of-unconstitutional-changes-of-government-in-africa (last accessed on 3 October 2025); *Oumarou Narey*, Les changements anticonstitutionnels de gouvernement mode ou contre mode?, IACL-AIDC Blog, 28 June 2022, https://blog-iacl-aidc.org/transformations/2022/6/28/les-changements-anticonstitutionnels-de-gouvernement-mode-ou-contre-mode- (last accessed on 3 October 2025).

3 See *Jeremie Gilbert*, Constitutionalism, Ethnicity and Minority Rights in Africa: A Legal Appraisal from the Great Lakes Region and the reply by *Kwasi Prempeh*, International Journal of Constitutional Law 11 (2013), p. 414.

4 *Charles Manga Fombad / Johannes Socher* (eds.), Constitutionalisation of Political Parties and the State of Democracy in Sub-Saharan Africa, Baden-Baden 2025.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

tutional experts from across the African continent and beyond.[5] We would also like to thank the managing editors of this journal for agreeing to publish selected proceedings of the Congress, and the various external reviewers for their diligent comments that helped improve the quality of the contributions. The authors deserve tremendous recognition for putting together contributions that we are certain will move the discourse forward. In addition to these contributions written in English and French, we are honoured that one of the keynote speakers at the Congress, former President of Cabo Verde Jorge Carlos Fonseca, has agreed to complement this symposium with inspiring reflections—written in Portuguese and translated to English—on constitutionalism, democracy and legitimate government in Africa, drawing on his personal experience as a political leader of the West African island country and his towering intellectual credentials.[6]

In his foreword "From the Island to the Mainland–Insights for African Constitutionalism from Cabo Verde from a Personal Experience of Political Life", Fonseca urges us to always consider the critical value of "a societal commitment to the values and principles that sustain the democratic order grounded in liberty". He draws on Cabo Verde's experience, and echoing Africa-wide aspirations, on the importance of a constitutional and institutional architecture that "promotes dialogue, the sharing of powers, and the pursuit of consensus", beyond brutally adversarial, winner-takes-all systems. The Constitution, he writes, is "an unfinished project, requiring constant deepening", and "democracy is not a point of arrival, but a permanent process of construction". In this, the African experience of making and unmaking constitutions may perhaps be seen as part of learning by trial and error in the journey towards genuine self-determination—one confident to draw on African history, experiences across and beyond the vast seas surrounding the continent, reason and continuous dialogue.[7] In the process, Fonseca urges us to navigate carefully the enduring "tensions between hope and disenchantment" in Africa, as countries "oscillated invariably between the enthusiasm of a 'renaissance' and the disillusionment of coups d'état, political and institutional instability, and the absence of progress in the well-being of populations under autocratic regimes." Fonseca concludes that "cultivating democracy in Africa means believing that societies of free women and men are the best guarantee of development, justice, and dignity for all". With this, he reminds us that there is no single route or institutional architecture to achieving these ideals. Our hope is that the contributions comprising this symposium will advance the discourse, design and practice as

5 The symposium editors would like to thank the ANCL and here in particular the following persons for convening the Congress: Elvis Fokala, Laura-Stella Enonchong, Yvonne Oyieke, Djaminatou Zombre, Papa Momar Diop, Al Hassane Boye Sakho, and Ghislain Pemba.

6 *Jorge Carlos Fonseca*, Prefácio: Da Ilha ao Continente–Perspectivas para o Constitucionalismo Africano a partir de Cabo Verde, com base em uma Experiência Pessoal de Vida Política, World Comparative Law 58 (2025), in this issue.

7 *Abdullahi Ahmed An-Na'im*, African Constitutionalism and the Role of Islam, Philadelphia 2006, Chapter 3.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Africa seeks to build a constitutional and democratic architecture capable of delivering a life of dignity and agile enough to adapt to the demands of a changing continent and world.

In the second contribution with the title "An African Model of Democracy? Evidence from Treaties and Frameworks, Constitutional Preambles, and Public Opinion", Seema Shah and Alexander Hudson observe that as postcolonial states push back against the hegemony of the liberal democratic model, possibly more than ever before, a vision of a reimagined African democracy is simultaneously emerging at different institutional levels, revealing an alternative "conceptualization of democracy that goes beyond the core tenets of the liberal model".[8] As Shah and Hudson show, this emerging vision is marked by participation, consensus and the importance of context-specific values, rules and modes of operation—ideals that Fonseca emphasized in his foreword. Consequently, the authors call for more scholarly attention to modes of political participation that go beyond elections to better understand the ways in which Africans are already practicing this alternative vision of democracy in their communities.

In the symposium's third contribution, "Autochtonie et Démocratie, entre Tradition et Modernité: Le Compromis Africain, l'Exemple du Cameroun", Paule Suzanne Ngo Nguimbous goes on to address the fundamental question of autochthony and its relationship to democracy.[9] Examining the African compromise between tradition and modernity, the author offers a nuanced reflection on the possibility of reconciling universal democratic values with African cultural and traditional specificities, thus moving beyond the sterile opposition between tradition and modernity, using Cameroon as an illustrative example.

The institutional dimension of African constitutionalism is explored in the next contribution by Aubran Donadoni Ntolo Nzéko, who analyses the potential role of the African Court on Human and Peoples' Rights in resolving electoral disputes ("La Cour Africaine des Droits De L'homme et des Peuples: Une Solution aux Contestations des Élections en Afrique").[10] Nzéko's contribution raises crucial questions about the articulation between regional and national jurisdictional mechanisms and about building a truly pan-African constitutional architecture.

Moustapha Ndiaye, in the symposium's fifth contribution "La Constitutionnalisation de l'Ethnie dans les États d'Afrique Subsaharienne de Succession Coloniale Française", examines the constitutionalisation of ethnicity in francophone African countries.[11] His study

8 *Seema Shah / Alexander Hudson,* An African Model of Democracy? Evidence from Treaties and Frameworks, Constitutional Preambles, and Public Opinion, World Comparative Law 58 (2025), in this issue.

9 *Paule Suzanne Ngo Nguimbous*, Autochtonie et Démocratie, entre Tradition et Modernité: Le Compromis Africain, l'Exemple du Cameroun, World Comparative Law 58 (2025), in this issue.

10 *Aubran Donadoni Ntolo Nzéko*, La Cour Africaine des Droits De L'homme et des Peuples: Une Solution aux Contestations des Élections en Afrique, World Comparative Law 58 (2025), in this issue.

11 *Moustapha Ndiaye*, La Constitutionnalisation de l'Ethnie dans les États d'Afrique Subsaharienne de Succession Coloniale Française, World Comparative Law 58 (2025), in this issue.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

highlights tensions between recognition of ethnic diversity and construction of national unity, thus questioning the modalities of integrating African sociological realities into formal constitutional frameworks.

Ndiaye's study is followed by Satang Nabaneh's "The Colonial Architecture of Exclusion: The Personal Law Exemption and the Institutionalization of Gender Subordination in West Africa and the Caribbean".[12] Nabaneh shows how colonial legacies continue to shape gender relations and legal frameworks in many anglophone African countries. Using the UN Women's database of constitutional provisions relating to women's human rights, she reveals a pattern for many anglophone African countries where provisions dating back to British colonial rule continue to be in place that exempt personal and customary laws from non-discriminatory protection.

Finally, Jan Erk concludes the symposium with some general reflections on the prospects for African constitutionalism amid a changing global world.[13] Drawing extensively on his own scholarship on decentralisation, federalism and constitutional identity and history in Africa, Erk argues that the present changing world order offers an opportunity for recognising and empowering homegrown traditions of constitutionalism in Africa. Following an examination of the potential impact the changing world order will bring to constitutional development in Africa, Erk looks at the fate of different homegrown systems of traditional law and governance. Against this background, he identifies five distinct categories of challenges and opportunities to recognising and empowering homegrown constitutionalism.

Several cross-cutting themes emerge from these contributions and deserve emphasis. First, the question of legitimacy runs across the symposium. It is not sufficient for a constitution (or amendments to it) to be formally adopted according to required formal procedures; it must be perceived as legitimate by the populations it seeks to serve, and such legitimacy is often linked to the extent to which the document is seen as reflecting "broad consensus" among the key stakeholders.[14] This legitimacy presupposes popular appropriation and adequacy between constitutional norms and societal values.

Second, diversity appears as an essential characteristic that African constitutions must recognise and manage. Whether ethnic, cultural, linguistic, or religious diversity, constitutional frameworks must find mechanisms to transform this plurality into richness rather than a source of conflict.

12 *Satang Nabaneh*, The Colonial Architecture of Exclusion: The Personal Law Exemption and the Institutionalization of Gender Subordination in West Africa and the Caribbean, World Comparative Law 58 (2025), in this issue.

13 *Jan Erk,* Recognising and Empowering Homegrown Constitutionalism: The Challenges and Opportunities Accompanying the Changing Global Order, World Comparative Law 58 (2025), in this issue.

14 *Adem Kassie Abebe*, The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding, Asian Journal of Comparative Law 19 (2024), p. 473.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Third, the question of the relationship between the global and the local arises acutely. An endogenous constitutionalism does not mean isolationism or rejection of all external influence. Rather, it involves developing a capacity for selection, adaptation, and creative hybridization, allowing the integration of external contributions into an authentically African synthesis.

Fourth, the articulation between tradition and modernity emerges as a permanent challenge. African societies are dynamic and constantly evolving. An endogenous African constitutionalism must therefore be capable of integrating traditional heritages while enabling innovation and adaptation to contemporary realities. Of course, this is not a call for a nostalgic return to an idealized past, nor is it a rejection of the achievements of universal constitutional thought. Rather, it is an ambitious project to construct a constitutional order that is both faithful to African realities and open to the world, rooted in traditions while resolutely oriented toward the future.

The contributions presented in this symposium were developed and discussed during the ANCL Congress against the background that the idea of the modern state, as well as its constitutive elements—territorial boundaries, people, and even the ideas of sovereignty and government—were either imposed (through the Berlin Conference of 1884-1885),[15] or largely based on inherited constitutional ideas and institutional frameworks of governance developed in other parts of the world. In particular, the first independence constitutions and the post-1990 constitutional framework were largely designed at a time of ascendancy of the idea of liberal democracy, founded on the principles of limited government, political pluralism, rights, and separation of powers. The record of the largely liberal framework remains mixed, reflecting both the challenges of the foundational structure and the lack of political will to practice and live up to enshrined constitutional ideas.

Within this broad liberal framework, there have been experiments to adapt ideas, as well as to pursue innovative values and ways of designing constitutional and democratic governance. The contributions in this Symposium demonstrate this vitality of African constitutional reflection and the richness of ongoing experiences across the continent. They show that another constitutionalism is possible, one that places African peoples at the centre, recognises their historical agency, and gives them the means to define their own political destiny. It is in this spirit that we present this symposium to the readers of this journal. We hope that it will contribute to nourishing the debate on the future of constitutionalism in Africa and inspire new research and practices capable of strengthening the legitimacy and effectiveness of African constitutional systems. The path toward a truly endogenous African constitutionalism is long and fraught with obstacles, but it is necessary. The scholarship represented here sketches some of its contours and illuminates its stakes.

15 *Berihun Adugna Gebeye*, Global Constitutionalism and Cultural Diversity: The Emergence of Jurisgenerative Constitutionalism in Africa, Global Constitutionalism 10 (2021), p. 44.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

It is up to intellectuals, practitioners, and citizens from and concerned for the African continent to continue this essential work of constitutional refoundation.

© Adem Abebe, Abdou Khadre Diop, Johannes Socher

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Prefácio: Da Ilha ao Continente–Perspectivas para o Constitucionalismo Africano a partir de Cabo Verde, com base em uma Experiência Pessoal de Vida Política

By *Jorge Carlos Fonseca*[*]

A experiência da construção democrática em África, particularmente em Cabo Verde, oferece pistas valiosas para a compreensão do constitucionalismo contemporâneo e dos desafios da consolidação das instituições em sociedades marcadas por transições políticas, memórias de lutas de libertação e persistentes desigualdades sociais. Este artigo procura sistematizar reflexões em torno da cultura constitucional, da função do Presidente da República no sistema semipresidencialista cabo-verdiano, do papel da sociedade civil, bem como das tensões entre populismo e democracia, enquadrando tais questões num horizonte mais vasto que abrange o continente africano.

A reflexão parte de uma experiência pessoal de vida política. A militância começou na juventude, ainda em contexto clandestino, no seio do movimento de libertação nacional, no final dos anos sessenta. Mais tarde, o exercício da diplomacia e, subsequentemente, a dissidência do regime autocrático de partido único, em finais dos anos setenta, e a luta pela democratização do país, abriram caminho para a candidatura presidencial independente e a subsequente eleição, em dois mandatos sucessivos, de 2011 a 2021. Impedido constitucionalmente de se recandidatar para um terceiro mandato consecutivo, este percurso ilustra, desde logo, a importância da Constituição como limite do poder e como garante da alternância democrática.

Dessa vivência nasceu também, mais recentemente, a *Iniciativa Liberdade e Democracia–Jorge Carlos Fonseca*(ILD), um projecto destinado a promover a cultura da liberdade e da democracia, vale dizer, da cidadania, igualmente difundindo e materializando a ideia de que não existe democracia fora da Constituição, muito menos contra ela. É na Constituição que se encontra o fundamento da organização do poder, a protecção dos direitos e a garantia das liberdades. Defender o constitucionalismo significa, assim, cultivar uma verdadeira "vontade de Constituição", um compromisso da sociedade com os valores e princípios que sustentam a ordem democrática, fundada nas liberdades.

Cabo Verde foi, neste processo, um laboratório privilegiado. A Constituição deixou de ser apenas um texto jurídico abstracto, distante da vida quotidiana das pessoas, para se tornar numa referência efectiva na construção da cidadania. A promoção contínua da Constituição que pude levar a cabo, durante dez anos de exercício da função presidencial,

* Former President of the Republic of Cabo Verde (2011–2021); former Professor of Criminal Law and Criminal Procedure in Portugal, Macau, and Cabo Verde; founder and patron of the JCF – Freedom and Democracy Initiative; speaker; gardener of freedom and pilgrim of democracy; poet and writer.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

que incluiu a sua disseminação, através de edições distribuídas em escolas, universidades e municípios, ajudou a potenciar uma apropriação social crescente. Gradualmente, assistiu-se ao aumento da invocação da Constituição em petições de advogados, na fundamentação das decisões judiciais, em reivindicações sindicais, em manifestações de estudantes, jornalistas, policiais, guardas prisionais, defensores da regionalização e cidadãos em geral. Inclusivamente por parte de segmentos sociais mais distanciados do ideário e dos valores democráticos. A cultura constitucional foi-se enraizando, silenciosa mas firmemente.

A repetida, crescente e generalizada "invocação" da Constituição em Cabo Verde que se verifica nos tempos últimos, particularmente, na última década, não significando, em todo o rigor e em toda a dimensão, que a "sociedade constitucional", além de pretender viver sob a égide dos valores e comandos constitucionais, acredita numa sua função ou papel que não se acantona na ideia de que a normatividade da Lei Fundamental está de todo assegurada para além dela, isto é, entregue a instâncias outras como os órgãos do poder político, o Tribunal Constitucional ou o poder judicial, terá, no entanto, de se traduzir em algo mais. De se aproximar de uma meta outra.

No fundo, era a este desiderato de "vigilância" ou de "defesa" da Constituição que, por outros instrumentos linguísticos, me referi, em múltiplas ocasiões, como objectivo de uma sempre acrescida cultura constituição, e, de certa forma, "vontade de Constituição".

A experiência do Presidente da República, no contexto cabo-verdiano, ajuda a compreender a singularidade do sistema de governo. Cabo Verde adota um modelo semipresidencialista «fraco» (há quem fale em «parlamentarismo mitigado»), no qual o Presidente não detém poderes de governação, mas exerce funções moderadoras: é árbitro do sistema político, garante do regular funcionamento das instituições democráticas e guardião da Constituição. Essa configuração institucional promove o diálogo, a partilha de poderes e a procura de consensos. Poderia ousar dizer que se trata, falando concretamente da experiência cabo-verdiana, de um sistema de governo que favorece uma cultura de democracia. Não se trata de um mero detalhe organizativo: é precisamente esse equilíbrio que tem contribuído, de forma relevante, para evitar crises políticas graves e assegurado estabilidade ao país. Aliás, creio ser também esse um factor, entre outros, que favorece(favoreceu) a atitude de empenho do Presidente da República em defender e promover a Constituição e a cultura constitucional.

A Constituição de 1992 constituiu uma ruptura material com a anterior, forjada no período do partido único. Se, até então, a legitimidade advinha da história revolucionária do movimento de libertação nacional, a nova Lei Fundamental instituiu um Estado de Direito democrático, fundado na soberania popular, nos direitos fundamentais e na limitação dos poderes. Ela, em rigor, inaugurou o constitucionalismo em Cabo Verde (a Constituição como fundamento e limite do poder do Estado e do seu exercício, base de um «estado constitucional»). Tudo num processo que, tendo passado por uma reforma constitucional em 1990, culmina com a aprovação da Constituição de 1992, a materialização, em nosso entender, da transição democrática em Cabo Verde.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Foi, nas palavras de Luigi Ferrajoli, uma "segunda revolução" que transformou a relação entre política e direito: a política deixou de ser omnipotente e passou a estar subordinada ao direito.

O equilíbrio entre órgãos de soberania—Presidente, Assembleia Nacional e Governo—foi concebido para evitar qualquer macrocefalia de poder. O Presidente da República, embora eleito por sufrágio universal, não pode demitir livremente o Governo; depende sempre da manifestação parlamentar, seja pela rejeição de moções de confiança ou pela aprovação de moções de censura. Essa limitação reforça a centralidade da Assembleia Nacional e preserva a lógica da responsabilidade política do Executivo perante o Parlamento. O poder presidencial manifesta-se, sobretudo, como poder moderador e de influenciação e não como poder de imposição.

Neste quadro, o Tribunal Constitucional, criado na revisão de 1999 mas instalado apenas em 2015, assume importância decisiva. A jurisdição constitucional garante que a Constituição não seja apenas letra morta, mas um verdadeiro instrumento de limitação e controlo do poder. A sua actuação tem vindo a consolidar a confiança no sistema democrático cabo-verdiano e a já mencionada cultura constitucional e «vontade de Constituição», apesar das resistências iniciais à sua criação.

A Constituição, contudo, não é apenas um catálogo de direitos e instituições. É também um projecto inacabado, que exige permanente aprofundamento. Se o Estado de Direito se radica na dignidade da pessoa humana, então a democracia deve traduzir-se não só em direitos civis e políticos, mas também em direitos económicos, sociais e culturais. A luta contra a pobreza, o desemprego e as desigualdades regionais constitui parte integrante da realização constitucional. É neste ponto que se revelam os grandes desafios contemporâneos: aperfeiçoar o sistema eleitoral para preservar a confiança na representação política, reforçar a independência judicial, consolidar a liberdade de imprensa e dinamizar uma sociedade civil crítica e interventiva.

Um dos maiores riscos à democracia pluralista é o populismo, inimigo declarado do constitucionalismo democrático. O populismo tende a reduzir os parlamentos à sua expressão mínima, a fragilizar o poder judicial e a corroer os mecanismos de mediação institucional. Sob a bandeira da luta contra a corrupção - que constitui, é certo, um fenómeno portador de um elevado potencial de danosidade social, se não for contido a níveis aceitáveis, podendo contribuir para minar as instituições e o próprio estado de direito-, pode justificar autocracias, centralizar o poder e enfraquecer progressivamente as liberdades. A história recente, em várias geografias, mostra como o populismo se transforma em alimento de regimes autoritários e ditatoriais. A resposta a este desafio não pode ser simplista: exige sofisticação política, educação permanente para a liberdade e democracia e perseverança na defesa dos valores constitucionais. Neste contexto, poder-se-ia dizer que a impaciência, a ignorância e a preguiça constituem adversários da democracia.

Em África, as tensões entre esperança e desencanto são particularmente visíveis. O continente tem oscilado invariavelmente entre o entusiasmo de uma "renaissance" e as desilusões de golpes de Estado, instabilidade política e institucional, ausência de progressoe

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

de bem-estar das populações, sob regimes autocráticos. Embora seja inegável que a herança do colonialismo e da escravatura marcou profundamente o atraso estrutural, persiste o risco de se cair numa desculpabilização reiterada, atribuindo aos "outros" responsabilidades que também são internas. Necessidade há de profundas mudanças, num processo que possa arrostar as resistências ditadas por fundos complexos, nomeadamente por parte de certas elites africanas. Como assinala Claude Ake, a democratização não pode ser feita por terceiros; deve ser construída pelos próprios africanos.

A Agenda 2063 da União Africana aponta para o desenvolvimento económico e social, mas sem estabilidade política, sem instituições credíveis e sem limites constitucionais claros, esse progresso dificilmente se concretizará. O ciclo de golpes militares, conflitos étnicos, radicalismo religioso e regimes de poder pessoal continua a comprometer o futuro. O combate à corrupção, a criação de lideranças fortes e credíveis com legitimação democrática e o fortalecimento das sociedades civis são imperativos incontornáveis.

A democracia africana não deve ser entendida apenas como uma técnica de governo, mas como uma cultura política. Exige paciência, persistência e a capacidade de conciliar (numa espécie de «concordância prática» modernidade e tradição, autonomia e interdependência, desenvolvimento económico e justiça social, liberdade e as tentações de seu condicionamento, o político e o cultural, a aritmética das tecnocracias e as exigências de salvação colectiva e da solidariedade social, o realismo e os preconceitos, as representações colectivas e, mesmo, os aparelhos da *simbologia identitária* muito arreigados, políticos, históricos, sociais. Trata-se de um processo inacabado, feito de avanços e recuos, mas que só será viável se abandonar posições extremas e mimetismos acríticos. Cada sociedade africana terá o seu próprio caminho democrático, desde que enraizado na participação cidadã e no respeito pelos direitos fundamentais.

Neste percurso, a sociedade civil tem desempenhado um papel central. Estudantes, jornalistas, advogados, professores, movimentos sociais e organizações de defesa dos direitos humanos foram, em muitas ocasiões, motores das mudanças políticas e da resistência às tentações autoritárias. São estes actores que asseguram que a democracia não se limite às instituições, mas seja vivida como prática social quotidiana.

A principal e mais perigosa ilusão a desmistificar é a de que a paz e a segurança, também o desenvolvimento, em África podem ser obtido através de regimes autoritários. A história demonstrou repetidamente que as autocracias não garantem estabilidade duradoura, mas apenas adiam conflitos, aprofundam desigualdades e perpetuam ciclos de violência. A verdadeira estabilidade nasce de sociedades livres, pluralistas e com instituições sólidas.

O percurso cabo-verdiano, com todas as suas limitações, mostra que a democracia é possível em África. A consolidação de uma cultura constitucional, a limitação de poderes, o respeito pela alternância política e o fortalecimento de instituições independentes constituem conquistas silenciosas, mas profundas. O desafio está em não as dar por garantidas, em resistir às tentações fáceis do populismo e em investir continuamente na educação para a cidadania.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Quando, há duas décadas e meia, dizíamos termos a convicção de que, para que a prática do poder político seja cada vez mais conforme com os ditames, os valores e os princípios acolhidos na nossa Constituição material, para que eles sejam efectivamente traduzidos na vivência colectiva dos cabo-verdianos, mister se torna que condições sejam criadas para a interiorização e generalização daqueles valores e princípios, de forma a que defensores da Constituição sejam não apenas os tribunais, não apenas os órgãos constitucionais, mas todos os cidadãos com "vontade de constituição".

Ao cabo e ao resto, a sociedade, os cidadãos devem constituir-se no mais forte e derradeiro baluarte da Constituição (e da democracia, pode dizer-se), pois na falta dele há sempre o risco – como assinalou Pedro Cruz Villalón, socorrendo-se de aforismo atribuído a Heráclito ("O povo deve defender as suas leis como defende os seus muros")—de um dia acordarmos com a surpresa de que os muros caíram. "Sin saber".

A democracia não é um ponto de chegada, mas um processo permanente de construção. Como lembrava Onésimo Silveira, a democratização dos países africanos tem que ser analisada como instrumento de modernização, e não como opção política, e que esta modernização "… tem que ser enquadrada no processo mais amplo de integração social, que é um quadro social nacional, em que as lealdades étnicas e tribais cedem lugar a uma lealdade institucional, regulada por leis ordinárias e consagrada… nos textos constitucionais".

É um caminho exigente, por vezes moroso, mas insubstituível. No fundo, cultivar a democracia em África significa acreditar que sociedades de mulheres e homens livres são a melhor garantia de desenvolvimento, justiça e dignidade para todos.

Foreword: From the Island to the Mainland – Insights for African Constitutionalism from Cabo Verde from a Personal Experience of Political Life

This contribution seeks to systematize reflections on constitutional culture, on the role of the President of the Republic of Cabo Verde's semi-presidential system, on the role of civil society, as well as on the tensions between populism and democracy, framing such issues within a broader horizon that encompasses the African continent.

These reflections originate from a personal experience of political life. My political militancy began in youth, still in a clandestine context, within the national liberation movement in the late 1960s. Later, my work in diplomacy and, subsequently, my dissent from the one-party autocratic regime in the late 1970s, followed by the struggle for the country's democratization, paved the way for my independent presidential candidacy and the subsequent election to two consecutive mandates, from 2011 to 2021. Constitutionally barred from my seeking a third consecutive mandate, this trajectory illustrates, from the outset, the importance of the Constitution as both a limit on power and a guarantor of democratic alternation.

From this experience was also born, more recently, the *Freedom and Democracy Initiative–Jorge Carlos Fonseca* (ILD), a project aimed at promoting a culture of freedom

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and democracy, that is, of citizenship, simultaneously disseminating and materializing the notion that there is no democracy outside the Constitution, and still less against it. It is within the Constitution that one finds the foundation of the organization of power, the protection of rights, and the guarantee of liberties. To defend constitutionalism thus means cultivating a true "will of Constitution"—a societal commitment to the values and principles that sustain the democratic order grounded in liberty.

Cabo Verde, in this process, became a privileged laboratory. The Constitution ceased to be merely an abstract legal text, distant from the daily lives of the people, and became an effective reference in the construction of citizenship. The continuous promotion of the Constitution that I was able to carry out during ten years of presidential office—which included its dissemination through editions distributed to schools, universities, and municipalities—contributed significantly to fostering a growing social appropriation of it. Gradually, one witnessed an increased invocation of the Constitution in lawyers' petitions, in the reasoning of judicial decisions, in trade union demands, in demonstrations by students, journalists, police officers, prison guards, advocates of regionalization, and citizens at large—even by social groups more distanced from democratic ideals and values. Constitutional culture thus became gradually embedded, silently yet firmly.

The repeated, growing, and widespread invocation of the Constitution in Cabo Verde in recent times, particularly over the last decade, does not, in all rigor and dimension, mean that the "constitutional society", beyond seeking to live under the aegis of constitutional values and commands, believes in a function or role that is not confined to the idea that the normativity of this fundamental law is entirely safeguarded by other bodies, such as the political authorities, the Constitutional Court, or the judiciary. It must, however, translate into something further — moving closer to another objective. In the end, it is this desideratum of "vigilance" or "defense" of the Constitution that, through other linguistic formulations, I have referred to on multiple occasions as the objective of an ever-expanding constitutional culture and, in a certain sense, a "will of Constitution."

The Cabo Verdean experience with the role of the President within the country's constitutional system helps to illustrate its singularity. Cabo Verde adopts a "weak" semi-presidential model (some even refer to it as a "mitigated parliamentarism"), in which the President does not hold governing powers but rather exercises moderating functions: he is the arbiter of the political system, the guarantor of the regular functioning of democratic institutions, and the guardian of the Constitution. This institutional configuration promotes dialogue, power-sharing, and the pursuit of consensus. One could venture to say that, speaking concretely of the Cabo Verdean experience, it is a system of government that favors a culture of democracy. This is not a mere organizational detail: It is precisely this balance that has significantly contributed to the avoidance of severe political crises and to the preservation of national stability. Indeed, I also believe that this has been one of the factors, among others, that has fostered the President of the Republic's steadfast commitment to defending and promoting the Constitution and constitutional culture.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The 1992 Constitution represented a material rupture from the text previously in place, forged during the one-party period. Until then, legitimacy had stemmed from the revolutionary history of the national liberation movement; the new constitution, however, established a democratic rule of law, grounded in popular sovereignty, fundamental rights, and the limitation of powers. It, in effect, inaugurated constitutionalism in Cabo Verde—the Constitution as both the foundation and the limit of state power and its exercise, the basis of a true "constitutional state." Initiated in 1990, this constitutional reform process culminated in the 1992 Constitution, which, in our understanding, embodies the democratic transition in Cabo Verde. It was, in the words of Luigi Ferrajoli, a "second revolution" that transformed the relationship between politics and law: politics ceased to be omnipotent and became subordinated to law.

The balance between the President, the National Assembly, and the Government was designed to prevent any top-heaviness of power. The President of the Republic, though elected by universal suffrage, cannot freely dismiss the Government; he always depends on parliamentary expression, whether through the rejection of motions of confidence or the approval of motions of censure. This limitation reinforces the centrality of the National Assembly and preserves the logic of the Government's political accountability before Parliament. Presidential power thus manifests itself primarily as a moderating and influencing authority, rather than as an imposing power.

Within this framework, the Constitutional Court—created by constitutional amendments adopted in 1999 but operationalized only in 2015—assumes decisive importance. Constitutional jurisdiction ensures that the Constitution is not merely a dead letter but a genuine instrument of limitation and control of power. Its activity has gradually consolidated trust in the Cabo Verdean democratic system and in the aforementioned constitutional culture and "will of Constitution," despite initial resistance to its creation.

The Constitution, however, is not merely a catalogue of rights and institutions. It is also an unfinished project, requiring constant deepening. If the rule of law is rooted in the dignity of the human person, then democracy must be expressed not only through civil and political rights but also through economic, social, and cultural rights. The struggle against poverty, unemployment, and regional inequalities constitutes an integral part of constitutional realization. It is at this juncture that contemporary challenges reveal themselves: improving the electoral system to preserve trust in political representation, reinforcing judicial independence, consolidating freedom of the press, and invigorating a critical and engaged civil society.

One of the greatest risks to pluralist democracy is populism, a declared enemy of democratic constitutionalism. Populism tends to reduce parliaments to their minimal expression, to weaken the judiciary, and to corrode institutional mediation mechanisms. Under the banner of fighting corruption—which is indeed a phenomenon with a high potential for social harm if not contained to acceptable levels, as it may undermine institutions and the very rule of law—populism can be used to justify autocracies, centralize power, and progressively weaken liberties. Recent history, across various geographies, demonstrates how

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

populism often becomes the seedbed of authoritarian and dictatorial regimes. The response to this challenge cannot be simplistic: it requires political sophistication, permanent education for freedom and democracy, and perseverance in the defense of constitutional values. In this context, one might say that impatience, ignorance, and indolence are themselves adversaries of democracy.

In Africa, the tensions between hope and disenchantment are particularly visible. The continent has oscillated invariably between the enthusiasm of a "renaissance" and the disillusionment of coups d'état, political and institutional instability, and the absence of progress in the well-being of populations under autocratic regimes.

Although it is undeniable that the legacy of colonialism and slavery profoundly marked structural underdevelopment, the persistent risk remains of falling into a repeated exculpation, attributing to "others" responsibilities that are also internal. There is a pressing need for profound change through a process capable of confronting entrenched resistance, notably from certain African elites. As Claude Ake pointed out, democratization cannot be achieved by third parties; it must be built by Africans themselves.

The African Union's Agenda 2063 points toward economic and social development, but without political stability, credible institutions, and clear constitutional limits, such progress will hardly be realized. The cycle of military coups, ethnic conflicts, religious radicalism, and regimes of personal power continues to compromise the future. Combating corruption, fostering strong and credible leadership with democratic legitimacy, and strengthening civil societies are imperatives that cannot be evaded.

African democracy should not be understood merely as a technique of government, but rather as a political culture. It requires patience, persistence, and the capacity to reconcile—in a kind of "practical concordance"—modernity and tradition, autonomy and interdependence, economic development and social justice, freedom and the temptations to condition it, the political and the cultural, the arithmetic of technocracies and the demands of collective salvation and social solidarity, realism and prejudice, collective representations, and even the entrenched apparatuses of identity symbolism—political, historical, and social. It is an unfinished process, one made of advances and setbacks, but which will only be viable if it abandons extreme positions and uncritical mimicry. Each African society must trace its own democratic path, provided it is rooted in citizen participation and respect for fundamental rights.

On this path, civil society has played a central role. Students, journalists, lawyers, teachers, social movements, and human rights organizations have, on many occasions, been the driving force behind political change and resistance to authoritarian temptations. These actors ensure that democracy is not limited to institutions but is lived as a daily social practice.

The main and most dangerous illusion to be dispelled is that peace, security, and even development in Africa can be achieved through authoritarian regimes. History has repeatedly demonstrated that autocracies do not guarantee lasting stability; rather, they

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

merely postpone conflicts, deepen inequalities, and perpetuate cycles of violence. True stability arises from free, pluralist societies with strong institutions.

The Cabo Verdean trajectory, with all its limitations, shows that democracy is possible in Africa. The consolidation of a constitutional culture, the limitation of powers, respect for political alternation, and the strengthening of independent institutions are silent yet profound achievements. The challenge lies in not taking them for granted, in resisting the easy temptations of populism, and in continuously investing in civic education.

When, a quarter of a century ago, we affirmed our conviction that, in order for the exercise of political power to increasingly conform with the dictates, values, and principles enshrined in our material Constitution—so that they might be effectively translated into the collective experience of Cape Verdeans—it was necessary to create conditions for the internalization and generalization of those values and principles, such that the defenders of the Constitution would not only be the courts or constitutional bodies, but all citizens with a "will of Constitution."

Ultimately, society—the citizens—must constitute itself as the strongest and ultimate bulwark of the Constitution (and of democracy, it might be said). For in its absence, there is always the risk, as Pedro Cruz Villalón warned, drawing upon an aphorism attributed to Heraclitus ("The people must defend their laws as they defend their walls"), that one day we might awake to the surprise that the walls have fallen: "sin saber."

Democracy is not a point of arrival but a permanent process of construction. As *Onésimo Silveira* reminded us, the democratization of African countries must be analyzed as an instrument of modernization rather than as a mere political option, and this modernization "must be framed within the broader process of social integration, which is a national social framework, wherein ethnic and tribal loyalties give way to an institutional loyalty, regulated by ordinary laws and enshrined ... in constitutional texts." It is a demanding path, at times slow, but irreplaceable. Ultimately, cultivating democracy in Africa means believing that societies of free women and men are the best guarantee of development, justice, and dignity for all.

© Jorge Carlos Fonseca

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

An African Model of Democracy? Evidence from Treaties and Frameworks, Constitutional Preambles, and Public Opinion

By *Seema Shah*[*] and *Alexander Hudson*[**]

Abstract: Possibly more so than ever before, postcolonial states in Africa are pushing back against the hegemony of the liberal democratic model. Such arguments have explained how liberal democracy does not centre socioeconomic rights and group rights enough or in ways that align with many African communities' priorities. Others have faulted weak institutions, adopted wholesale from colonial rulers who designed them for purposes of extraction and exclusion. Some experts have explained that the antagonistic nature of electoral politics conflicts with many African societies' values for consensus, while others argue that communal identities and slow development stand in the way of democratic growth. At the same time, an emergent vision of African democracy is recognizable in at least three institutional levels: regional frameworks (and judicial interpretations of them), the preambles of national constitutions, and popular values (as evidenced in survey data). Examination of these standards, laws and opinions reveals a conceptualization of democracy that goes beyond the core tenets of the liberal model in important ways. Weak implementation notwithstanding, these instruments and popular views provide the broad strokes of a vision of post-liberal democracy in the African context. Analysis of these documents and public opinion data reveals that while there is a great deal of inter-national variation, there are several consistent values across the continent. This continental vision strongly features the values of participation, consensus and the importance of context-specific values, rules and modes of operation. This analysis reveals that African institutions and legal texts already support forms of democracy that go beyond elections and may even transcend national boundaries. A turn to research on the ways in which institutions considered core to liberal democracy may need to be redesigned to reflect local priorities more accurately could be a fruitful next step.

Keywords: Africa; Democracy; Values

***

* Head, Democracy Assessment, International IDEA, Stockholm, Sweden. Email: s.shah@idea.int.

** Senior Adviser, Democracy Assessment, International IDEA, Stockholm, Sweden. Email: a.hudson@idea.int.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

A. Introduction

Over the years, scholars have argued that the liberal model of democracy that is dominant in "the West" does not resonate in many African contexts. That model blends representative government with liberal principles of individual rights; the latter is meant to protect the former. Liberal democracy is often characterized by the supremacy of elections (and a focus on competition therein), the separation of powers and certain civil and political rights (the freedoms of expression, association and assembly and the press are the most common).[1]

The arguments against its universal relevance, especially from the perspective of many African contexts, have been founded on several theories. These include problems associated with post-colonial states' preservation of non-democratic, colonial-era political institutions that have the appearance of liberal democracy but do not truly represent the people,[2] the liberal preoccupation with civil and political rights that contrasts with the value that non-western countries place on economic, social and cultural rights,[3] the dissonance between western prioritization of individual rights and traditional African prioritization of group rights,[4] the disconnect between certain African communities' preference for consensus and the often hostile environment that marks electoral competitions,[5] and low levels of development, widespread poverty and relative economic weakness that impede the effectiveness of some liberal political processes.[6] Some scholars have argued that Africans are not "ready" for (liberal) democracy, because the post-colonial era had been primarily marked by repression and intolerance,[7] or because loyalty to localized ethnic groups trumps a sense of broader, unified nationhood.[8]

These arguments have gained new traction in the contemporary era, especially as non-democratic leaders in large and increasingly powerful states (such as India and South Africa) have rejected criticisms of the ways in which they have weakened their own

1 *Marc Plattner*, From Liberalism to Liberal Democracy, Journal of Democracy 10 (1999), pp. 121-134.

2 *Carol Lancaster*, Democracy in Africa, Foreign Policy 85 (1991-1992), pp. 148-165.

3 *Claude Ake*, The Unique Case of African Democracy, International Affairs 69 (1993), pp. 239-244; *Makau Mutua*, Savages, Victims and Saviors: The Metaphor of Human Rights, Harvard International Law Journal 42 (2001), pp. 201-245; *Thomas Koelble* / *Edward Lipuma*, Democratizing Democracy: A Postcolonial Critique of Conventional Approaches to the 'Measurement of Democracy, Democratization 15 (2008), pp. 1-28.

4 *Claude Ake*, The Unique Case of African Democracy, International Affairs 69 (1993), p. 239-244; *Josiah A.M. Cobbah*, African Values and the Human Rights Debate: An African Perspective, Human Rights Quarterly 9 (1987), pp. 309-331.

5 *Kwasi Wiredu*, Democracy by Consensus: Some Conceptual Considerations, Philosophical Papers 30 (2001), pp. 227–244.

6 *Richard G. Niemi* / *Joel Barkan*, Age and Turnout in New Electorates and Peasant Societies, American Political Science Review 81 (1987), pp. 583-588.

7 *Carol Lancaster*, Democracy in Africa, Foreign Policy 85 (1991-1992), p. 157.

8 *Donald Horowitz*, Ethnic Groups in Conflict, Berkeley 1985.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

political institutions[9] and used the opportunity to argue that liberal democracy has not delivered in ways that people consider important.[10] As these regimes' power grows, often buoyed by strong domestic support, doubts about liberal democracy's global legitimacy raise important questions for a range of stakeholders, including scholars, policymakers and donors. What does an alternative to liberal democracy look like, and what are the markers of such a model? What are the implications of regionally specific models of democracy, both for policy development and democracy assistance, as well as for scholarly conceptions and theories of democracy and democratization? Who decides (and how do they decide) what kind of democracy makes the most sense in a particular context?

Despite the criticisms of liberal democracy, certain aspects of it are thriving in some African countries. The African regional average for measures of civic engagement (reflecting the extent to which people engage in political and non-political associations and trade unions as well as civil society traditions) surpasses, if only slightly, the global average.[11] Several African countries—such as (but not limited to) Cabo Verde, Ghana, Senegal, Kenya, South Africa, Botswana and Namibia—also perform above the global average with regard to multiple factors of the quality of democracy. Importantly, several countries also exhibit especially strong performance in metrics of participation (which reflect voter turnout, the space for civil society to operate and public engagement in associations and trade unions, the latter noted above).[12]

In this article, we examine the emerging shape of a model for African democracy. Specifically, we argue that three distinct levels of inputs, including from citizens (via survey data), national elites (via the preambles of constitutions) and regional elites (via normative frameworks) suggest that African ideals of democratic governance focus primarily on popular participation, prioritize consensus and unity and value the ways in which unique sociopolitical contexts give rise to varying democratic priorities.

B. The Normative Framework

I. The Infrastructure of Democracy in African Normative Frameworks

Though scholars and policymakers have offered and debated multiple definitions of democracy, recent mainstream English-language discussions have shifted from what constitutes the "core" of democracy to an exploration of models that might exist outside of liberal

9 See *Mustafa Kutlay* / *Ziya Onis*, Liberal Democracy on the Edge? Anxieties in a Shifting Global (dis)order, Alternatives 48 (2022), pp. 20-37; Sansad TV, EAM: Don't preach us on democracy, 15 March 2021, https://www.youtube.com/watch?v=y17LZ-JIaYU (last accessed on 7 March 2025).

10 *Kwangu Liwewe,* South Africa's 'Born Frees' are Disillusioned with Democracy, New Lines Magazine, 28 May 2024, https://newlinesmag.com/reportage/south-africas-born-frees-are-disillusioned-with-democracy/ (last accessed on 7 March 2025).

11 International IDEA, The Global State of Democracy Indices v8, Stockholm 2024.

12 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

democracy. This way of thinking is apparent in initiatives that range from the Varieties of Democracy project, which articulates five principles and indices of democracy, to the "lexicon of democracy" and research on post-liberal democracy.[13] Given relatively low levels of popular satisfaction with democracy around the world, such a turn in the research is a positive response to the needs of the moment.[14]

Regardless of the exact definition, popular participation—either through elections or more direct citizen participation—is central to all conceptions of democracy. This centrality is evident in even the most minimalistic definitions, like that of Joseph Schumpeter, who argued that though democracy is merely an "institutional arrangement for arriving at political decisions", it does not exist without "the means of a competitive struggle for the *people's vote*."[15] It is the people's participation that gives life to institutions.

Thicker definitions also focus on participation, whether it is one part of a broad conceptual framework,[16] or it is framed as a democratic freedom,[17] or as a right on its own.[18] Indeed, a common point among various arguments regarding the inherent weaknesses of the democratic model has long revolved around the obstacles to effective and equal participation for all those who dwell within the governed territory, both in ancient times and today. Growing frustration with the insufficiency of elections as a mode of participation, for example, has sparked a renewed interest in participatory forms of democratic governance in recent decades.[19]

13 *Philippe C. Schmitter*, 'Post-Liberal' Democracy: A Sketch of the Possible Future?, Florence 2018; *Jean-Paul Gagnon*, 2,234 Descriptions of Democracy: An Update to Democracy's Ontological Pluralism, Democratic Theory 5 (2018), pp. 92–113.

14 See *Christian Haerpfer* / *Ronald Inglehart* / *Alejandro Moreno* / *Christian Welzel* / *Kseniya Kizilova* / *Jaime Diez-Medrano* / *M. Lagos* / *Pippa Norris* / *E. Ponarin* / *Bi Puranen* (eds.), World Values Survey: Round Seven – Country-Pooled Datafile, Madrid / Vienna 2020; *Richard Wike* / *Janell Fetterolf*, Satisfaction with democracy has declined in recent years in high-income nations, Short Reads, 18 June 2024, https://www.pewresearch.org/short-reads/2024/06/18/satisfaction-with-democracy-has-declined-in-recent-years-in-high-income-nations/ (last accessed on 7 March 2025).

15 *Joseph Schumpeter*, Capitalism, Socialism and Democracy, New York 1942, p. 269 (emphasis added).

16 See, for example, *David Beetham*, Democracy and Human Rights, Cambridge 1999; see also *David Beetham et al*., Assessing the Quality of Democracy: A Practical Guide, Stockholm 2008.

17 *Freedom House*, Marking 50 Years in the Struggle for Democracy: Freedom in the World 2023, Freedom in the World Report, 9 March 2023, https://freedomhouse.org/report/freedom-world/2023/marking-50-years (last accessed on 7 March 2025).

18 Office of the United Nations High Commissioner for Human Rights, Guidelines for States on the effective implementation of

the right to participate in public affairs, https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf (last accessed on 7 March 2025).

19 *Marit Hammond*, Democratic innovations after the post-democratic turn: between activation and empowerment, Critical Policy Studies 15 (2020), pp. 174–191. See also *Adrian Bua* / *Sonia Bussu*, Reclaiming Participatory Governance: Social Movements and the Reinvention of Democratic

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Participation is also central to African normative frameworks on democracy. These include the Constitutive Act of the African Union, which lists the protection and promotion of democratic institutions and culture in its preamble,[20] the African Charter on Human and Peoples' Rights (ACHPR) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). There is also the African Charter on Democracy, Elections and Governance (ACDEG), an instrument devoted solely to setting common standards for democratic governance across the continent. It is only the Americas that has a comparable framework devoted to democracy in this way (the Inter-American Democratic Charter). Though they are not central to the argument here, it is noteworthy that several other African regional frameworks include democracy as a guiding principle, objective or goal.[21]

In some ways, these normative standards reflect global norms and language on these topics; indeed, they are partially modelled on discourse in the UN Human Rights Committee and in international civil and political rights treaties.[22] At the same time, however, certain provisions stand out for reflecting distinctly contextualized priorities. These include articles that specify the family as the natural unit of society, grant colonized or oppressed peoples the right to be free, request states to eliminate foreign economic exploitation and that specify people's duty to respect their families, parents and to strengthen positive African values.[23] Also relevant are provisions that prioritize consensus and recognize the role of traditional institutions and authorities.[24]

II. The Centrality of Participation

The centrality of participation stands out across these frameworks. The AU's Constitutive Act, for example, includes participation among its objectives and among the principles upon which the Union functions.[25] ACDEG references the inclusion of participation in the AU's Constitutive Act as an inspiration for its own articles.[26] The ACHPR also includes

Innovation, Abingdon-on-Thames 2023; *Carole Pateman*, Participatory Democracy Revisited, Perspectives on Politics 10 (2012), pp. 7-19.

20 Preamble of the Constitutive Act of the African Union.

21 See, for example, the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; the African Charter on Values and Principles of Public Service and Administration; African Union Convention on Preventing and Combating Corruption; the New Partnership for African Development (NEPAD).

22 *Mutua*, note 3.

23 ACHPR, Articles 18, 20, 21, 29.

24 ACDEG, Articles 10, 35 and 39.

25 Constitutive Act of the African Union, Articles 3(g) and 4(c).

26 ACDEG, Preamble.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

participation, and the Maputo Protocol lists the full participation of women "as equal partners" in its preamble, also refencing the Constitutive Act of the AU.[27]

One reason why participation features so centrally across these frameworks is because it is broadly conceived, touching multiple aspects of governance. The ACHPR offers a useful starting point, stating, "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."[28] Here, the Charter recalls the concepts of direct and representative democracy, emphasizing that citizens should have recourse to both. Notably, the ACHPR makes no specific mention of democracy or elections, suggesting instead that participation in government may legitimately take place through other mechanisms.

1. Electoral Participation

It is ACDEG, however, that does prioritize elections as a key form of participation. Article 17, in particular, focuses on states' "commitment to regularly holding transparent, free and fair elections," marked by independent and impartial national election authorities, national mechanisms that redress election disputes, "fair and equitable access" for parties and candidates to the media and a binding code of conduct for political stakeholders requiring acceptance of the results or challenges to results only through legal channels.

In the case of *Actions pour la Protection des Droits de l'Homme v Cote D'Ivoire*, an Ivorian NGO filed suit at the African Court on Human and Peoples' Rights (African Court), for violation of Articles 10(3) and 17 of ACDEG, as well as Article 3 of the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance. The NGO took issue with a law that provided for the composition of the Independent Electoral Commission, the IEC. This law specified that the IEC was to be composed of eight members of the executive, legislature and the party in power, four members from opposition parties, one representative of the judiciary and four representatives of civil society. The petitioners argued that this imbalanced composition was more advantageous to the ruling party and government than it was to the opposition. Petitioners showed that this imbalance resulted in a violation of the requirement for independent and impartial national electoral bodies.[29] The African Court agreed, ruling that the violation of Article 17 ultimately impacted Article 13, which guarantees the right of every Ivorian citizen to participate freely in the conduct of public affairs of her country. The Court did not expound on its point that the violation of Article 17 also impacted respect for Article 13. One interpretation, however, is that an unbalanced authority may suffer from a lack of checks on potential biases, which could have knock-on effects on many aspects of the electoral cycle. In fact, the Court also ruled that ACDEG's provision on equality before the

27 Preamble of the Maputo Protocol.

28 ACHPR, Article 13(1).

29 ACDEG, Article 17.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

law was violated, because an imbalanced authority skewed in favour of one party will not be able to guarantee all candidates a level playing field.[30]

Electoral participation is also taken up by the African Court in *Marie Aikoue Ajavon v Benin*. In that case, the petitioner alleged that his right to non-discrimination had been violated by a requirement that native Beninese (as opposed to naturalized Beninese) be resident in the country for a minimum of one year prior to elections to be eligible for candidacy. Here, the Court noted that residence could be important for candidates, because it may denote direct or continuous engagement/familiarity with the daily problems in a country. Additionally, however, the Court explained that in the African context, exiled opponents who have justified fears do often continue to be interested in the affairs of their home countries, even from afar. "A distinction must be made between those who voluntarily left their country and those who did so under duress."[31] The Court ruled that the residency requirement was not justified, because remaining in the country would have been perilous and would have made it impossible for the petitioner to exercise his political rights.[32] Though this ruling was in relation to Article 13, which deals not directly with participation but instead with political and social dialogue, trust and transparency between political leaders and the people, it raises significant questions related to what might be an emergent "African" vision of democracy. If residence is less relevant for electoral candidates who face conditions that warrant (self-imposed) exile, perhaps certain forms of African democracy could integrate officially exiled as well as diaspora communities more systematically. This may lead to greater attention to mechanisms such as overseas voting, but it could also raise questions about the need for transnational campaigning or even transnational participatory fora (such as citizens' assemblies).

This topic was also addressed by the African Commission on Human and Peoples Rights in *Open Society Justice Initiative v Cote d'Ivoire*, a case in which the petitioners alleged that the Ivorian government passed a restrictive law about nationality in order to purposely exclude a particular candidate from contesting the presidential election. In its judgment, the Commission focused on why citizenship in the African context requires special consideration, explaining the importance of understanding the historical, legal and political background that went into the creation of modern-day African countries. It explained that African states have had to work hard to "create national entities out of several entities dismantled by colonization."[33] The judgment detailed migration patterns into modern-day Cote d'Ivoire and explained,

> *"In the light of this prior clarification, the Commission believes that in many African States, any legal creation of nationality must essentially take its main source from*

30 Actions pour la Protection des Droits de l'Homme v Cote D'Ivoire, paras. 149-150.

31 Sebastien Germain Marie Aikoue Ajavon v Republic of Benin, p. 51.

32 Ibid., p. 52.

33 Open Society Justice Initiative v Cote d'Ivoire (Communication No 318/06) [2016] ACHPR [99].

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

> *a sociological and political understanding but also from the historical source of nationality. Considering the foundations recalled above, an alternative approach would constitute not only a denial of history but also an open door for dismantling new national entities, which people who were constrained by a wrongful demarcation of boundaries, have striven to build in several decades or even centuries."*[34]

This position articulates a uniquely important aspect of the way participation is understood in the African context. Specifically, the Commission's argument is that nationality, for the purposes of determining who is eligible to represent the people of a country, must be thought of holistically and as the child of a particular historical experience. When determining whether the rules for candidate eligibility are fair or not, the Commission argues that citizenship itself must reflect an understanding of a country's particular context and history, which is a unique requirement, one that strives to contextualize the nuances within which elections in the region take place. The ruling raises questions about how to define citizenship, which then impacts who can and cannot participate (and where). In this case, credible elections require a set of rules that accurately acknowledges and integrates unique aspects of national identity into electoral rules.

2. Participation and Consensus

Second, participation in the African context elevates diversity of all kinds, including ethnic, cultural and religious, as well as women, youth and people with special needs.[35] In fact, ACDEG considers ethnic, cultural and religious diversity to strengthen both democracy and participation.[36] ACDEG also considers the "full and active participation" of women in decision-making processes at all levels to be a fundamental element in the promotion and exercise of a democratic culture. The document takes this point further by requiring that member states "take all possible measures" to ensure gender parity at all levels of governance.[37] It is noteworthy that the ACDEG takes yet another step to emphasize the importance of participation, stating that "State Parties shall ensure systematic and comprehensive civic education in order to encourage full participation of social groups with special needs in democracy and development processes."[38] This point is reiterated elsewhere in the document, as member states are directed to integrate civic education into broader education curricula. Civic education is described as a prerequisite for not just the promotion of democratic principles but to "consolidate a culture of democracy and peace."[39]

34 Ibid. [100].
35 ACDEG, Articles 8(3), 29(2), 29(3), 31(1) and 31(2).
36 ACDEG, Article 8(3).
37 ACDEG, Article 29(2).
38 ACDEG, Article 31(2).
39 ACDEG, Article 12.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ACDEG also integrates consensus and inclusion into key provisions. Specifically, ACDEG stipulates that a constitutional amendment "reposes on national consensus, obtained, if need be, through referendum."[40] In this way, ACDEG provides specific instructions regarding how to realize the principle of participation.

Indeed, Kwasi Wiredu expounds upon the idea of consensus and takes it as the basis for an alternative model of democracy. He argues that elections can result in a situation in which the decisions of the governing body do not reflect the consent of all or even a large proportion of the citizens.[41] The focus on elections results in a political system that is a "perpetual struggle for power among political parties" and one in which representation does not guarantee substantive citizen involvement in decision-making. In parallel, the quest for power can be corrupting, resulting in the sacrifice of "objectivity in discussion or fairness in human relations…human life is also lost, sometimes in numbers too grievous to recount."[42] A consensus-based system, on the other hand, is not only "kinder, gentler and more rational" but also known to societies in many parts of the world, including African groups "with a pre-colonial history of government by consensus."[43] Wiredu argues for what he calls decisional consensus, the idea that universal agreement on competing agendas can be reached by the "targeted pruning" of differing points so that a workable compromise can be achieved.[44]

Two cases demonstrate the importance of the idea of consensus, which is dependent on participation. In *Houngoue Eric Noudehouenou v Benin*, the African Court ruled that Benin violated the principle of national consensus by amending the constitution without sufficient popular input and participation. While the Court does not go as far as to require the unanimity of Wiredu's decisional consensus, it does define consensus to mean a solution that "satisfies a greater number of people through an appropriate channel."[45] The Court explained that this greater number of people applied not only to the people at large but to the representatives of the people if they "truly represent the different forces or sections of society." The Court noted that since all parliamentarians were "part of the presidential camp", this requirement was not satisfied in this case. Ultimately, the Court ruled that a consensual revision of the constitution would have required consultation with all stakeholders in the country and "people of various opinions." This could have been followed by a referendum, though not necessarily so.[46] The Court argued and ruled similarly in *Sebastien Germain Marie Aikoue Ajavon v Benin*.[47]

40 ACDEG, Article 10(2).
41 *Wiredu*, note 5, p. 157.
42 Ibid., p. 159.
43 Ibid., p. 159.
44 Ibid., pp. 162-163.
45 See Houngue Eric Noudehouenou v Republic of Benin, p. 16.
46 Ibid., p. 17.
47 *Sebastien Germain Marie Aikoue Ajavon v Republic of Benin.*

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

These cases raise important points about the democratic model of governance in use today. If electoral politics and the relatively antagonistic (or at least competitive) environments they produce are antithetical to "traditional" African decision-making, perhaps models in which participation is more ongoing could have deeper resonance. In thinking about African democracy, though, it is important to ask about how relevant a "traditional" norm may continue (or not) to be. Often, pushbacks against the universal legitimacy of liberal democracy involve arguments that the model was imposed on non-western communities in ways that overlooked or purposely supplanted traditional systems. While that may be true, the question today is whether what is considered "traditional" continues to have widespread legitimacy. Perhaps it is more important to understand what values and norms are widely supported today and may one day become "traditional." This question is taken up further in subsequent sections of this article.

3. Participation for Peace, Culture and the Environment

Third, the regional frameworks posit that participation is linked to several important outcomes, including peace and development. ACDEG states, "State Parties shall promote peace, security and stability in their respective countries, regions and in the continent by fostering participatory political systems with well-functioning and, if need be, inclusive institutions."[48] It also includes participation, specifically with regard to development processes, in its preamble, and later instructs states to promote citizen participation in the development process.[49] This position arguably demonstrates a belief that people's involvement in decision-making can help mitigate conflict and contribute to better long-term outcomes.

While it is not necessarily a core framework with regard to democracy, the African Charter for Popular Participation in Development and Transformation (ACPPDT), adopted in 1990, deals with participation and development. It specifically criticizes governments for maintaining an overly narrow social base of power and decision-making, exhorting them to yield space to the people and to galvanize and tap into people's energy and commitment.[50] It defines participation thus as:

> *"... the empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits."*[51]

48 ACDEG, Article 38(1).

49 ACDEG, Articles 30 and 3(7).

50 United Nations Economic Commission for Africa, African Charter for Popular Participation in Development and Transformation, UN Doc E/ECA/CM.16/11 (1990), Article 16.

51 Ibid, Article 11.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

In fact, instead of making it incumbent only on states to facilitate public participation, the ACPPDT emphasizes people's responsibility to "seize the initiative" and establish genuinely grassroots, voluntary, democratic and self-reliant organizations that are rooted in the tradition and culture of society. People also have a responsibility to establish consultative machinery with governments at various levels and to forge links across borders.[52] The first chapter of the ACPPDT blames an over-centralization of power for the constraint and curtailment of the motivation of a majority of people to contribute to development and to the betterment of their own well-being.[53] Kufuor argues that since the definition does not specify particular fora for participation, this conception of participation has the potential to be far-reaching, opening up space for inclusion in everything from school governing boards to national parliaments.[54]

African leaders further developed and articulated priorities with regard to democracy and participation in the Maputo Protocol, which went into effect in 2005. Most of the rationale behind the Protocol was the clear demand and need for greater respect for women's rights and the unique struggles they face in all spheres of life. More participation in the conceptualization of rights in the African context was critical: mainstream international human rights instruments are defined in relation to men's experiences and that the ACHPR's emphasis on traditional African values sometimes obfuscated the ways in which some customary practices may be threatening to women and girls.[55]

At the same time, however, the Maputo Protocol can also be seen as a reflection of broader beliefs about participation and serve to elucidate African priorities for democracy. While ACDEG already made it clear that popular participation is an integral part of development processes, the Maputo Protocol specifies what such participation entails. The protocol requires that women be a part of the conceptualisation, decision-making, implementation and evaluation of development policies and programmes.[56] It goes further by stating that this is part of what it means to "fully enjoy" the right to sustainable development.[57]

The case law with regard to participation and the Maputo Protocol is limited, focusing mostly on ascriptive indicators of women's representation in legislatures and other government bodies. In *Centre for Rights Education and Awareness & another v Speaker of National Assembly & Others*, for example, a High Court in Kenya (Nairobi) held that the Kenyan Parliament failed in its obligation to uphold the constitution by not enacting

52 Ibid., Articles 11 and 13.

53 Ibid., Preamble.

54 *Kofi Oteng Kufuor*, The African Charter for Popular Participation in Development and Transformation: A Critical Review, Netherlands Quarterly of Human Rights 18 (2000) pp. 7, 13.

55 *Mary Wandia*, Rights of Women in Africa: Launch of petition to the African Union, Pambazuka News, 3 June 2004, https://www.pambazuka.org/gender-minorities/rights-women-africa-launch-petition-african-union (last accessed on 7 March 2025).

56 Maputo Protocol, Article 18(b).

57 Maputo Protocol, Article 19.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

legislation to operationalize the constitutional requirement that no more than two-thirds of the members of elective or appointive bodies be of the same gender. It ordered Parliament and the Attorney General to take steps to enact the required laws within sixty days and report progress to the Chief Justice.[58] In another case dealing with similar facts, the Court ruled against petitioners. In *National Gender & Equality Commission & Another v Judicial Service Commission & Others*, the High Court at Nairobi held that Kenya's Judicial Service Commission was not in violation of the law when it failed to recommend a female Chief Justice. Since the new bench was made up of five men and two women, the Court opined that two-thirds of seven is 4.66, which can be rounded up to five men.[59] These judgments do not provide deeper discussions of participation.

The Maputo Protocol also develops the links between participation and peace, specifying that participation in the promotion and maintenance of peace includes participation in educational programmes and in conflict prevention structures. Importantly, it also explicitly states that women's participation is necessary in the "local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women" as well as in the structures related to the management of camps and settlements for these communities.[60] The inclusion of non-citizens is an important point, raising questions about how mobility and migration (both voluntary and forced) could impact rights and democracy in the African context. It also recalls the *Open Society* case mentioned above, which articulated the reasons for understanding nationality in a holistic way. The Maputo Protocol is significant for its approach, which does not make a judgment about the reasons for migration but accepts it as fact. In doing so, it shifts attention to the role of participation as a key way to manage migration and the consequences it may have in various contexts.

The Maputo Protocol also makes important points about the importance of public participation in the development of culture and the preservation of the environment. Specifically, Article 17 stipulates that states must take "all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels." In terms of the environment, Article 18 requires states to make sure that women are more involved in the planning, management and preservation of the environment and that they participate in the control of new energy sources and relevant technologies.

C. Constitutional Visions of Democracy

Moving from the international level down to the national level, we can turn to constitutions to better understand how African countries express their democratic commitments. While

58 Centre for Rights Education and Awareness & another v Speaker of National Assembly & Others 2017 eKLR (High Court, Kenya).

59 National Gender & Equality Commission & Another v Judicial Service Commission & Others 2017 eKLR (High Court, Kenya).

60 Maputo Protocol, Article 10.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

treaties and international covenants and protocols reflect the views of governments and international elites, constitutions reflect the views of national elites (claiming to speak for the people). As Jeff King has argued, constitutions can be understood to be national "mission statements"—"a set of core values and commitments that constitute or form part of the purpose of the state and are meant to guide its decision making."[61] As such, they provide valuable data on national views of democracy across the African continent.

For our purposes, the most valuable part of the constitution is the preamble. While the operative articles of the constitution make any democratic commitments a legal and institutional reality, the preambles often convey a sense of the state's constitutional identity.[62] To be sure, preambles include phrases that are widely used, and frequently reference international treaties.[63] Yet even with these international elements, preambles provide the drafters of constitutions with an opportunity to make evocative statements about the model of democracy that the constitution is intended to guarantee.

We therefore collected the text of the preambles of African constitutions. These texts were sourced in English (official texts or translations) from the Comparative Constitutions Project's *Constitute* website. From the 54 African states, we have 47 preambles from constitutions that were in force in November 2024.[64] It would be preferable for some reasons to analyze these texts in their original languages, but our empirical approach requires us to have all the texts in the same language.

Our specific empirical approach follows one of the many "text as data" methods used by empirical legal scholars,[65] namely topic modelling. The specific model we use is an unsupervised form of machine learning called latent Dirichlet allocation (LDA).[66] This method allows us to group words that are commonly found together across the documents (preambles) in the corpus (the 47 preambles), and from there to estimate the probability that each topic is discussed in each document. Each document is understood to include a mixture of the several topics in the model, and each topic is a mixture of the words in the corpus.

61 *Jeff King*, Constitutions as Mission Statements", in: Denis J. Galligan / Mila Versteeg (eds.), Social and Political Foundations of Constitutions, New York 2013, p. 73.

62 *Gary Jeffrey Jacobsohn*, Constitutional Identity, Cambridge 2010.

63 *Tom Ginsburg* / *Nick Foti* / *Daniel Rockmore*, 'We the Peoples': The Global Origins of Constitutional Preambles, George Washington International Law Review 46 (2014).

64 Constitute does not have the text for the current (December 2024) constitutional documents of Guinea and Mali. The constitutions of Botswana, Lesotho, Mauritius, Sierra Leone, and Somalia do not have preambles.

65 *David S. Law*, The Global Language of Human Rights: A Computational Linguistic Analysis, Law & Ethics of Human Rights 12 (2018), p. 111–150; *Daniel N. Rockmore / Chen Fang / Nicholas J. Foti / Tom Ginsburg / David C. Krakauer,* The Cultural Evolution of National Constitutions, Journal of the Association for Information Science and Technology 69 (2018), pp. 483–494.

66 *David M. Blei* / *Andrew Y. Ng*. / *Michael I. Jordan*, Latent Dirichlet Allocation, Journal of Machine Learning Research 3 (2003), p. 993–1022.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Pre-processing of the text is required for LDA, including removing common words that convey no unique substantive meaning (such as conjunctions and articles). Words are often "stemmed" so that the ending of the word is removed (meaning that both constitution and constitutional would become "constitu"). We have opted not to stem the words so that we can retain more nuance in the interpretation. However, we de-nationalized the texts by removing country names and demonyms. In our pre-processing we also allowed for two-word pairs that are frequently found together to be treated as one unit (for example, this allows the inclusion of "justice", "equality", and "justice_equality" as terms in the model).

One of the key points where a judgement call must be made in the use of an LDA model is in determining the number of topics in the model. We tested the performance of models with 1 to 20 topics, and determined that the model with the best balance of mathematical coherence and substantive interpretability was the one with 12 topics. The model of course treats each group of words as mere mathematical relationships, and it is up to us to give some substantive meaning to the associations. In our analysis of the topics, we understand them to deal with the following general themes: (1) Principles, (2) Mechanisms, (3) Values, (4) Declarations, (5) Institutions, (6) Sovereignty, (7) Good Governance, (8) Closing Statements, (9) International Treaties, (10) Liberation History, (11) Peace, (12) Revolutionary History.

These 12 topics reveal the mix of national and international concerns and influences that scholars have identified as being a common part of the approach to preambles the world over.[67] In our model, topic 9 captures the invocation of international treaties, most notably the African Charter on Human and Peoples' Rights, which appears in 16 of the preambles. Topic 10 has a national (or at least regional) focus, including terms often used in the recounting of liberation struggles that feature in several of the preambles, particularly in North Africa. The top 10 words in each topic (those that have the strongest association with the topic) are graphed in Figure 1. The importance of the words to the topics is illustrated in Figure 2.

67 *Ginsburg / Foti / Rockmore*, note 65.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

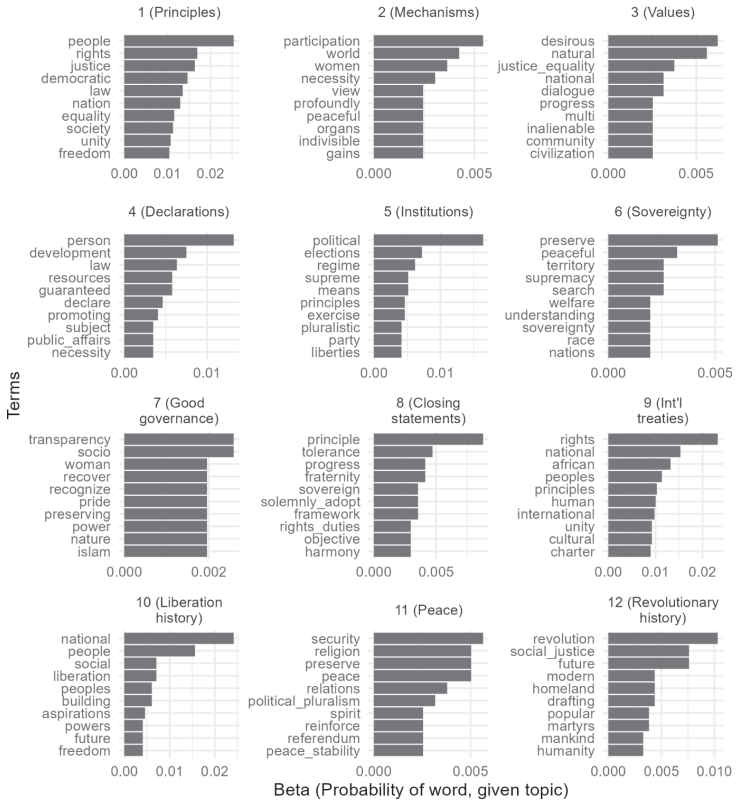


Figure 1: Top terms by topic

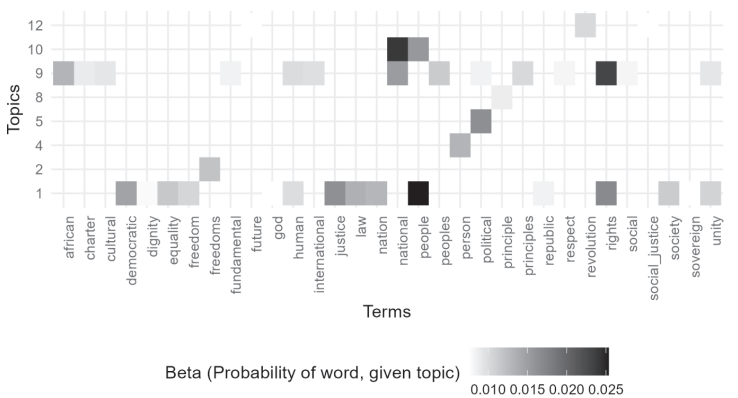


Figure 2: Heatmap of terms across topics

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Figure 3 illustrates the proportion of the text in the documents that is attributed to each topic. We can therefore see that topic 1 (Principles) and its discussion of the commitment of African states to fundamental principles of democracy and human (and peoples) rights covers a great deal of the content of the preambles across the corpus, and in some cases covers a large proportion of the text in individual documents. In six constitutions, more than a third of the text is on this topic, with Seychelles devoting 40 per cent of its preamble to this theme. Indeed, in the Seychellois preamble, there are solemn commitments to sovereignty, the rule of law, democracy, participatory development, individual rights, and a healthy environment. These are all themes that were evident in the analysis of continental norms above. In the same way, we should draw attention to the prominence of "participation" in the second topic, which also describes a commitment to gender equality.

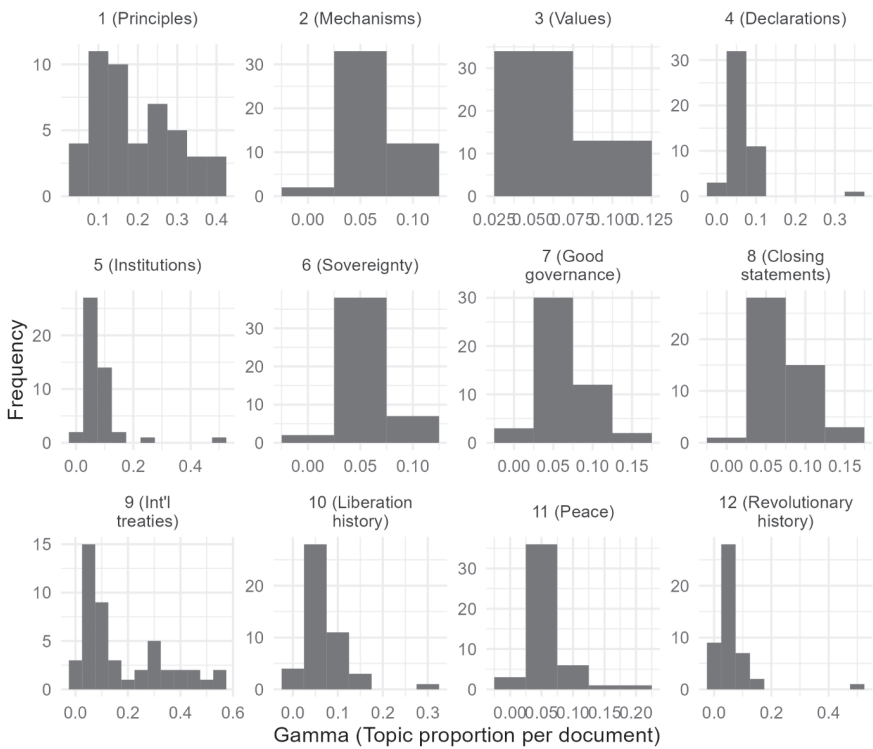


Figure 3: Distribution of topics across documents

The topic that deals with democratic institutions is fifth in the list, generally covering a low proportion of the text, but is mentioned in most of the preambles, featuring very heavily in that of Cabo Verde. That preamble describes the history of the country, devoting two

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

paragraphs to a discussion of the first multi-party legislative elections that took place in 1991. Furthermore, the penultimate paragraph of the preamble takes the form of a robust list of democratic commitments touching upon many institutions:

> *"Assuming the principle of popular sovereignty, this Constitutional text consecrates a Democratic State with a vast list of rights, liberties, and guarantees to citizens, the concept of the dignity of the human being as the absolute value which is supreme over the State itself, a system of government with a balance of power between the various national institutions, a strong and independent judiciary, local authorities whose officeholders shall be elected by the communities to whom they are responsible, a Public Administration at the service of the citizens and conceived as an instrument of development, and a system of defence of the Constitution characteristic of a pluralistic democracy."*[68]

As another example, the third statement in the Ugandan preamble states that the country is "committed to" establishing a "socio-economic and political order… based on the principles of unity, peace, equality, democracy, freedom, social justice and progress."[69] There is a somewhat similar statement in the Ethiopian preamble, which speaks of a commitment to: "building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development."[70]

The association between democracy and development is clear in these latter two quotations, and indeed is substantiated in the topic model. There is no topic that can be understood to narrowly capture social or economic development. However, the term "development" has a strong association with topic 4 (termed Declarations), but also with topic 1 (Principles) and topic 5 (Institutions). Topic 7 (termed Good Governance) actually includes the term "harmonious development", a term found in the constitutions of the Central African Republic, Djibouti, Madagascar, and Sao Tome and Principe.

Fundamentally, constitutions are aspirational documents. In most cases, they seek to establish institutions and rights that will carry the country into a more just, prosperous, and democratic future. The larger picture that emerges from analysis of the dozen topics that are covered in the diverse constitutional preambles across the continent is one that places democracy at the center, often with national history (including liberation struggles) in the background, and a connection to international human rights alongside it. In many cases, democracy and development are discussed together, perhaps expressing a double ambition, or a close connection between two mutually reinforcing processes.

68 Constitution of the Republic of Cabo Verde, preamble.

69 Constitution of the Republic of Uganda, preamble.

70 Constitution of the Federal Democratic Republic of Ethiopia, preamble.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

D. People's Priorities for Democracy

The third leg of our empirical stool is data on the views of the people themselves. We have interrogated what continental treaties and other norms tell us about a concept of African democracy; we have inquired into the content of constitutional preambles from across the continent. But these have both been elite data sources. The various rounds of the Afrobarometer survey project provide an unparalleled set of data on public opinion about democracy across most countries on the continent, and it is to these data we now turn.

As a source for information about popular conceptions of democracy, the Afrobarometer Round 9 data provide us with several advantages. The data collection method involves in-person interviews with people across the 39 covered countries, using most of the local languages.[71] While not exhaustive, this is a remarkable level of country coverage in such deep survey data. However, the data do have some limitations, mainly stemming from the choice of questions and the wording used in describing democratic concepts.[72] No survey instrument can cover everything, but it also cannot exceed the frames of reference of the question writers. In sum, the survey responses allow us to identify the things African respondents prioritize in their concept of democracy—but only among the provided options. As we will see, this is not an insurmountable impediment to the use of these data for the purpose of understanding an African concept of democracy, but there could be more to learn from data that provides more open-ended response options.

I. Questions from the Survey

There are many questions in round 9 of the Afrobarometer that relate to democracy. For our purposes, the questions that are most useful ask respondents to indicate their degree of agreement with one of two statements. For example, question 15 asks respondents: "Which of the following statements is closest to your view? Choose Statement 1 or Statement 2. Statement 1: The government should be able to ban any organization that goes against its policies. Statement 2: We should be able to join any organization, whether or not the government approves of it."[73] In this case Statement 1 has an anti-democratic or at least anti-pluralist valence, while Statement 2 is supportive of democratic or pluralistic society. The order of these statements (positive or negative first) varies across the questions.

71 *Carolyn Logan / Robert Mattes / Francis Kibirige*, Harmonization in the Afrobarometer, in: Irina Tomescu-Dubrow / Christof Wolf / Kazimierz M. Slomczynski / J. Craig Jenkins (eds.), Survey Data Harmonization in the Social Sciences, Hoboken 2023.

72 *Frederic Charles Schaffer*, Thin Descriptions: The Limits of Survey Research on the Meaning of Democracy Polity 46 (2014), pp. 303–330.; *Chad P. Kiewiet de Jonge*, Should Researchers Abandon Questions about 'Democracy'?: Evidence from Latin America, Public Opinion Quarterly 80 (2016), pp. 694–716.

73 Afrobarometer, Data - Afrobarometer, 2024, https://www.afrobarometer.org/data/ (last accessed on 7 March 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

In our analysis, we include 16 questions of this type, covering matters such as media freedom, the relationship between citizens and the government, the role of women in democracy, multipartyism, desirability of elections, and accountability for political leaders. We also include three questions in which respondents were asked whether they approve or disapprove of one-party rule, one-man rule, and military rule.

We recoded all these questions such that they vary between 2 and -2, with positive values indicating support for statements that are generally consonant with common views of democracy in the academic literature (such as rejecting one-party rule), with refused, do not know, and missing responses coded as 0.

II. Principal Components Analysis

As a first, high-level, pass through the data, we used principal components analysis (PCA) to measure the degree of coherence in the responses and to identify which questions are most helpful in understanding the variation between respondents. As illustrated in Figure 4, the variation in the data is best explained with reference to three dimensions. That does not mean that there are three groups of respondents in the survey data, but that the variation between them is significantly explained with reference to three dimensions.

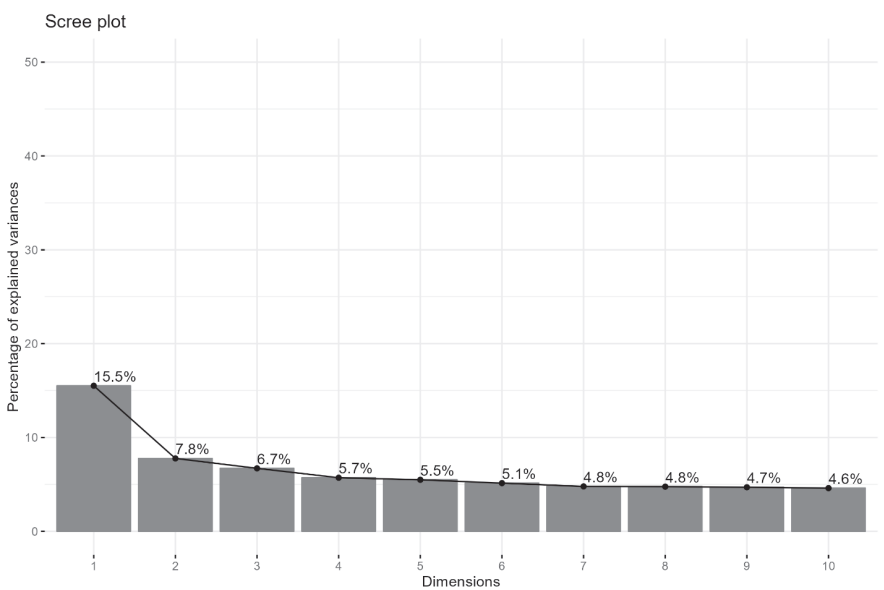


Figure 4: Variance explained by dimensions 1 through 10

The substance of these three dimensions can be understood in terms of the questions within the survey that contribute the most information to each dimension. These are graphed in

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Figure 5. Here we see that Dimension 1 addresses *pluralism* and is particularly informed by questions that address: (Q22C) rejecting one-man rule, (Q22A) rejecting one-party rule, and (Q27A) the roles of the president and parliament in passing laws. Dimension 2 addresses *accountability* and is informed by questions about: (Q19A) the subordination of the government to the people or vice-versa, (Q27C) the role of the opposition party in the legislature, and (Q18) the balance of efficiency and accountability in government. Finally, Dimension 3 addresses *authority* and is most prominently influenced by people's view about: (Q22B) rejecting military rule, (Q16) the extent of media criticism of the government, and (Q22C) rejecting one-man rule (like Dimension 1).

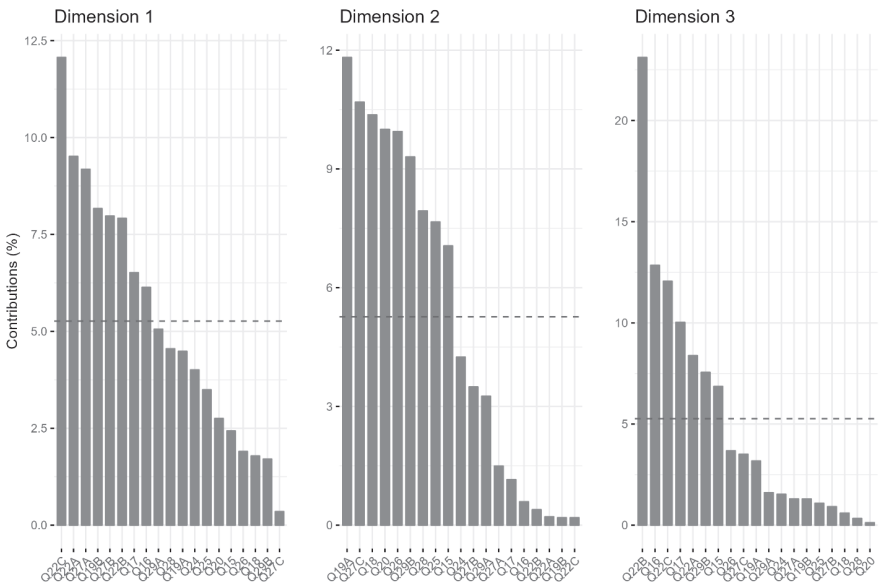


Figure 5: PCA dimensions and questions

III. Cluster Analysis

We can learn more about the extent to which the diverse responses to the survey establish groups with internally consistent views through k-means clustering over a random sample of 10,000 of the responses (the full sample of more than 50,000 responses was too large for processing on a standard laptop). The first thing to note about this analysis is that the best fit for these responses to 19 questions from 10,000 respondents has 10 clusters. The number of respondents in each cluster is relatively consistent, varying between 828 (cluster 8) and 1,244 (cluster 5). The individual respondents are identified in Figure 4 with codes that include a three-letter country code indicating the country in which the respondent lives.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

This figure plots the respondents with reference to the two dimensions that explain the greatest amount of the variation.

It is apparent that there are many respondents whose answers are far from the mainstream view on these two dimensions, but there is also no clear regional or national trend to these outliers. Rather, the larger picture that emerges is that these 10 clusters have very significant overlaps on these two dimensions.

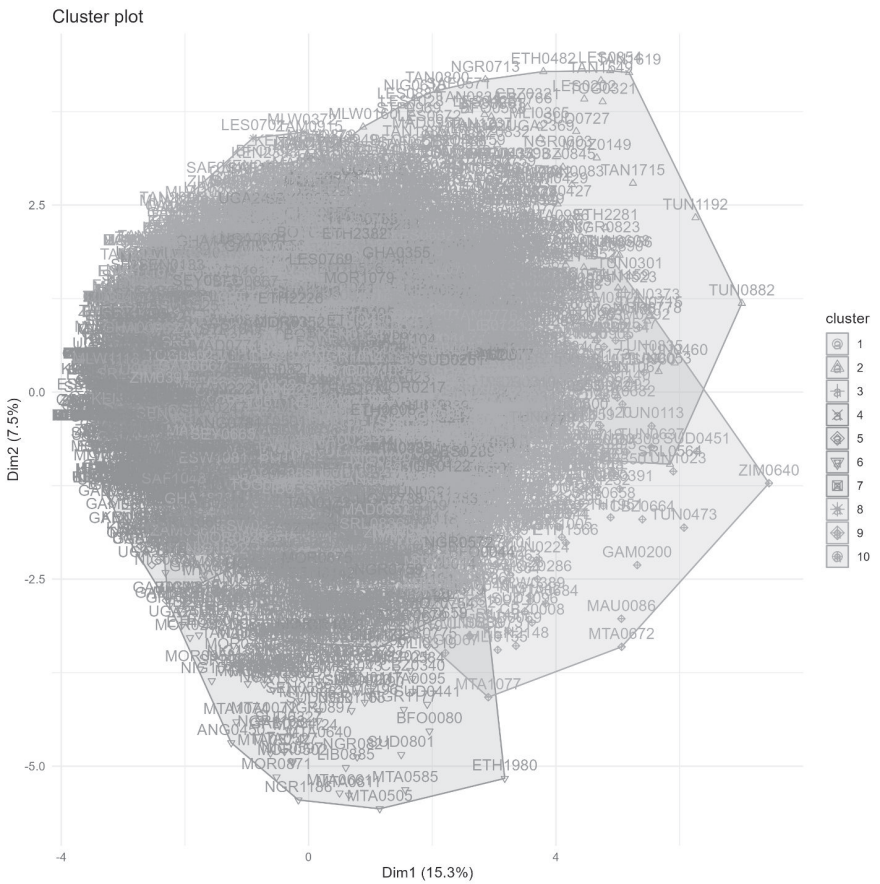


Figure 6: KMEANS cluster analysis of responses to 19 Afrobarometer questions

In the model presented in Figure 6, the cluster with the highest average score across the 19 survey questions (meaning they chose the statements with a pro-democratic valence) is cluster 5, which is not especially easy to pick up in this visualization, but respondents in this cluster have low scores on dimension 1 (thus are on the left of the figure) and

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

mid-range scores on dimension 2 (thus being near the center vertically). The cluster with the lowest average score (meaning they more often chose the statements with the anti-democratic valence) is cluster 2. This cluster is found in Figure 6 with higher values on both dimensions (appearing at the top-right of the figure). However, there is overlap even between these two most extreme clusters.

The clusters can be even better understood through a closer look at the mean responses to each of the 19 questions. These are depicted in Figure 7. As noted above, the number of respondents in each cluster is relatively even, but cluster 5 is the largest. As noted above, it is this cluster that has the highest mean score across the 19 questions, indicating a preference for a more open and pluralistic society.

However, note that cluster 5 has a negative mean for the question that deals with the orientation of the opposition party (Q27C). This is an interesting question in the Afrobarometer. The full question poses a choice between these options: "Statement 1: After losing an election, opposition parties should monitor and criticize the government in order to hold it accountable. Statement 2: Once an election is over, opposition parties and politicians should accept defeat and cooperate with government to help it develop the country."[74] In our pre-processing, we had recoded the responses such that positive values are associated with statement 1 and negative values with statement 2. It would not be quite correct to say that negative values for this question are anti-democratic. Rather, they indicate a preference for two somewhat different things: loser's consent and a consensual orientation in the legislature. This preference in the population (which is consistent across all but one of the clusters) recalls Wiredu's argument for consensus as a definitional characteristic of African democracy that we referenced above and later described by Matolino as well.[75] Notably, respondents in cluster 5 (but also in clusters 1, 2, 3, 4, 7, and 10) have a preference for a multi-party system and the subordination of the government to the people, but generally oppose an adversarial orientation between the governing party and a critical opposition.

74 Afrobarometer, note 75, p. 22.

75 *Wiredu*, note 5; *Bernard Matolino*, Consensus as Democracy in Africa, Grahamstown 2018.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

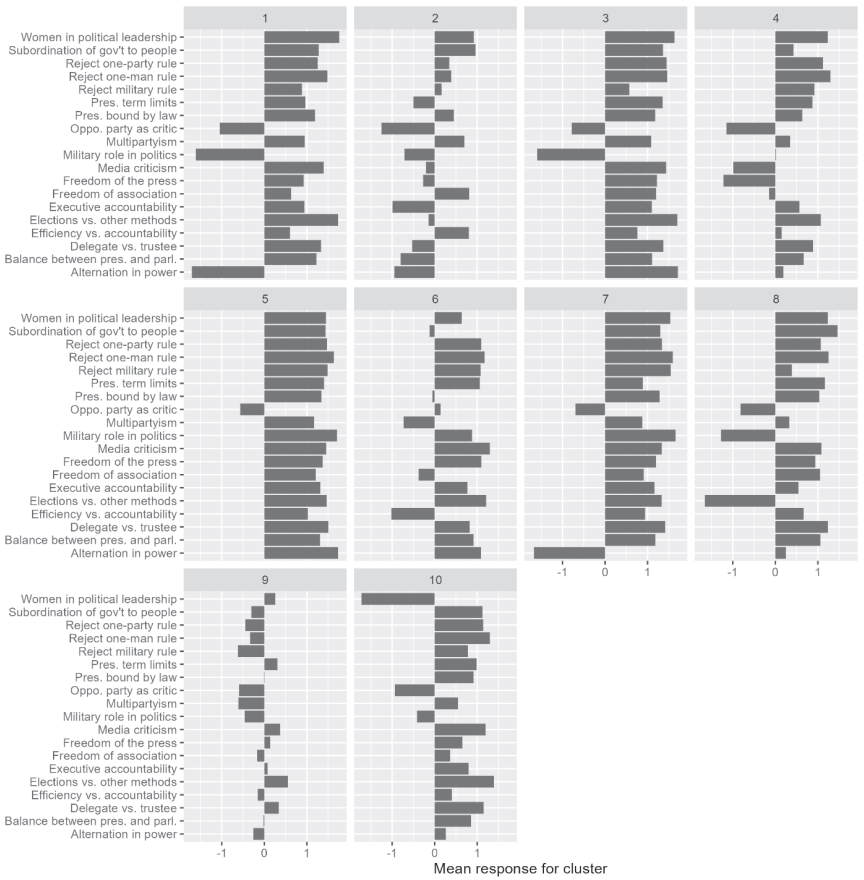


Figure 7: Mean responses to questions by cluster

Space does not permit a full explanation of the variation in responses, but there are a few more interesting points we can highlight. Note that in cluster 1, respondents have broad support for pluralism, gender equality and elections, but are at the same time favourable to a role for the military in politics and openness to the possibility that one party consistently wins the elections. Note also cluster 7, which is highly similar to cluster 5, except that respondents in this cluster share cluster 1's openness to one party staying in power through elections. Cluster 10 stands out negatively in terms of gender equality; respondents in this cluster express a belief that men are better political leaders than women. All the other clusters have more equitable preferences.

Most of the clusters express support for elections as a means of selecting political leaders, seeing this as superior to other methods. However, note that cluster 2 has a weakly

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

negative view on this subject (alongside tepid support for several other points associated with democracy), and cluster 8 has a highly negative mean response to this question. Respondents in cluster 8 favour an open and pluralistic society in many ways but oppose a critical opposition and are open to a role for the military in politics and to non-electoral methods for selecting leaders. We should note that cluster 8 is the smallest of the clusters, 50 percent smaller than cluster 5.

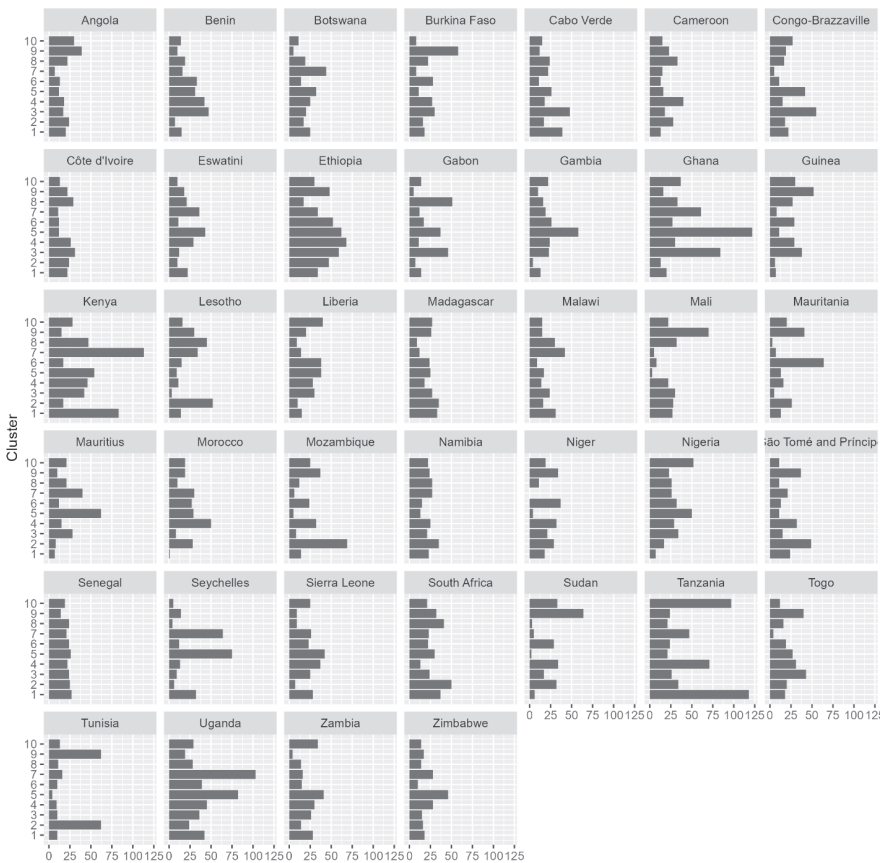


Figure 8: Number of respondents per country per cluster

As illustrated in Figure 8, there is also some variation between countries in the number of respondents that are in each cluster. Bear in mind that this is data from a random sample of the more than 50,000 respondents in round 9 of the Afrobarometer. However, we can note that a few countries stand out with reference to the clusters discussed above. Tunisians

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

are mostly grouped in cluster 2 and 9 (those with the least clear support for democratic values). This contrasts with a country like Ethiopia, whose respondents are relatively evenly distributed across the clusters. Seychelles is well represented in clusters 7 and 5, consistent with what we found in that country's preamble, but note cluster 7's openness to one party consistently winning elections. Kenya is also notable in that many Kenyan respondents are grouped in clusters 7 and 1, which share this openness to an electorally dominant party. Tanzania's large number of respondents in cluster 10 is notable given the fact that this cluster is associated with lack of faith in women as political leaders, and the country's current leader is a woman (President Samia Suluhu Hassan), perhaps reflecting their views on current politics rather than an abstract view of gender and leadership.

We take from this analysis both an appreciation of the diversity of responses to these statements, and a broader sense that there is something approaching a common core concept of democracy across respondents from these 39 African countries. This common core values openness, pluralism, and equality (with some exceptions). Importantly, we note that the kind of adversarial politics that is common in some other regions of the world is largely rejected by Africans, with a preference for consensual relationships between governing and opposition parties emerging from these data.

E. An African Model of Democracy

In the analysis described in this article we have considered three very different kinds of empirical evidence about an African concept of democracy. These sources have included information about the preferences of continental elites as expressed in treaties and other continental norm-setting documents, the preferences of national elites and the narratives of constitutional identity found in constitutional preambles, and finally data on the views and preferences of the people themselves in 39 African countries through the Afrobarometer data. We find across these three data sources the level of diversity and variation that one should expect from a continent with 54 countries. There is, for example, disagreement between people about the role of the military in politics. However, a few key themes consistently emerge.

First, there is a consistent level of support for the value of unity and consensus. While liberal democracy prizes individual competition, African democracy may prefer mechanisms that facilitate less antagonistic dialogue and debate. A solution that allows all parties to feel some sense of buy-in to final decisions seems preferable. This implies responsibilities on the part of both the ruling party and the opposition. For the ruling party, accountability in the absence of adversarial investigations by the opposition must require a high commitment to transparency and perhaps also to public participation. It would also imply that the governing party does not deprive opposition supporters of resources or otherwise engage in self-dealing. For the opposition parties, this requires commitment to working with the governing party on matters of national importance, while continuing to represent their own constituencies.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Second, the three types of data all reveal support for participation in politics, in both abstract terms and through elections. It is clear that neither elites nor the public perceive elections to be the ultimate form of participation, which opens the door for more innovation in participatory fora. This finding impacts scholars and practitioners, as it calls for further thought regarding what forms of non-electoral participation should be included (and measured) in theories and assessment of democracy. Participation is also presented as relevant not just to governance but to peace, culture, the environment and development. It is a broader value, one that strengthens a diverse array of outcomes and could—if taken seriously—result in the opportunity for a much smaller gap between the public and political, social and economic institutions.

Third, context matters: the history of the continent is a critical part of the continental frameworks and the national constitutions. Context thus plays a role in shaping what aspects of democracy have more or less weight. This finding is important, because it suggests that country or subregion-specific models of democracy may be more useful than "universal" ones. Additionally, while our broader goal has been to identify the core of an African concept of democracy, the cluster analysis identified national characteristics that in some countries may have something to do with recent political movements in those countries.

F. Conclusion

In this article we set out to conduct an inductive analysis of the core content of an African concept of democracy. This analysis was motivated by a recognition of the longstanding objections to any attempt to impose a liberal model of democracy on the continent, especially when that has been done in a manner that does not take the colonial experience into account. It was also motivated by the observation that though African countries tend to perform poorly in many assessments; it may be that this is partially because international assessments do not measure the things that African people prioritize when it comes to democratic governance. An African concept of democracy may give more importance to unifying practices rather than adversarial elections.

While much more can be done in this direction with these data and with other (more contextually enriched) sources, the disparate data sources consulted have allowed us to identify the centrality of consensus, participation, and context in an African concept of democracy. We recognize that research in this field will need to do more to reflect what people care about and are already doing: in neighbourhoods, households, workplaces, religious communities, and other areas of communal life.

In closing, we note that any outline of African democracy can be of only limited usefulness without implementation. This has long been a problem, as political institutions and practices in many African countries have fallen short of the legitimate expectations of the citizens the government should represent and serve. Our research here suggests that the

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

next steps for this research agenda will involve thinking about what tangible reforms might be needed to reshape institutions.

© Seema Shah, Alexander Hudson

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Autochtonie et Démocratie, entre Tradition et Modernité: Le Compromis Africain, l'Exemple du Cameroun

By *Paule Suzanne Ngo Nguimbous*[*]

Abstract: Democracy, as a political system that promotes the participation of all in public management, is implemented in ways that are coloured by the historical and political cultures of the peoples to whom it is to be applied. Cultural and ethnic mosaic, Africa is the place where tradition and modernity meet. It must find a formula that guarantees indigenous participation in democracy. While democracy is distinguished by its principles of equality, of majority and representation, indigenous is as much a matter of the individuals who embody it as it is of their culture. The example of Cameroon, Africa in miniature, shows that there is effective indigenous participation at the organic level, but that is difficult to integrate the rules of traditional law into the administration process. At the organic level, the indigenous presence is guaranteed by the rules which organise the various representative elections. At the regulatory level, customary law has met with hostility from modern system. Effectiveness at the organic level and progressiveness at the regulatory level, this is how the African compromise is developing. A compromise which, despite a number of pitfalls, suggest a desire to systematise an African-inspired form of law.

Keywords: Indigenous Peoples, Representative Democracy, Legal Pluralism.

***

A. Introduction

> *« L'un des plus grands et peut-être le principal fondement des Républiques est d'accommoder l'estat au naturel des citoyens, et les édits et les ordonnances à la nature des lieux, des personnes et du temps [...] à l'exemple du bon architecte qui accommode son bâtiment à la matière qu'il trouve sur les lieux ».*[1]

« Matière » que l'on trouve sur les lieux, l'autochtone dans son rapport avec la démocratie a souvent posé le problème de sa participation à la gestion des affaires publiques. Communément présenté comme toute personne issue du sol même où il habite,[2] le concept

* Chargée de Cours à la Faculté des Sciences juridiques et politiques de l'Université de Yaoundé II, Cameroun, Email: ngonguimbouspaule@gmail.com.

1 *Jean Bodin*, Les six livres de la République, Paris 1993, p. 11.

2 *Le Robert*, « autochtone », Dictionnaire en Ligne, https://dictionnaire.lerobert.com/definition/autochtone (last accessed on 15 May 2024).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

d'autochtone n'a pas fini d'être défini.[3] En effet, il n'existe pas de définition officielle, seulement des critères communs aux différents peuples autochtones (l'occupation ancestrale du territoire, la marginalisation au sein de la culture majoritaire, la continuité culturelle et linguistique, le sentiment d'appartenance). Stephane Pessina Dassonville fera remarquer qu' « il existe diverses façons d'être autochtone, de se revendiquer autochtone ».[4] Un effort de systématisation a cependant été fait en droit international. Le Centre des Droits de l'Homme des Nations Unies dans une plaquette sur les « droits des peuples autochtones » propose une définition qui a le mérite de répertorier les principaux critères d'identification.[5] Selon les experts de l'ONU, les peuples autochtones sont « les descendants de ceux qui habitaient dans un pays ou une région géographique à l'époque où des peuples de cultures ou d'origines ethniques différentes y sont arrivés et sont devenus par la suite prédominants, par la conquête, l'occupation, la colonisation ou d'autres moyens". Cette définition s'inspire de celle proposée par le rapport Cobo de 1987 qui insiste sur plusieurs critères comme « la continuité historique avec les sociétés antérieures à l'invasion » ; et la volonté de « conserver, développer et transmettre aux générations futures les territoires des ancêtres et l'identité ethnique qui constituent la base de la continuité de l'existence du peuple ».[6] Il en découle que l'identification des peuples autochtones se fait autour de deux axes que sont la terre et la culture.

S'inspirant des axes ci-dessus énumérés, une tentative d'identification des peuples autochtones africains a été menée par certains auteurs et experts de l'ONU. Les résultats de leurs travaux présentent certains peuples africains comme autochtones et dénient ce

3 Les différentes parties à la construction du droit des populations autochtones ont eu comme échantillons d'études les peuples autochtones d'Amérique du Nord, d'Amérique latine, d'Asie et d'Europe. Que ce soit pour le Groupe de Travail sur les Populations Autochtones qui depuis 1982 est un haut lieu de construction de l'identité autochtone, comme pour l'équipe de préparation de la convention 169 de l'OIT en 1989, les particularités des peuples autochtones d'Afrique n'ont pas été prises en compte dans la définition du concept d'autochtone. Dans l'étude ordonnée par l'ONU sur les discriminations à l'encontre des populations autochtones dans le monde, le Rapporteur J. R. Martinez Cobo reconnait avoir écarté le continent africain faute de renseignements suffisants, bien que se doutant de la présence des autochtones sur cette aire géographique. Cette ignorance des réalités africaines permet d'envisager une prochaine évolution de la notion d'autochtone.

4 *Stéphane Pessina Dassonville,* Le statut des peuples autochtones à la croisée des savoirs, Cahiers d'Anthropologie du droit 2011-2012 (2012), p. 12.

5 La définition ici proposée est le résultat des réflexions menées sur plusieurs décennies par des ethnologues, des organisations humanitaires, et des organisations tels qu'IWGIA (International Work Group for Indigenous Affairs) en 1968 et Survival International en 1969 qui se donnèrent pour but de défendre la cause autochtone. Compromis entre les craintes des États et les revendications autochtones, elle symbolise la reconnaissance par la communauté internationale du fait autochtone.

6 *Albane Geslin,* La protection internationale des peuples autochtones: de la reconnaissance d'une identité transnationale autochtone à l'interculturalité normative, Annuaire Français de Droit International (2011), p. 661.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

statut au reste de la population.[7] En 2003 pourtant, un groupe de travail mandaté par la Commission africaine des Droits de l'Homme et des Peuples (CADHP) a publié un rapport sur les populations/communautés autochtones en Afrique. La conclusion de ce rapport était qu'une définition stricte de ce qu'est un peuple autochtone n'est « ni nécessaire, ni souhaitable » et risquerait d'exclure certains groupes.[8] Partageant cet avis, ROULAND Norbert affirme que la définition proposée par le groupe des experts des Nations Unies est « difficilement applicable dans le contexte africain ».[9] En effet, dans les États occidentaux, la distinction entre autochtones et colons est relativement claire. On y distingue les peuples indigènes et les européens.[10] En Afrique par contre, culture et peuplements sont beaucoup plus imbriqués[11] et chaque ethnie se revendique d'entretenir un lien étroit et ancestral avec le sol qu'elle occupe. Les territoires ethniques se juxtaposant à l'intérieur comme à l'extérieur des frontières, les États africains postcoloniaux sont assimilables à des États multinationaux.[12] Quelle peut donc être la définition la plus adéquate dans le contexte africain ? Dans un effort de définition de l'autochtonie en Afrique, il importe de faire un bref arrêt sur la distinction (lorsqu'elle est possible), du concept d'autochtone d'avec d'autres qui lui sont proches comme l'ethnie et la minorité.

Selon le Dictionnaire Robert, l'ethnie désigne un ensemble de personne que rapprochent un certain nombre de caractères de civilisation, notamment la langue et la culture.[13] Dans son rapport avec l'autochtonie, il est établi que, le mouvement qui a abouti à la protection des populations autochtones plonge ses racines dans les revendications des ethnies indigènes des territoires colonisés. Ethnie au départ, c'est la mise en lumière de leur combat et l'internationalisation de celui-ci qui a permis aux peuples indigènes de réaliser qu'ils faisaient face aux mêmes défis et pouvaient par ce fait constituer une communauté internationale.[14] Ce lien de filiation transparait dans la convention n° 169 de l'OIT relative aux peuples indigènes et tribaux. Dans ce texte, l'organisme international prend en compte

7 Dans le cas du Cameroun par exemple, ce statut n'est reconnu qu'aux descendants des Pygmées et Mbororo.

8 Organisation internationale du Travail, Les droits des peuples autochtones et tribaux dans la pratique, un guide sur la convention No.169 de l'OIT, Genève 2009, p. 14.

9 *Norbert Rouland / Stéphane Pierre-Caps / Jacques Poumarede,* Droit des minorités et des peuples autochtones, Paris 1996, p. 26.

10 Tel est le cas en Amérique du nord et en Amérique Latine où la distinction est claire entre indigènes indiens et descendants des colons.

11 *Rouland / Pierre-Caps / Poumarede,* note 9, p. 26.

12 *Léonard Matala Tala,* L'ineffectivité du droit positif en Afrique subsaharienne, Civitas Europa 31 (2013), p. 250.

13 *Le Robert*, « ethnie », Dictionnaire en Ligne, https://dictionnaire.lerobert.com/definition/ethnie (last accessed on 23 August 2024).

14 *Françoise Morin*, De l'ethnie à l'Autochtonie. Stratégies politiques, Cahiers du monde hispanique et luso-brésilien 63 (1994), p. 162.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

l'identité tribale comme un critère des populations cibles de ladite convention.[15] Il en découle que si à la base de l'autochtonie l'on retrouve les ethnies, celles-ci se distinguent de l'occupant colons en ce qu'elles entretiennent un lien avec la terre qu'elles sacralisent et ont des *us* et coutumes qu'elles veulent préserver et transmettre à leurs descendants. Toute chose qui permet de constater une identité entre ethnie et autochtones.

S'agissant du terme minorité, il indique un ensemble de personnes, de choses, inférieurs en nombre par rapport à un autre ensemble.[16] Au plan juridique ce terme renvoie à « un groupe d'individus généralement fixés à demeure sur le territoire d'un État, qui forme une véritable communauté caractérisée par ses particularités ethniques linguistiques et religieuses et se trouve en infériorité numérique au sein d'une population majoritaire vis-à-vis de la quelle elle entend préserver son identité ».[17] Pris ainsi, l'on pourrait être tenté de conclure pour une identité entre minorités et autochtones. Ce serait une erreur. En effet, le seul critère numérique est insuffisant pour définir une minorité, à ce critère il faut adjoindre celui de la dépendance.[18] Joseph Sumpf et Michel Hugues définissent la minorité comme « un groupe ethnique qui se trouve dans la dépendance d'un groupe ethnique plus puissant soit du point de vue politique, soit du point de vue économique ».[19] Démographie et puissance sont alors les points d'identification d'une minorité. Celle-ci peut être autochtone ou allogène, cela n'emporte aucune conséquence sur son statut de minorité. En conclusion, une minorité n'est pas nécessairement autochtone. Le rapport avec la terre condition *sine qua non* du statut d'autochtone n'étant pas mobilisé dans la définition de la minorité.

« Les peuples africains actuels ne sont nullement des envahisseurs venus d'un autre continent, ils sont tous autochtones »,[20] affirme Cheik Anta Diop. Pour sa démonstration, l'auteur part des données en histoire qui font de l'Afrique, (en particulier l'Afrique noire), le berceau de la civilisation. Il établit alors que depuis l'apparition de *l'homo sapiens*, les africains peuvent retracer leurs origines sur le continent en tant que peuple sans solution de continuité notable.[21] S'il est établi que la population africaine est constituée d'ethnies, donc d'autochtones, il est aussi vrai que ces autochtones au regard de leur situation géographique ne sont pas toujours en minorité. Restreindre la notion d'autochtones aux ethnies minoritaires se révèle alors être une approche limitative. Telle est la position des gouvernements

15 Art. 1(2), Convention No.169 relative au peuples indigènes et tribaux, Organisation internationale du Travail, 1969.

16 *Larousse*, Définitions: minorité, https://www.larousse.fr/dictionnaires/francais/minorit%C3%A9/51666 (last accessed on 25 August 2024).

17 *Gérard Cornu* (ed.)*,* Vocabulaire juridique, Paris 2018, p. 1407.

18 L'histoire des sociétés a connu le phénomène de minorité dominante. Tel fut le cas avec l'apartheid ou la minorité blanche exerçait son pouvoir hégémonique sur la majorité noire. Le cas du Rwanda peut aussi être convoqué ici avec la domination de la minorité Tutsi sur la majorité Hutu.

19 *Joseph Sumpf / Michel Hugues,* Dictionnaire de sociologi*e,* Paris 1973, p. 174.

20 *Cheik Anta Diop*, Les fondements économiques et culturels d'un État fédéral d'Afrique noire*,* Paris 1974, p. 11.

21 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

africains, et nous y souscrivons. L'exemple du législateur congolais, en est illustratif. Dans sa définition de l'autochtone, il dénie l'approche restrictive et interdit l'utilisation du terme pygmée qu'il assimile à l'infraction d'injure.[22] L'autochtone est alors considéré en Afrique au sud du Sahara « comme toute personne qui appartient au groupe ethnique occupant de manière ancestrale ou originale une région du pays ».[23]

« Lorsque, dans la République, le peuple en corps à la souveraine puissance c'est la démocratie ».[24] Modèle de gouvernement par excellence depuis la disparition de la plupart des régimes communistes,[25] la démocratie sera définie ici autour de trois idées, l'égalité, la majorité, et la représentation. La démocratie fait de l'égalité réelle « l'âme de l'État ».[26] il en résulte que, « toute inégalité dans la démocratie, doit être tirée de la nature de la démocratie et du principe même de l'égalité ».[27] Ainsi, l'inégalité ne peut être acceptée en démocratie que si elle contribue à la construction de l'égalité. La démocratie se présente aussi comme le régime politique de la majorité. « Dans le nombre, il y a tout » (en tôi pollôi eni tà panta). Cette formule d'Otanès fait du principe de la majorité, la clé de voûte de la démocratie. En démocratie moderne, le vote à la majorité est le mode privilégié de prise de décision tant au niveau électif qu'au niveau délibératif.[28] Il est l'outil fondateur de la représentation. Troisième pilier convoqué pour définir la démocratie, la représentation implique qu'en démocratie le pouvoir suprême est attribué au peuple qui l'exerce lui-même ou par l'intermédiaire des représentants qu'il élit.[29] Egalité, majorité et représentation loin d'être les critères exhaustifs de la définition de la démocratie, sont ceux qui seront mobilisés dans le cadre des prochains développements.

Mosaïque culturelle, religieuse et ethnique, l'encrage profond des clivages qui caractérisent la société africaine, donne une tonalité plus grave aux débats sur l'application stricte des principes de démocratie. L'égalité démocratique est-elle une égalité arithmétique ? absolue ? Les décisions de la majorité sont-elles toujours vertueuses ? tant d'interrogations

22 Art. 1er loi n°5-2011 du 25 février 2011 portant promotion et protection des droits des populations autochtones

23 *José Woehrling,* Les trois dimensions de la protection des minorités en droit constitutionnel comparé, Les minorités, Sherbrooke 2003, p. 104.

24 *Charles de Secondat de Montesquieu,* De l'esprit des lois, Paris 1995, p. 25.

25 *Lawrence Olivier / Yves Poirier*, Égalité et humanité: Le système moral de la démocratie*,* Politique et Société 16 (1997), p. 29.

26 *Montesquieu*, note 24, p. 47.

27 Ibid., p. 48.

28 *Charles Girard,* La règle de la majorité en démocratie; équité ou vérité?, Raison Politique 53 (2014), p. 107.

29 *Cornu*, note 17, p. 712; *Philippe Ardant*, Institutions politiques et Droit constitutionnel*,* Paris 2004, présente la démocratie comme un système de participation à la gestion publique qui offre deux voies d'expression. La première qui est la voie royale mais de moins en moins utilisée, est la démocratie directe, et la seconde qui connait les faveurs de la majorité des systèmes constitutionnels est la démocratie représentative, incarnée par le procédé électoral.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

qui ont été à l'origine de l'approche consociative[30] de la démocratie. Cette approche moins rigide prend en compte les spécificités des sociétés auxquelles on veut l'appliquer. . En Afrique noire, terre de tradition, la démocratie est plus le fruit d'une importation que le résultat d'une construction.

Comprise comme une opinion, une manière de faire, transmise par les générations antérieures,[31] la tradition a souvent été présentée comme la source des règles régissant les sociétés autochtones. Gérard Cornu dans son *Vocabulaire juridique,* la présente comme une « pratique héritée du passé qui peut être élément d'un usage ou d'une coutume ».[32] Ensemble de pratiques, de croyances et de valeurs transmises au sein d'une société,[33] la tradition est présentée comme un élément fondateur de la société, de son ordre de sa stabilité. Elle est selon les propos d'Olivier Nay, un « puissant registre de légitimation et de justification de la conservation de la société ».[34] Il ressort de ce qui précède que la tradition se saisit d'abord dans son rapport au temps. Elle désigne ce qui plongeant ses racines dans le passé, a les prétentions de continuer ou continue de régir le présent. Elle se saisit aussi dans son rapport à la morale. Ici la tradition renvoie à des prescriptions, des normes, destinées à la codification des comportements.[35] Ces normes et prescriptions jouissent d'une force morale contraignante auprès des personnes qu'elles entendent régir avec un champ d'application qui excède les considérations juridiques pour s'étendre aux rituels et pratiques culturelles. Souvent assimilée à la coutume, la tradition s'en distingue en ce que la coutume est « une norme de Droit objectif fondée sur une tradition populaire (consensus utentium) qui prête à une pratique constante, un caractère juridiquement contraignant ».[36] Avatar juridique de la tradition, la coutume porte les marques de la rusticité et de l'arriération, et semble se situer à l'opposer de la modernité.

30 Terme forgé par le politiste Arend Lijphart, alliant « consensus » et « association », pour désigner les régimes démocratiques qui font une place particulière à différentes communautés religieuses ou linguistiques, en droit ou par convention. L'idée générale de Lijphart consistait à montrer que le pluralisme élevé d'une société n'était pas nécessairement un facteur d'éclatement politique grâce à l'existence de mécanismes institutionnels facilitant une relative intégration des élites. Lire à ce sujet *Julien Lacabanne*, La démocratie consociative, Paris 2016.

31 *Académie Française*, « tradition », Dictionnaire de l'Académie française, 9e édition, https://www.dictionnaire-academie.fr/article/A9T1757 (last accessed 29 October 2025).

32 *Cornu*, note 17, p. 625.

33 *Olivier Nay* (ed.)*,* Lexique de science politique, Paris 2017, p. 245.

34 *Nay*, note 34, p. 245.

35 *Godefroy Onana Noah,* Tradition et modernité, quel modèle pour l'Afrique ? Une étude du concept tradition dans ses rapports avec la modernité des Lumières jusqu'à l'époque contemporaine, Paris 2012, p. 6.

36 *Cornu*, note 17, p. 625. Dans son entrée « coutumier, ière », l'auteur présente expressément l'adjectif comme un synonyme de traditionnel, et étend son application non seulement aux règles et maximes mais aussi à des notions juridiques et à des concepts.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

La modernité du point de vue temporel, renvoie à ce qui est actuel, de notre époque ou d'une époque récente.[37] Sous cet angle, elle s'oppose à la tradition qui est généralement taxée d'anachronique et d'obscurantiste. Du point de vue du droit, la modernité dans les États issus de la décolonisation renvoie au droit inspiré de la civilisation occidentale. Ce droit s'oppose au droit traditionnel qui régissait les rapports sociaux avant l'arrivée des européens.[38] La notion de modernité est alors utilisée pour évoquer le mouvement de transformation des idées et des représentations que suivent les sociétés.[39] L'histoire africaine de la rencontre entre la modernité et la tradition est entachée d'incompréhension, de violence, d'oppression et de soumission, qui ont abouti finalement à la négation pure et simple de la tradition africaine.[40] Au cours des dernières décennies, la montée croissante des revendications d'un retour à l'identité africaine, a débouché sur la nécessité de définir une position africaine devant concilier tradition et modernité, d'où l'idée de compromis.

Le compromis se défini comme « un accord dans lequel on se fait des concessions mutuelles ».[41] Phénomène perpétuellement condamné en théorie et toujours employé en pratique[42], le compromis est aussi un état intermédiaire.[43] Il apparaît dans un contexte de crise, de blocage dans le fonctionnement des institutions.[44] Accord dans lequel on se fait des concessions mutuelles, le compromis se présente comme une pondération des contraires.[45] Loin d'être le résultat du rapport de force, le compromis est l'expression de la volonté de cheminer ensemble. Rapporté à la participation autochtone à la démocratie, le compromis serait cette formule qui par un assouplissement des principes de démocratie, définit un cadre de cohabitation qui prend en compte l'héritage de la tradition et les acquisitions de la modernité.[46]

Situé au centre de l'Afrique, le Cameroun est un pays à la géographie et à la démographie plurielles. Afrique en miniature, ce pays offre une belle synthèse de l'Afrique avec ses plus de deux cent cinquante (250) ethnies.[47] Ancien territoire sous tutelles française

37 *Académie Française*, « modernité », Dictionnaire de l'Académie française, 9e édition, https://www.dictionnaire-academie.fr/article/A9M2456 (last accessed on 29 October 2025).

38 Voir « Moderne », dans *Cornu*, note 17, p. 1418.

39 Voir « Modernité », dans *Nay*, note 34, p. 681.

40 *Onana Noah*, note 35, p. 8.

41 Académie Française, « compromis », Dictionnaire de l'Académie française, https://www.dictionnaire-academie.fr/article/A9C3308 (last accessed on 29 October 2025).

42 *Ioan Petrovisci*, La philosophie du compromis, La Revue politique et littéraire 75 (1937), p. 736.

43 Académie Française, note 41.

44 *Jean-Luc Engoutou*, Le compromis constitutionnel dans les États d'Afrique noire francophone, Revue française de droit constitutionnel 121 (2020), p. 142.

45 *Mohamed Nachi*, La vertu du compromis: dimensions éthique et pragmatique de l'accord, Revue Interdisciplinaire d'Études Juridiques 46 (2001), p. 89.

46 C*hristophe Massot,* Les dynamiques du compromis productif, Marseille 2009, p. 17.

47 *Rodrigue Ngando Sandje*, Le peuple camerounais fier de sa diversité linguistique et culturelle, élément de sa personnalité nationale qu'elle contribue à enrichir, mais profondément conscient de la nécessité impérieuse de parfaire son unité, proclame solennellement qu'il constitue une seule

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

et britannique, le Cameroun est le théâtre des revendications d'auto-détermination dans sa partie anglophone, et de replis identitaires autour des questions de représentation. La cohabitation dans cette mosaïque ethnique et culturelle n'est pas chose acquise et fait de ce pays un échantillon indiqué pour l'étude de la représentation politique des populations autochtones en Afrique.

Porté par la vague d'intéressement des populations autochtones à la gestion de la chose publique, le constituant et le législateur camerounais ont pris plusieurs textes qui promeuvent la participation autochtone dans la gestion de affaires tant locales que nationales. D'où l'intérêt de savoir « Quelle est la place de l'autochtonie dans la démocratie au Cameroun ? » L'hypothèse ici formulée est que la place de l'autochtonie dans l'expression démocratique au Cameroun est ambivalente, navigant entre acceptation et résistance.

La réflexion qui s'engage ici est d'un intérêt indéniable. Au plan théorique, elle se loge dans le cadre du droit constitutionnel démotique. Elle est une contribution à la formation d'une définition du concept d'autochtonie dans le contexte africain et *a fortiori* une contribution à la réflexion sur la participation du peuple dans la formation et l'évolution des constitutions. Aussi, elle poursuit la réflexion sur la réception de la démocratie occidentale par les sociétés pluriethniques. Sous l'angle de pratique, la réflexion met en lumière tout en les évaluant, les solutions consacrées par le législateur camerounais et en dégage les incidences en matière de démocratie.

Ancrée dans l'exégèse des textes, la recherche sera menée sous la bannière du positivisme juridique. Il apparait alors que si le législateur a tempéré l'exigence d'égalité afin d'assurer une représentation autochtone au plan organique (B), l'autochtonie dans son volet culturel, peine à imprégner le corpus des règles du droit applicable (C).

B. L'Effectivité d'une Représentation Autochtone au Plan Organique

Selon René Otayek, dans la construction de l'État africain, « l'ethnicité devrait être envisagée comme mode de participation politique, une rationalité qui a sa logique propre ».[48] La prise en compte de l'ethnicité, au Cameroun, a induit un assouplissement des principes d'égalité et de majorité chers à la démocratie. Le législateur a ainsi édicté des normes qui favorisent l'inclusion des autochtones dans le processus électoral d'une part (I), et participent à l'érection de la chefferie traditionnelle dans les politiques de représentation d'autre part (II).

et même nation, engagée dans le même destin et affirme sa volonté inébranlable de construire la patrie camerounaise sur la base de l'idéal de fraternité, de justice et de progrès, in: *Jean-Louis Atangana* (ed.), La Constitution de la République du Cameroun, commentaire article par article, Paris 2025, p. 24.

48 Cité par *Matala Tala*, note 12 p. 248.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

I. L'Existence des Mesures Particulières d'Inclusion dans le Processus Électoral

La représentation politique au Cameroun est organisée aussi bien au niveau local qu'au niveau national. Au niveau national celle-ci est incarnée par l'Assemblée Nationale et le Sénat,[49] et au niveau local elle est matérialisée par les collectivités territoriales décentralisées.[50] Quel que soit le niveau de représentation considéré, l'on observe l'existence des mesures visant à garantir la participation des populations autochtones à la gestion des affaires publiques. Celles-ci encadrent tant la phase pré-électorale (1), que la désignation des organes (2).

1. Dans la Phase Pré-Électorale

Le processus électoral débute avec une phase pré-électorale où apparait la première mesure favorisant la participation des populations autochtones à la gestion de la chose publique. Cette mesure est contenue dans la constitution des listes des candidats aux élections représentatives. Les listes de candidature aux différents scrutins représentatifs sont soumises à la règle du reflet de la composition sociologique de la circonscription électorale.[51] Cette règle vise à éviter l'isolement d'une composante sociologique de la population d'une circonscription électorale du fait de sa minorité. Consacrée pour la première fois dans les lois électorales de 1991 et de 1992,[52] la notion de composante sociologique qui est au cœur de cette règle doit être bien comprise, toute chose qui permettra d'en apprécier les incidences.

James Mouangue Kobilla nous indique que l'exigence de la composition sociologique de la liste des candidats s'apprécie sous l'angle de vue socio-ethnique et non du point de vue socio-professionnel.[53] Il est question ici de garantir la représentation de tous les groupes ethniques qui constituent la population de la circonscription électorale concernée.

49 L'art. 2 de la constitution du 18 janvier 1996, pose que La souveraineté nationale appartient au peuple camerounais qui l'exerce soit par l'intermédiaire du Président de la République et des membres du Parlement… Dans le cadre du présent travail, nous ne nous arrêterons pas sur la représentation par l'intermédiaire du Président de la République, seuls le parlement et la représentation locale nous intéresseront.

50 Art. 55 Constitution camerounaise.

51 Cette exigence est posée par l'article 151(3) du code électoral camerounais pour ce qui est de l'élection des députés, par l'article 171(3) pour l'élection des conseillers municipaux et l'article 218(3) pour les élections sénatoriales.

52 Aucune disposition de la constitution de 1972 ne renvoyait à l'exigence du respect de la composition sociologique. Cette exigence fait son apparition au lendemain de la conférence tripartite de 1990 entre les pouvoirs publics, les partis politiques et la société civile. Depuis son apparition dans la loi N° 91-20 du 16 décembre 1991 fixant les conditions d'élections des députés à l'Assemblée nationale, cette règle n'a plus jamais disparue des textes législatifs encadrant les élections au Cameroun.

53 *James Kobilla Mouangue*, Droit de la participation politique des minorités et des populations autochtones, l'application de l'exigence de la prise en compte des composantes sociologiques de

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Plus imprégnée d'un souci d'équité que d'égalité, cette règle vise à garantir la représentation des populations autochtones au sein des organes décentralisés des différentes circonscriptions. Elle vient conforter la position du législateur de 1990 qui posait déjà à son époque une interdiction d'autorisation de tout parti politique « qui porte atteinte à (…) l'unité nationale (…) par toute sorte de discriminations basées sur les tribus, les provinces les groupes linguistiques ou les confessions religieuse (ou qui) favorise la belligérance entre les composantes de la Nation ou entre des pays ». [54]

Présente depuis les élections municipales, la règle du respect de la composante sociologique va émailler tout le processus électoral, et produire une réaction en chaine au niveau des élections soumises au suffrage indirect que sont l'élection des conseillers régionaux et l'élection des sénateurs.[55] Selon les dispositions du Code électoral en vigueur, les conseillers municipaux constituent le collège électoral des conseillers régionaux délégués des départements.[56] Quant au collège électoral des soixante-dix (70) sénateurs issus des élections sénatoriales,[57] il est constitué de conseillers municipaux et de conseillers régionaux.[58] Avec cet effet d'engrenage, le législateur parvient à imposer la présence des autochtones aussi bien dans la constitution des listes de candidatures, que dans la constitution des collèges électoraux des élections au suffrage indirect. L'exemple de l'élection des conseillers régionaux est illustratif en la matière.

Collectivité territoriale décentralisée au territoire étendu, la région fait la part belle à la participation autochtone quand vient le moment de constituer ses organes. Au terme de l'article 57 de la constitution camerounaise en vigueur, les organes de la région sont le Conseil Régional, organe légiférant et le Président du Conseil Régional, organe exécutif. Les conditions qui encadrent l'élection de ces différents organes révèlent la pensée du législateur camerounais en ce qui concerne la participation des autochtones à la vie politique.

S'agissant des conseillers régionaux, le code électoral distingue deux types de conseillers régionaux : les délégués des départements et les représentants du commandement traditionnel.[59] La question des représentants du commandement traditionnel étant traitée dans les développements *infra,* l'emphase sera mise ici sur le mode de désignation des

la circonscription dans la constitution des listes des candidats aux élections au Cameroun, Revue Française de Droit Constitutionnel 3 (2008), p. 655.

54 Art. 9, loi n°90/56 du 19 décembre 1990 portant sur la création des partis politiques.

55 Toutes les élections au Cameroun ne sont pas soumises au suffrage direct. Seules celle du Président de la République, celle des députés et celle des conseillers municipaux bénéficient du plébiscite direct du peuple. Les élections des conseillers régionaux et des sénateurs quant à elles sont soumises aux suffrages indirects, avec un collège électoral préalablement déterminé.

56 Art. 248, loi n° 2012/001 du 19 avril 2012 portant code électoral, modifiée et complétée par la loi n° 2012/017 du 21 décembre 2012.

57 La constitution camerounaise en organisant la désignation des sénateurs, prévoie que le Président de la République procède à la nomination de trente (30) sénateurs sur les cents (100) qui constituent le Sénat.

58 Art. 222, loi n° 2012/001 du 19 avril 2012 portant code électoral, note 56

59 Art. 243, loi n° 2012/001 du 19 avril 2012 portant code électoral, note 56.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

autres organes. Les délégués des départements sont élus au suffrage universel indirect, par un collège électoral constitué de conseillers municipaux. Ces conseillers municipaux qui constituent le collège électoral des représentants de départements étant issus d'une élection soumise à la règle du respect de la composante sociologique, les conseillers municipaux autochtones, ont ainsi l'opportunité de s'assurer d'une représentation autochtone au niveau régional. Par ailleurs, l'autochtonie jouit d'un privilège dans la désignation des organes de direction.

2. Dans la Désignation des Organes

Au sein de la région, le président du Conseil Régional est l'organe qui incarne l'exécutif régional. Son élection échappe à l'application stricte de la règle de la majorité, et est marquée par une condition promotrice de la participation des autochtones à la gouvernance locale. Au terme de l'article 307 du Code Général des Collectivités Territoriales Décentralisées, le président du conseil régional doit être une personnalité autochtone de la région. Force est de constater qu'à ce niveau, la règle est plus restrictive que celle du respect de la composante sociologique. Ici l'autorité autochtone visée est celle originaire de la circonscription électorale concernée. On retrouve aussi cette préférence dans l'organisation des régions à statut spécial.[60] Dans ces régions, le Président et le Vice-Président du Conseil Exécutif Régional[61] et au moins un secrétaire du conseil exécutif[62] sont des personnalités autochtones. Aussi, les organes de ces régions que sont le Conseil Exécutif Régional et l'Assemblée Régionale sont présidés par le président du Conseil Exécutif Régional qui est une personnalité autochtone. C'est dire que l'autochtonie est au cœur de la gouvernance de la région.

L'attractivité du statut d'autochtone se manifeste aussi au sein des communautés urbaines.[63] Les organes de ces communautés sont : l'organe délibérant qu'est le Conseil de Communauté et l'organe exécutif que sont le Maire de la Ville et ses adjoints[64]. Alors que le Conseil de Communauté est composé des maires des communes d'arrondissement qui constituent la communauté urbaine et des représentants désignés en son sein[65], le Maire de

60 Au Cameroun, les régions du Nord-Ouest et du Sud-Ouest présentent la particularité d'avoir un héritage colonial britannique. L'administration coloniale britannique y appliquait un système d'administration directe, toute chose qui dans le processus de décentralisation a conduit à la reconnaissance d'un statut spécial aux dites régions.

61 Art. 353, loi n° 2019/024 du 24 décembre 2024.

62 Art. 339, Ibid.

63 La mairie de ville est l'appellation que revêt une communauté urbaine. Celle-ci est une collectivité territoriale composée d'au moins deux communes.

64 Art. 243, loi n° 2019/024 du 24 décembre 2019, note 61.

65 Art. 244, Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

la ville qui est la figure de proue de l'exécutif, est une personnalité autochtone de la Région de rattachement de la Communauté Urbaine.[66]

La décentralisation constitue l'axe fondamental de promotion du développement de la démocratie et de la bonne gouvernance au niveau local.[67] La participation autochtone y est garantie au plan organique par la règle du respect de la composition sociologique des listes qui émaille le processus électoral d'une part, et par le privilège assuré aux autochtones dans la désignation aux postes de représentation, d'autre part. A côté de tous ces aménagements, la chefferie traditionnelle, institution autochtone émerge comme un acteur majeur de la politique de décentralisation.

II. L'Erection de la Chefferie Traditionnelle

La chefferie traditionnelle au Cameroun comme dans la plupart des pays d'Afrique noire, représente le creuset par excellence où se forge l'expression culturelle des peuples.[68] Auxiliaire d'administration[69] au lendemain de l'indépendance, les chefs traditionnels se voient portés dans l'arène de la décentralisation à la faveur de la création des régions (1). Du fait de la spécificité des régions à statut spécial, ils y connaitront un sort plus heureux (2).

1. Les Chefs Traditionnels Acteurs de la Décentralisation

La chefferie traditionnelle est selon l'expression de Jean Njoya, « le tabernacle anthropologique de l'État [70]». En effet chaque aire géographique au Cameroun, cache une aire culturelle dont il faut assurer la sauvegarde nonobstant les politiques d'intégration nationale. Au terme du décret n° 77/245 du 15 juillet 1997 portant organisation des chefferies traditionnelles, la chefferie traditionnelle est organisée sur une base territoriale et comporte trois degrés hiérarchisés.[71] Immergées dans le milieu et les réalités sociales et culturelles

66 Art. 246, Ibid.

67 Art. 5(2), Ibid.

68 *Sylvain Charles Amougou Mveng,* La chefferie traditionnelle au Cameroun dynamique de valorisation du patrimoine culturel à l'âge de la libéralisation politique, Revue Africaine de Droit et de Science Politique 24 (2021), p. 562.

69 Le décret n°77/245 du 15 juillet 1977 portant organisation des chefferies traditionnelles en ses articles 19 et 20, fait des chefs traditionnels des auxiliaires d'administrations chargés de seconder les autorités administratives dans leur mission d'encadrement des populations.

70 *Jean Njoya*, Autorités Traditionnelles et Pouvoir Politique au Cameroun: Captation Politico-Juridique et Mobilisation des Ressources d´Adaptation et de Maintien, World Comparative Law 56 (2023), p. 423.

71 Aux termes de l'article 2 du décret n°77/2245 du 15 juillet 1977 portant l'organisation des chefferies traditionnelles, l'on distingue les chefferies de premier degré, les chefferies de deuxième degré et les chefferies de troisième degré.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

locales, les chefferies traditionnelles ont et se réclament d'un fondement ancestral.[72] Avec à leur tête des chefs choisis au sein des familles appelées à exercer coutumièrement le commandement traditionnel,[73] les chefs traditionnels sont désignés par les autorités du pouvoir central après consultation de la notabilité. Aux termes de l'article 20 du décret portant organisation et fonctionnement des chefferies traditionnelles, le chef traditionnel est un auxiliaire de l'administration centrale, placé sous l'autorité du ministre de l'administration territoriale. Il seconde les autorités administratives dans leur mission d'encadrement des populations. Avec l'avènement de l'État unitaire décentralisé, la chefferie traditionnelle va connaitre une valorisation, et se présente aujourd'hui comme une institution transcendantale et mutante,[74] une passerelle entre tradition et modernité.

Les représentants du commandement traditionnel constituent le second type de conseillers régionaux. Ils sont issus d'un cadre bien délimité. En organisant leur processus de désignation, le législateur précise que ceux-ci sont élus par leurs pairs au sein des chefs traditionnels du premier, deuxième et troisième degré qui vérifient le statut d'autochtones et dont la désignation a été homologuée conformément à la réglementation en vigueur.[75] Par cette précision, le législateur exclut du processus d'élection les chefs de zones, de quartiers et de blocs créés en milieu urbain selon les dispositions de l'article 31 du décret de 1977,[76] ainsi que ceux des catégories visées mais ne vérifiant pas le statut d'autochtones. Au cœur même de la préservation de l'autochtonie et de la perpétration de l'identité tribale et ethnique, la chefferie traditionnelle dans les régions à statut spécial connait une accentuation de sa représentation dans le jeu démocratique.

2. L'Accentuation dans les Régions à Statut Spécial

La participation des chefs traditionnels à la gouvernance est plus accentuée dans les régions du Nord-Ouest et du Sud-Ouest. Ces régions à statut spécial,[77] présentent des spécificités tant dans leur organisation que dans leur fonctionnement. L'Assemblée Régionale qui est l'organe délibérant ici comporte une « house of chief » aux pouvoirs accrus. Avec ses vingt

72 *Hubert Ouedraogo*, Décentralisation et pouvoirs traditionnels: le paradoxe des légitimités locales, Mondes en Développement 133 (2006), p. 15.

73 Art. 8, décret n°77/2245 du 15 juillet 1977, note 69.

74 *Sylvain Charles Amougou Mveng*, Liturgies et ritualisation de l'État du Cameroun en une grande chefferie, Damà Ninav 13 (2023), p. 92.

75 Art. 248(2), loi n° 2012/001 du 19 avril 2012, note 56.

76 Cet article ouvre la possibilité à l'administration de procéder au découpage de certaines agglomérations urbaines en zones quartiers et blocs. Bien qu'instituant des chefs à la tête de ces unités, le législateur n'a pas prévu que ceux-ci participeraient de ce fait à la désignation des conseillers régionaux.

77 L'année 2016 a connu une montée des revendications d'auto-détermination des populations des régions du nord-ouest et du sud-ouest. Cette crise a donné lieu à la tenue d'un Grand Dialogue National qui a entre autres eu pour résolution la reconnaissance d'un statut spécial aux deux régions d'expression anglaise.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

(20) membres issus du commandement traditionnel, elle est dotée de deux commissions et émet un avis conforme sur les questions relevant du statut de la chefferie traditionnelle, de la gestion et la conservation des sites, monuments et vestiges historiques, de l'organisation des manifestations culturelles et traditionnelles dans la Région, de la collecte et la traduction des éléments de la tradition orale.[78]

Partie prenante à la nouvelle gouvernance, l'autochtonie jouit des faveurs du législateur camerounais avec un cadre juridique garanti à tous les niveaux de représentation. Si l'approche organique semble satisfaisante, l'on ne peut dire autant de l'approche matérielle où les règles du droit traditionnel peinent à pénétrer les règles de droit écrit.

C. La Frugalité de la Représentation Autochtone au Plan Matériel

En 1758, Montesquieu affirmait déjà que « Les lois doivent être tellement propres au peuple pour lequel elles sont faites que c'est un très grand hasard si celles d'une nation peuvent convenir à une autre ».[79] Ces propos mettent en lumière la pertinence des origines culturelles du droit. Dans un contexte africain où les pluralismes juridiques ont débouché sur une juxtaposition, voire même une absorption des droits africains par celui hérité de la colonisation,[80] on remarque contre toute attente une résistance du droit coutumier[81] qui passe par des phénomènes de mutation de la coutume (I), et ce, malgré l'existence de certains écueils (II).

I. L'Adaptation de la Coutume au Nouvel Environnement

Ubis societas, ibi jus, cette maxime pose que, les groupes humains, quelle que soit la bannière sous laquelle ils se regroupent organisent leur fonctionnement social en secrétant leur propre droit, codes de conduite et modes de solidarité. L'Afrique précoloniale n'a pas échappé à cette règle. Outil normatif des traditions en Afrique, la coutume est selon Gérard Cornu « une règle de droit d'origine non étatique, que la collectivité a fait sienne par habitude dans la conviction de son caractère obligatoire ».[82] Après sa rencontre avec le droit écrit, la coutume va progressivement muter pour s'adapter au nouvel environnement juridique des sociétés modernes. Cette mutation commence par la résistance au droit écrit (1), pour aboutir à la codification des règles coutumières (2).

78 Art. 339, loi n°2019/024 du 24 décembre 2019, note 61.

79 *Montesquieu*, note 24, p. 24.

80 *Stanislas Melone*, Les juridictions mixte de droit écrit et de droit coutumier dans les pays en développement, du bon usage du pluralisme judiciaire en Afrique : l'exemple du Cameroun, Revue internationale de droit comparé 2 (1986), p. 336.

81 *Diakhaté Maty BB-Laye*, Renaissance africaine : l'environnement juridique, Afrique et développement XXXIX (2014), p. 121.

82 *Cornu*, note 17, p. 625.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

1. La Résistance au Droit Écrit

C'est un constat, en dépit de son entrée impériale dans les sociétés africaines, le droit écrit n'a pas pu obtenir un règne sans partage. La coutume, tel le naturel n'a eu cesse de revenir au galop. Caractérisée par son oralité, sa sacralité et son caractère communautaire,[83] la coutume a connu les assauts du droit écrit introduit par les puissances colonisatrices. Il était alors question que les textes juridiques modernes semblables à ceux du colonisateur remplacent l'ordre juridique traditionnel.[84] Cet effort de substitution entamé par le colon, a été poursuivi par l'administration post coloniale qui a développé des méthodes qui vont de l'adoption de mesures extrêmes à l'implémentation de mesures souples. C'est ainsi que dans certains États d'Afrique subsaharienne l'on a assisté à la consécration constitutionnelle de la condamnation de la coutume. Ici, les nouveaux gouvernements ont parfois de façon directe proclamé la suppression des droits coutumiers considérés comme contraires au développement,[85] d'autres ont procédé de façon indirecte en supprimant les juridictions coutumières sensées appliquer le droit coutumier.[86] Ceux des États qui ont adopté les mesures souples de suppression à l'instar du Cameroun, ont opté pour le maintien d'un système dualiste où de façon progressive l'on procéderait au remplacement des règles de droit coutumier par les règles de droit moderne. Mesures souples ou mesures extrêmes la finalité était la même : l'adoption d'un système juridique moderne unique.

Cependant, le droit coutumier a résisté et même, il triomphe se répand et déborde de son domaine.[87] Cette résistance se traduit par deux attitudes de la coutume face au droit écrit. D'une part l'on assiste à la contradiction du droit écrit par le droit coutumier, et d'autre part à la complémentarité de celui-ci par la coutume. S'agissant de la contradiction, l'on observe que, malgré l'existence de règles de droit écrit dans certains domaines, les populations continuent d'appliquer les règles coutumières régissant lesdits domaines. La complémentarité quant à elle, se traduit par l'application de la coutume dans les domaines non pris en compte par la législation moderne. Cette complémentarité a pu être constatée en matière civile en ce qui concerne l'institution du mariage et l'organisation de la succession.[88]

83 *Maty BB-Laye*, note 81, p. 123, lire aussi *Jacques Vanderlinden*, Aspect de la règle de droit dans l'Afrique traditionnelle, in: Charles Perelman (ed.), La règle de droit, Bruxelles 1971, pp. 131-141.

84 *Melone*, note 80, p. 328.

85 Tel a été le cas en Guinée où l'ordonnance n° 45/P.R.G. du 20 novembre 1960 a abolit le droit coutumier.

86 Le Sénégal, le Mali, la Côte d'Ivoire et le Burundi ont procédé à la suppression des juridictions coutumières après leur accession à l'indépendance. Sur ce point lire, *Pierre Etienne Kenfack*, Droits écrits et droits coutumiers dans les Etats d'Afrique noire francophone aujourd'hui, Teoria de Critica della Regolazione Sociale 2 (2021), p. 281.

87 *Melone,* note 80, p. 330.

88 Relativement au mariage, la coutume continue de régir les phases qui précèdent la cérémonie civile. Celles-ci vont de la présentation du fiancé aux parents de la jeune fille à la dot. Concernant

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Le processus de mutation de la coutume, règle de droit des peuples autochtones s'est amorcé par la résistance de celle-ci à l'hégémonie du droit écrit pour se poursuivre par son adaptation au nouvel environnement juridique.

2. La Progressive Codification de la Coutume

L'une des critiques fortes formulées contre le droit traditionnel africain réside en son oralité. Ce droit que l'on retrouve dans les proverbes dictons et adages,[89] souffre de son mode de transmission qui est un facteur d'insécurité juridique. La codification des droits traditionnels se présente alors comme un moyen de combler cette lacune.[90] Par codification, l'on entend ici l'« entreprise concertée de rédaction d'une règle jusqu'alors coutumière ».[91] Celle-ci permet à la coutume de laisser ses vêtements anachroniques d'oralité pour revêtir un manteau taillé dans une étoffe de sécurité. La codification dans le contexte camerounais connait une double implémentation. Au niveau constitutionnel, le préambule de la constitution reconnait protège et encourage la pluralité culturelle ethnique et linguistique du pays. Au plan législatif, un vaste mouvement de codification des pratiques coutumières a été engagé. Le dernier acte en la matière est la possibilité offerte aux conjoints de faire enregistrer leur union traditionnelle aux fins de lui donner une protection juridique.

Cependant, si la codification se présente comme la passerelle entre tradition et modernité, la question de la conformité à l'ordre public des règles coutumière se pose. Si au plan interne il est acquis que la coutume résiste au droit d'inspiration occidentale du fait de son ancrage local, qu'en est-il des règles de droit internationales avec lesquelles elle pourrait entretenir des rapports de contrariété ? La coutume doit-elle disparaitre devant les normes du droit international ? Ou alors doit-elle guider les États engagés dans un processus de réforme aux motivations endogènes ? C'est une constance sur la scène internationale que certains droits protégés par des instruments internationaux constituent une violation des droits traditionnels africains.[92] Les États africains dans la manifestation de leur souveraineté gagneraient à s'inspirer des règles coutumières quand celles-ci encadrent les questions juridiques en débats. La codification offre la possibilité de souscrire à la devise de la philosophie de lumière formulée par Kant en ces termes « Saper aud » ; « Aie le courage de te servir de ton entendement » ; car, comme le dit Matala Tala, « une norme sociale

l'encadrement de la succession, le doit traditionnel régit la succession personnelle du défunt qui est encore ignorée par le droit moderne qui ne prend en compte que la succession matérielle.

89 *Ben Luther Touere Elenga*, Justice traditionnelle et système africain de protection des droits de l'homme, La Revue des droits de l'homme 22 (2022), p. 6.

90 *Kenfack*, note 86, p. 285.

91 *Cornu*, note 17, p. 424.

92 Les considérations autour de la question de l'homosexualité sont illustratives en la matière. Alors que l'on assiste à la reconnaissance de nouveaux genres sur la scène internationale, la tradition africaine n'a cesse de condamner les pratiques d'homosexualité et plaide pour le maintien de la pénalisation de celles-ci.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

rendue obligatoire par un texte juridique ne s'appliquera que si elle est sociologiquement praticable ».[93] Il convient alors que les États africains aient le courage de penser par eux-mêmes afin d'articuler les héritages des différents systèmes, pour en dégager un droit sans conflit.

La coutume, norme d'organisation sociale des populations autochtones, a résisté à la destinée qui lui était prédite. Entre résistance et adaptation, elle participe à l'expression démocratique de ces populations. Néanmoins, le compromis ainsi trouvé entre tradition et modernité reste menacé par l'existence de certains écueils.

II. Les Écueils à une Participation Efficiente

La participation des autochtones à la démocratie passe par l'implication de ceux-ci tant au niveau individuel qu'au niveau règlementaire. Cette participation se voit affaiblie par la marginalisation des ethnies autochtones minoritaires (1) et la fébrilité des juridictions traditionnelles (2).

1. La Marginalisation des Ethnies Autochtones Minoritaires

Selon les critères indiqués par les instruments du droit international, deux grands groupes d'autochtones ont été répertoriés au Cameroun. Il s'agit des pygmées d'une part et des Mbororos d'autre part. Dans le cadre des présents développements, nous avons estimé que cette approche des instances internationales de la notion d'autochtonie présente un caractère limitatif au regard de la réalité africaine. Dans une approche où les différentes ethnies présentes sur le continent bénéficient du statut d'autochtones lorsqu'elles se trouvent sur « la terre de leurs ancêtres » les groupes tels que les Pygmées et les Mbororos sont des minorités autochtones se différenciant des autres autochtones en ce qu'elles sont minoritaires.

Les pygmées sont des peuples de forêt. Leurs populations qui pratiquent la chasse et la cueillette sont reparties en trois groupes distincts : les Bakas, les Bakola encore appelés Bagyelis et les Bedzan. Les Mbororos quant à eux sont des éleveurs nomades repartis sur l'ensemble du territoire avec une forte concentration dans le septentrion.[94] Ces peuples nonobstant leurs situations géographiques respectives, rencontrent les mêmes problèmes en matière de représentation politique.

Alors qu'ils partagent les mêmes divisions administratives avec les peuples bantous, les pygmées et le Mbororos se réclament être des peuples distincts et veulent être reconnus comme tel.[95] La cohabitation avec d'autres groupes autochtones plus nombreux et plus émancipés qu'eux, met les minorités autochtones en situation de non-représentation dans les instances démocratiques. Bien que le cadre règlementaire précédant 1996 ne prenait

93 *Matala Tala*, note 12, p. 242.

94 Bureau international du Travail, Les peuples autochtones au Cameroun: guide à l'attention des professionnels des médias, Genève 2015, p. 14.

95 Organisation internationale du Travail, note 8, p. 15.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

pas explicitement en compte les questions autochtones, il existait déjà des mécanismes de représentation visant à intégrer les différentes composantes de la population. Tel est le cas de la politique d'équilibre régional mise sur pieds par le premier président camerounais. Cette politique qui fragilise le postulat d'égalité défendu par la démocratie, repose sur l'idée selon laquelle la représentation de toutes les ethnies ou régions du pays aux postes de direction serait le seul modèle capable d'assurer la participation universelle aux tâches d'administration de l'État. Fort de cela, il était question de réaliser un microdosage à l'intérieur de chaque circonscription administrative, aux fins d'assurer la représentation des ethnies locales.[96] C'est ainsi que les postes de maire revenaient systématiquement aux personnes originaires de la région. Au niveau de l'administration centrale, les considérations d'origines régionales et départementales étaient prises en compte dans l'attribution des postes de responsabilité. Consacré juridiquement par le décret n°82/407 du 7 septembre 1982, ce mécanisme qui a été qualifié par Jean François Bayart de « processus moléculaire de l'assimilation réciproque »,[97] a été repris par le président actuel. Toutefois, malgré ces efforts de prise en compte de toutes les composantes de la population, les minorités autochtones ne sont pas représentées parce que couvertes au plan géographique par les autres communautés avec lesquelles elles cohabitent.[98] Pourtant, la déclaration des Nations Unies sur les droits des peuples autochtones semble montrer la voie en indiquant que « les peuples autochtones ont le droit de participer à la prise de décisions sur des questions qui peuvent concerner leurs droits, par l'intermédiaire de représentants qu'ils ont eux-mêmes choisis conformément à leurs propres procédures, ainsi que le droit de conserver et de développer leurs propres institutions décisionnelles ».[99] Cet article sonne comme une invitation à stimuler le désir de participer à la gouvernance locale et nationale chez ces peuples, par l'introduction dans la carte administrative, de leurs propres institutions décisionnelles.

Par ailleurs, les différents programmes mis sur pieds pour garantir la participation des minorités autochtones aux affaires tant politique qu'économique, ne réussissent pas à faire d'eux des acteurs actifs. Ces programmes, pris d'en haut en inadéquation avec leurs *us* et coutumes, sont inappropriés et perçus par ces populations comme des mesures imposées. Fort de ceci, le Bureau International du Travail, dans un processus d'intégration progressif, propose de les organiser en comités de gestion restreints afin de permettre à ces populations de se prononcer sur les mécanismes de développements les plus adaptés à leurs cultures. Le fonctionnement desdits comités devra alors être adossé sur des considérations de calendrier des activités saisonnières qui rythment la vie de ces populations.[100] De fil en

96 *Pierre Flambeau Ngayap*, Cameroun. Qui gouverne? de Ahidjo à Biya, l'héritage et l'enjeu, Paris 1983, p. 82. Cité par *Ibrahim Mouiche*, Chefferie traditionnelles, autochtonie et construction d'une sphère publique locale au Cameroun, L'anthropologue africain 1-2 (2008), p. 64.

97 *Jean-François Bayart*, L'État au Cameroun*,* Paris 1985, p. 193.

98 Lire utilement, *Serge François Sobze*, Autochtonie et gouvernance locale: Réflexion à partir de l'exemple du Cameroun, Revue Française de Droit Constitutionnel 134 (2023), pp. 413.

99 Art. 18, Déclaration de l'Organisation internationale du Travail No. 169.

100 Bureau international du Travail, note 94, p. 32.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

aiguille, des comités aux conseils municipaux, ces populations pourront intégrer les arènes de représentation politique et réduire ainsi la fracture représentative.[101]

Les écueils à la représentation politique des populations autochtones au Cameroun ne se limitent pas à la marginalisation des minorités autochtones, ils sont aussi présents dans l'organisation de la juridiction traditionnelle.

2. La Fébrilité de la Juridiction Coutumière

La variété des modes de production des règles de droit n'est pas la seule marque des pluralismes juridiques. Ceux-ci se matérialisent aussi par un pluralisme judiciaire dont l'enjeu est la résolution des conflits à travers la complémentarité entre les mécanismes judiciaires dits officiels et les solutions traditionnelles.[102] Au niveau international, les dispositions de la déclaration des Nations Unies sur les droits des peuples autochtones, reconnaissent aux autochtones un droit de maintenir et de renforcer leurs institutions politiques, juridiques, économiques, sociales et culturelles distinctes, tout en conservant le droit, si tel est leur choix, de participer pleinement à la vie politique, économique, sociale et culturelle de l'État.[103] Au Cameroun, les juridictions traditionnelles sont ces institutions de l'ordre judiciaire qui ont la charge de résoudre les conflits qui relèvent de leur compétence sur la base du droit traditionnel et de la coutume. L'on en distingue quatre (04) qui sont les tribunaux de premier degré, les tribunaux coutumiers les alkali court et les customary courts. Les jugements rendus par ces instances sont examinés en appel et en cassation par les chambres coutumière des Cours d'Appel et de la Cour Suprême selon le degré de reformation.[104] Ces tribunaux traditionnels qui sont maintenus dans l'ordre juridictionnel à côté des juridictions du droit écrit, statuent sur la base des coutumes des parties en litige.[105] Ils sont compétents pour connaitre des litiges en matières civile et commerciale,[106] et peuvent selon le cas se prononcer en matière pénale pour des infractions de moindre importance telle que le vol, les propos diffamatoires etc.

La justice traditionnelle est rendue par deux principaux canaux que sont les tribunaux traditionnels et les chefferies traditionnelles. C'est aussi sous le prisme de ceux-ci que transparait sa fébrilité.

101 Union Interparlementaire*,* Au-delà des chiffres: la représentation des peuples autochtones au parlement, Rapport d'enquête, Genève 2014, p. 6.

102 *Fabrice Hourquebie* / *Pauline Gervier*, Introduction. Les enjeux du pluralisme juridique et judiciaire, Les cahiers de la justice 1 (2021)*,* p. 29.

103 Art. 5, Déclaration des Nations Unies sur les droits des peuples autochtones, 13 septembre 2007

104 Art. 20 de la loi n°2006/015 du 29 décembre 22006 portant organisation judiciaire, modifiée et complétée par la loi n° 2011/027 du 14 décembre 2011, et art. 37 de la loi n° 2006/016 du 29 décembre 2006 fixant l'organisation et le fonctionnement de la cour suprême.

105 Art. 2, décret 69-DF-544 du 29 décembre 1969 fixant l'organisation judiciaire et la procédure devant les juridictions traditionnelles au Cameroun oriental.

106 Art. 4, décret 69-DF-544 du 29 décembre 1969, note 105.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Dans l'accomplissement de leurs missions, les tribunaux traditionnels, présentent des faiblesses tant en ce qui concerne leur composition qu'en ce qu'il s'agit de leurs compétences. Relativement à leur composition, le mode de désignation des organes des juridictions traditionnelles est l'une des entraves qui menacent leur efficacité. Ces tribunaux qui siègent en collégialité sont constitués d'un président de tribunal qui est un magistrat formé dans les matières du droit écrit et de six assesseurs nommés par le ministre de la Justice sur proposition conjointe du préfet et du Président du Tribunal de première instance du ressort.[107] Forts de leur formation en droit écrit, les présidents des tribunaux cèdent très souvent à la tentation de trancher les litiges qui leur sont présentés en s'inspirant des règles de droit écrit, et relègue ainsi le droit traditionnel au second plan. Par ailleurs, l'efficacité de l'office des assesseurs est très souvent limitée tant par le manque de maitrise des coutumes des parties en présence[108] que par l'absence de ces auxiliaires de justice traditionnelle auprès des instances de second degré.

Sur le plan de leur compétence, la Cour suprême dans un de ses arrêts a posé le principe selon lequel la compétence des juridictions traditionnelles ne peut s'étendre aux personnes non autochtones ou étrangères à la coutume invoquée.[109] Au niveau de la procédure, le décret portant organisation des tribunaux traditionnels subordonne la compétence des juridictions traditionnelles à l'acceptation de sa compétence par toutes les parties en cause. Dans les cas de déclinaison de ladite compétence par l'une des partie, la compétence revient aux juridictions de droit moderne.[110] La compétence des juridictions traditionnelles est ainsi fragilisée au profit de celles de droit écrit.

Dans la pratique, l'exercice de la justice traditionnelle n'est pas exclusivement réservé aux juridictions traditionnelles. Elles le partage avec les chefferies traditionnelles. Dans les sociétés africaines, la chefferie traditionnelle occupe une position centrale et une valeur de représentativité indéniable pour les populations. Celles-ci en font leur premier interlocuteur en cas de litige.[111] Lorsqu'ils sont appelés à trancher les litiges qui sont portés devant eux par les membres de leurs communautés, ces juges de la tradition siègent conformément à la coutume et aux traditions de leurs peuples. Trait d'union entre les traditions et la

107 Art. 10, ibid.

108 Ce constat est fait par les rédacteurs du Rapport supplémentaire soumis suite au deuxième rapport périodique du Cameroun présenté à la Commission Africaine des Droits de l'Homme et des Peuples par le Centre pour l'Environnement et le Développement (CED) et autres, Les droits des peuples autochtones au Cameroun*,* 2010, p. 2.

109 Cette limitation qui vient du juge trouve sa substance dans l'arrêt n°2/L du 10 octobre 1985, *Francois Anoukaha*, Observation. Affaire Dame Dada Balkissou c/ Abdoul Karim Mohamed, Juridis Info (1991), pp. 55.

110 Art. 2 du décret 69-DF-544 du 29 décembre 1969, note 105.

111 *Amougou Mveng,* note 74, p. 92.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

modernité,[112] la chefferie traditionnelle est menacée de dénaturation du fait des assauts des entrepreneurs politiques désireux d'appartenir à une sphère de pouvoir, ou au mieux de combiner les deux.[113] En effet, dans la sociologie camerounaise, le véritable titulaire du pouvoir politique est celui qui combine le pouvoir étatique et le pouvoir traditionnel.[114] Une telle pensée a débouché sur une course au poste de chef traditionnel. Faisant fi des principes traditionnels, cette course a engendré une politisation de la succession au détriment de la tradition. Les cas les plus patents ont vu le détournement de la chefferie hors des familles de commandement.[115] De tel travers entrainent une dilution de la culture par l'arrivée à la tête des chefferies de personnes non initiées ou pas suffisamment initiées.

De ce qui précède, il convient de décrier la manipulation qui est faite autour de l'identité autochtone au détriment de la culture. Entre marginalisation des minorités autochtones et fébrilité de la juridiction traditionnelle, les écueils dont souffre la participation autochtone à la démocratie, s'ils ne sont pas pris en compte peuvent déboucher sur une dénaturation de l'identité autochtone.

D. Conclusion

Paraphrasant Antoine LECA,[116] l'on peut affirmer que la construction de la démocratie en Afrique repose sur l'évolution du rapport modernité-tradition. États multiculturels, les États africains dans l'expression de leur démocratie doivent résoudre l'équation des pluralismes juridiques crée par la rencontre entre la société traditionnelle et l'État moderne. Ne pouvant trancher radicalement, ils ont fait le choix d'appliquer les règles de démocratie consociative qui offrent un compromis entre les deux extrêmes. L'exemple du Cameroun qui a servi de toile de fond à la démonstration a permis d'observer que si la participation autochtone à la démocratie est garantie au plan organique, son influence au niveau des règles encadrant le fonctionnement de la société semble trainer le pas. Il s'agit alors aujourd'hui de penser une démocratie en Afrique à partir de ses traditions, d'accepter et d'assumer l'originalité d'une approche africaine. Ce mouvement de réappropriation du droit, mené à son terme pourrait déboucher sur une conception africaine de la participation des peuples à leur gouvernance.

112 Les article 20 et 21 du décret illustrent très bien cette double fonction du chef traditionnel. Alors que l'article 20 en fait un auxiliaire de l'administration, l'article 21 en fait un gardien des traditions et coutume.

113 *Njoya*, note 70, p. 425.

114 *Ammougou Mveng*, note 74, p. 96.

115 *Charles Nach Mback*, La chefferie traditionnelle au Cameroun: ambiguïtés juridiques et dérives politiques, Africa development XXV (2000), p. 114.

116 *Antoine Leca*, Avant-propos, in Thiam Samba, Introduction historique au droit en Afrique, Paris 2011, p. 13.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

N’est-ce pas là l’objectif inavoué de la nouvelle dynamique de participation autochtone à la démocratie ?

© Paule Suzanne Ngo Nguimbous

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

La Cour Africaine des Droits De L'homme et des Peuples: Une Solution aux Contestations des Élections en Afrique

By *Aubran Donadoni Ntolo Nzéko**

Abstract: In Africa, the persistence of post-electoral crises despite national legal and political solutions necessitates an exploration of alternative remedies. The African Court on Human and Peoples' Rights (ACHPR) presents a credible and serious alternative for resolving disputes related to national political elections. This is due to its flexible handling of petitions and its credible approach to dispute resolution. The ACHPR's flexible approach is demonstrated by the expanded power of individuals and electoral observers to challenge election results. Similarly, certain non-governmental organizations with observer status can also bring cases before the Court. This broader access gives a voice to those often marginalized in national processes, such as voters. The Court's flexibility is also evident in its use of a wider range of legal references, including regional and international human rights instruments, in its rulings. This contrasts with national constitutional courts that are often constrained by domestic laws, which are sometimes seen as tailored to favor the ruling party. Furthermore, the ACHPR's decisions are more credible due to its expanded judicial powers and the guarantee of a fair trial. The Court can review and even suspend contested electoral laws. Crucially, the judges on the ACHPR offer greater guarantees of independence and impartiality compared to many national constitutional judges, who may be appointed by the head of state. The process for electing judges to the ACHPR, their diverse nationalities, and the clear rules for recusation all enhance the Court's credibility.

Keywords: African Court on Human and Peoples' Rights; Electoral Disputes; Human Rights

***

A. Introduction

En retirant à la Cour africaine la compétence d'être saisie directement par leurs citoyens et organisations non gouvernementales (ONG), la Côte d'Ivoire et le Bénin[1] ont ramé

* Chargé de cours à la Faculté des sciences juridiques et politiques à l'Université de Douala (Cameroun), Email : aubranntolo@yahoo.ca.

1 *Thierry Sèdjro Bidouzo*, Le retrait de déclaration facultative de reconnaissance de compétence de la Cour africaine des droits de l'homme et des peuples. Le cas du Bénin, Revue des Droits et Libertés Fondamenteux 29 (2023); *Koffi Kouame / Elisée Judicaël Tiehi*, Le Civexit ou le retrait par la Côte d'ivoire de sa déclaration d'acceptation de la compétence de la Cour africaine des droits de

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

à rebours de la protection des droits de l'Homme. Ces vagues de dénonciation du fonctionnement de la Cour africaine des droits de l'homme et des peuples, alors que les contestations des élections nationales ne désemplissent pas, incite à interroger sa place dans le système africain de protection des droits constitutionnels des citoyens. A ce propos, le rapport de cette juridiction à vocation régionale avec le règlement des contestations des élections politiques nationales mérite d'être exploré dans le sens de la valorisation de la Cour africaine des droits de l'homme et des peuples. Cependant, l'analyse pertinente de ces rapports exige au préalable une précision conceptuelle des principaux éléments de l'étude.

La Cour africaine des droits de l'homme et des peuples (CADHP) a été instituée par les Etats membres de l'Union Africaine pour renforcer le système africain de protection des droits de l'homme aux côtés de la commission africaine des droits de l'homme et des peuples. Ce faisant, premier organe judiciaire africain à vocation continentale[2], la CADHP est instituée par le protocole à la charte africaine des droits de l'homme et des peuples signé à Ouagadougou le 10 juin 1998. Ce protocole prévoit que l'office de la Cour africaine se résume à une triple compétence personnelle[3], temporelle[4] et matérielle dans la cadre de sa fonction contentieuse à côté de sa fonction consultative.[5] S'agissant de la compétence matérielle, le protocole à la charte consacre une compétence assez large de la Cour africaine. Ainsi, contrairement à la Cour européenne des droits de l'homme qui n'a vocation qu'à interpréter et à appliquer la convention européenne des droits de l'homme, la Cour africaine voit sa compétence étendue au-delà de l'application de la Charte africaine.[6] La fusion de cette Cour à la Cour de justice de l'Union africaine pour donner naissance à la Cour africaine de justice et des droits de l'homme ne remettra en cause cette compétence potentielle sur le contrôle des élections politiques nationales[7]. Au regard des principes et droits fondamentaux consacrés dans la Charte africaine des droits de l'homme et des peuples, son application par la CADHP permet aisément de comprendre son influence

l'homme et des peuples : un pas en avant, deux pas en arrière, Revue des droits de l'homme 21 (2022), p. 1.

2 *Fatsah Ouguergouz*, La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, Annuaire français de droit international 52 (2006), pp. 213-240.

3 Le Protocole de Ouagadougou prévoit la compétence obligatoire de la Cour africaine pour toutes les affaires portées devant celle-ci par la Commission, par certains États parties et par une organisation intergouvernementale africaine, et une compétence facultative en ce qui concerne les affaires soumises par un individu ou une organisation non gouvernementale.

4 Compétence de la Cour sur les États ayant ratifié le Protocole de Ouagadougou au moment des faits.

5 Art. 5 du Protocole à la Charte africaine des droits de l'homme et des peuples portant création de la Cour africaine des droits de l'homme et des peuples.

6 Art. 3 § 1 du protocole à la charte.

7 Protocole portant statut de la Cour africaine de justice et des droits de l'homme.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

potentielle[8] sur le contrôle des élections politiques nationales dont il convient de préciser le contenu.

En fait, l'élection est le mode de dévolution du pouvoir reposant sur un choix opéré par l'intermédiaire d'un vote ou suffrage.[9] Eisenmann renchérissait dans ce sens que « l'élection s'oppose à la nomination qui est la méthode de création propre à l'autocratie réelle »[10]. Cette définition écarte le référendum qui doit pourtant être considéré dans la présente analyse. Ce dernier est selon Julien Laferrière le procédé par lequel le corps des citoyens est appelé à exprimer par une votation populaire son avis ou sa volonté à l'égard d'une mesure qu'une autorité a prise ou envisage de prendre.[11] Pour regrouper ces deux modalités d'expression de la souveraineté du peuple, le doyen Hauriou parlait de pouvoir de suffrage par lequel le peuple donne son assentiment soit sur une candidature soit sur une loi votée par la législature.[12] Ce faisant, on distingue les élections politiques des élections administratives même si la frontière n'est pas si étanche car les dernières ont tendance à être politisées.[13] Qu'à cela ne tienne seules les élections politiques sont concernées dans cette étude et plus précisément les élections politiques nationales. Celles-ci regroupent les élections présidentielles et les élections parlementaires opposées aux élections locales qui concernent soit les élections régionales, soit les élections municipales. Si seules les élections politiques nationales retiennent l'attention ici, c'est parce qu'elles sont source de vives tensions dans le constitutionnalisme africain. Ainsi, les solutions aux contestations des élections politiques nationales dans la pratique constitutionnelle en Afrique sont classiquement juridiques.

La solution juridique pour le règlement des désaccords à l'occasion des élections politiques nationales se résume à l'institution d'un contentieux devant le juge. Les Etats d'Afrique ont consacré dans leur constitution une juridiction constitutionnelle pour régler le contentieux des élections politiques nationales.[14] Toutefois, de telles solutions peuvent s'avérer inefficaces, dès lors que sont contestées tant la légitimité[15] des institutions chargées de les appliquer en l'occurrence les membres des juridictions constitutionnelles, que la qualité des règles porteuses de droits peu favorables à l'éclosion de l'idéal démocratique.

8 C'est dans le cadre de la protection juridictionnelle des droits fondamentaux tels que le droit à la participation politique, la liberté d'association, ou le droit à l'égalité et à la non discrimination que la CADHP fonde son intervention dans le règlement des litiges électoraux des Etats membres.

9 *Yves Meny / Olivier Duhamel,* Dictionnaire constitutionnel, Paris 1992, p. 372.

10 *Charles Eisenmann,* La démocratie. Sa nature, sa valeur, Paris 1988, p. 79.

11 *Julien Laferriere*, Manuel de droit constitutionnel, Paris 1947, p. 431.

12 *Maurice Hauriou*, Précis de droit constitutionnel, Paris 1929, p. 351.

13 *Nicolas Kada*, Les élections administratives, Revue du droit public 6 (2017), p. 1489.

14 Art. 50 de la constitution du Cameroun révisée en 1996 ; art. 175 de la constitution du Congo 2015 ; art. 114 de la constitution du Bénin de 1990 ; art. 98 de la constitution du Bénin ; art. 157 de la constitution de la RDC de 2006 ; art. 126 de la constitution de la Côte d'Ivoire de 2016.

15 *Louis Favoreu*, La légitimité du juge constitutionnel, Revue internationale de droit comparé 2 (1994), pp. 557-581.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

A cet égard, le règlement du contentieux de l'élection présidentielle ou des élections parlementaires par le juge constitutionnel peut ruiner la croyance au processus de désignation du représentant du peuple.[16] Lorsque le désaccord entre les acteurs politiques au sujet du droit électoral est profond ou que les contestations sur la gestion du contentieux ne peuvent plus être maîtrisées par les procédures juridictionnelles, la lutte pour le pouvoir en Afrique emprunte soit les voies de la violence des armes soit celles des solutions politiques.

La solution politique pour le règlement des contestations des élections politiques nationales prend régulièrement la forme de compromis politique, d'entente politique ou tout simplement d'accord politique. Le professeur Atangana Amougou en a proposé une définition essentielle.[17] Parlant plutôt d'accords de paix, et situant ainsi les accords politiques dans un contexte de protection ou de retour à la stabilité sociale suite à des secousses observées, l'auteur s'attache en effet à les présenter comme des conventions conclues entre les protagonistes d'une crise interne dans le but de la résorber. Qu'il s'agisse d'un constitutionnalisme alternatif[18] pour certains ou d'un conventionnalisme constitutionnel[19] pour d'autres, les accords politiques sont davantage considérés comme des « normes destinées à suppléer les insuffisances ou carences du texte constitutionnel ».[20] Ils ont pour objet privilégié la résolution des crises post-électorales survenues à l'occasion de l'organisation de l'élection présidentielle. Toutefois, les arrangements politiques laissent entrevoir des limites dans le règlement des contestations électorales en ce que le respect de ceux-ci est fondé sur la bonne foi et la confiance des acteurs politiques en considération des rapports de force des uns et des autres.

Ceci étant, si la place de la Cour dans le système africain de protection des droits de l'homme a régulièrement été évoquée par la doctrine par l'analyse de sa jurisprudence[21], l'autorité de ses décisions à l'égard des Etats[22], de sa survivance dans le système de protec-

16 *Jean Dubois De Gaudusson / Albert Bourgi / Christine Desouches / Jean-Pierre Vettovaglia*, Démocratie et élection dans l'espace francophone*,* Bruxelles 2010, p. 4.

17 *Jean Louis Atangana Amougou*, Les accords de paix dans l'ordre juridique interne en Afrique, Revue de la recherche juridique, Droit prospectif 3 (2008), p. 1743.

18 *Karim Dosso*, Les pratiques constitutionnelles dans les pays d'Afrique noire francophone : cohérences et incohérences, Revue française de droit constitutionnel 90 (2012), p. 79.

19 *Frédéric-Joël Aïvo*, La crise de la normativité de la constitution en Afrique, Revue du droit public 1 (2012), p. 151.

20 *Félicien Lemaire*, les conventions de la constitution dans le système juridique français, Revue française de droit constitutionnel 98 (1998), p. 465.

21 *Télesphore Ondo,* La jurisprudence de la Cour africaine des droits de l'homme et des peuples: entre particularisme et universalité, Annuaire africain des droits de l'homme 1 (2017), pp. 244-262.

22 *Judicaël Elisée Tiehi,* L´exécution minimaliste de l´arrêt de la Cour africaine des droits de l ´homme et des peuples dans l´affaire Actions pour la protection des droits de l´homme (APDH) c. République de Côte d´Ivoire : much ado about nothing?, Revue des droits de l'homme 18 (2020), pp. 1-27.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

tion[23], voire de l'étendue de ses compétences[24], la réflexion sur l'alternative qu'elle peut constituer dans le règlement des contestations électorales reste entière. Au regard de l'instabilité de la paix sociale entretenue par la contestation des élections politiques nationales en Afrique, la doctrine s'est toujours proposée de préconiser des solutions susceptibles de régler les désaccords électoraux sans évoquer l'alternative de la CADHP. Ainsi, le professeur Djedjro reste dans une logique de présentation des solutions juridictionnelles et politiques nationales tout en entretenant le dilemme entre ces deux solutions.[25] La même approche est perceptible dans l'étude menée par le professeur Keutcha Tchapnga qui a présenté les solutions juridiques et politiques de règlement des contestations des élections présidentielles en relevant leurs limites respectives.[26] L'efficacité des solutions juridiques ou politiques sur la régulation des crises africaines divise la doctrine africaine. Une certaine opinion doctrinale a longtemps défendu l'efficacité des solutions constitutionnelles à juguler les conflits politiques.[27] La dernière en date préconise l'application cumulative des solutions juridiques et politiques pour restaurer l'expression de la souveraineté du peuple.[28] Or, au regarde de la persistance des contestations électorales en Afrique, la CADHP semble constituer une alternative sérieuse aux potentialités encore inexplorées. D'où l'intérêt scientifique d'y mener une étude spécifique.

Dans cet ordre d'idées, la CADHP n'en mérite pas moins de faire partie des atouts en termes de solutions juridiques aux règlements des contestations des élections politiques nationales. En outre, il est question, par la présentation des potentialités qu'offre cette juridiction dans l'apaisement des tensions nées des élections, d'inciter les Etats à infléchir leur souveraineté face aux principes de légitimité démocratique dont la garantie transcende les frontières étatiques.

Ce faisant, face aux limites des solutions juridiques proposées par les Etats pour le règlement des contestations des élections politiques nationales, il parait judicieux de se poser la question de savoir en quoi la CADHP peut constituer une alternative sérieuse dans le

23 *Salir Zime Yerima,* La Cour et la Commission africaines des droits de l'homme et des peuples: noces constructives ou cohabitation ombrageuse?, Annuaire africain des droits de l'homme 1 (2017), pp. 357-385.

24 *Sakré Keke*, L'exercice de la compétence contentieuse de la Cour africaine des droits de l'homme et des peuples à l'épreuve de la souveraineté des États, Annuaire africain des droits de l'homme 2 (2018), pp. 153-178; *Abdou-Khadre Diop*, La Cour Africaine des Droits de l'Homme et des Peuples Ou le Miroir Stendalien du Système Africain de Protection des Droits de l'Homme, Les Cahiers de Droit 55 (2014), pp. 529-556.

25 *Francis Meledje Djedjro*, Le contentieux électoral en Afrique, Pouvoirs 129 (2009), p. 154

26 *Célestin Keutcha Tchapnga*, Droit constitutionnel et conflits politiques dans les Etats francophones d'Afrique noire », Revue française de droit constitutionnel 63 (2005), pp. 451-491.

27 *Jean Dubois De Gaudusson*, Les solutions constitutionnelles des conflits politiques, Afrique contemporaine (1996), p. 251.

28 *Aubran Donadoni Ntolo Nzeko*, Les solutions aux contestations des élections politiques nationales dans les Etats d'Afrique noire francophone, Revue française de droit constitutionnel 4 (2020), pp. 965-985.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

règlement des contestations des élections politiques nationales. En adoptant principalement la méthode juridique dans l'analyse, il convient de retenir en guise d'hypothèse que la CADHP constitue une alternative sérieuse au règlement des contestations électorales dans le cadre du contentieux des droits de l'homme. Ceci se justifie par le traitement souple des requêtes par rapport au juge national d'une part (B) et d'autre part par le règlement crédible des contestations des élections politiques nationales (C).

B. Un Traitement Flexible des Requêtes en Contestation des Élections Politiques Nationales

L'une des causes des tensions nées de l'organisation des élections politiques nationales est la rigidité de la procédure avec laquelle les requêtes contentieuses sont examinées par la juridiction constitutionnelle. Or, le régime juridique de la CADHP offre aux justiciables un traitement souple des requêtes en contestation des élections politiques nationales. Il se traduit d'une part par l'extension du pouvoir de contestation des élections politiques nationales (I) et d'autre part par l'élargissement des référents normatifs dans le traitement des requêtes contentieuses (II).

I. L'Allongement du Pouvoir de Contestation des Élections Politiques Nationales

Au regard des règles qui encadrent le fonctionnement de la CADHP, force est remarquer que cette dernière offre une saisine élargie aux justiciables pour la contestation des élections parlementaires ou présidentielle. Ainsi, le recours à la CADHP permet aussi bien aux observateurs électoraux (1) qu'aux individus (2) de déposer une requête pour dénoncer les irrégularités desdits scrutins.

1. L'Extension Mesurée du Pouvoir de Contestation des Élections Politiques aux Observateurs Électoraux

L'une des manifestations du regain d'intérêt pour le principe de légitimité démocratique est l'observation internationale des élections. Ce qui a fait dire à Luc Sindjoun que « l'observation internationale des élections est devenue le cheval de Troie du nouveau constitutionnalisme ».[29] Les critères des éléments essentiels qui constituent des élections libres et justes sont universellement convenus et des observateurs internationaux sont détachés pour veiller à ce qu'ils soient appliqués. Il serait contraire à la logique du droit international qu'un gouvernement ayant un intérêt quelconque concernant une élection, soit le juge ultime

29 *Luc Sindjoun*, La formation du patrimoine constitutionnel commun des sociétés politiques: Éléments pour une théorie de la civilisation politique internationale, Dakar 1998, pp. 27 ff.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

chargé de trancher si les élections se sont déroulées conformément aux normes internationales ou pas.[30] C'est en toute logique que les observateurs internationaux peuvent à certaines conditions saisir la CADHP d'une requête en dénonciation des irrégularités dans l'organisation des élections politiques nationales.

Si l'observation internationale des élections semble être promue sur le plan international, sa mise en œuvre obéit, cependant, à des conditions spécifiques. Elle demeure conditionnée par une invitation formelle de la part de l'État. Cette exigence vise à la sortir du carcan de l'ingérence extérieure. Ce faisant, les observateurs internationaux peuvent être l'émanation des organisations internationales ou des organisations non gouvernementales (ONG).

Le système africain de protection juridictionnelle des droits de l'homme permet aux observateurs internationaux de saisir la CADHP pour dénoncer notamment les irrégularités qui ont entaché l'organisation des élections politiques nationales. Le protocole à la Charte africaine des droits de l'homme et des peuples dispose dans ce sens que « la Cour peut permettre (…) aux organisations non gouvernementales (ONG) dotées du statut d'observateur auprès de la Commission d'introduire des requêtes directement devant elle conformément à l'article 34(6) de ce Protocole ».[31] L'article 34(6) dudit protocole assujettit cette saisine au dépôt de la déclaration de l'Etat d'accueil. En outre, de ces dispositions, il ressort que tous les observateurs électoraux n'ont pas le pouvoir de saisir la Cour. Seuls ceux qui ont ce statut auprès de la commission africaine des droits de l'homme et des peuples bénéficient de ce pouvoir de saisine. Par déduction, les ONG ayant le statut d'observateur auprès de la commission, peuvent être des observateurs électoraux dans la mesure où la période électorale est un instant de vérification par ces derniers de l'exercice du droit de participation aux affaires publiques par les opérations de votation. Cette question a été précisée par la CADHP dans l'arrêt du 16 juin 2011 sur l'affaire *Association Juristes d'Afrique Pour la Bonne Gouvernance*.[32] A *contrario* dans l'affaire *Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R. Mtikila c. Tanzanie*, la CADHP a confirmé le statut d'observateur auprès de la commission africaine des droits de l'homme et des peoples de l'ONG requérante.[33]

La consécration du pouvoir de saisine des observateurs électoraux confirme une fois de plus l'originalité du système africain de protection des droits de l'homme. En effet, à titre

30 *Alain Didier Olinga*, La promotion de la démocratie et d'un ordre constitutionnel de qualité par le système africain des droits fondamentaux: entre acquis et défis**,** Annuaire Africain des Droits de l'Homme 1 (2017), pp. 221-243.

31 Art. 5(3) du protocole à la charte africaine des droits de l'homme et des peuples relative à la Cour africaine des droits de l'homme et des peuples.

32 Association Juristes d'Afrique pour la Bonne Gouvernance c. Côte d'Ivoire (compétence) (2011) 1 RJCA 29.

33 Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R. Mtikila c. Tanzanie, Arrêt du 14 juin 2013, Recueil de jurisprudence de la Cour africaine Volume 1 (2006-2016), op.cit., p. 105.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

de droit comparé, le système américain est assez restrictif quant aux entités pouvant saisir la Cour. La convention interaméricaine des droits de l'homme limite la saisine de la Cour interaméricaine des droits de l'homme aux Etats parties et à la commission américaine des droits de l'homme.[34] Le système européen n'est pas en reste dans la logique de l'exclusion des observateurs internationaux des organes pouvant saisir la Cour européenne des droits de l'homme. Celle-ci ne peut qu'être saisie par les Etats parties, les personnes morales notamment les partis politiques[35] les individus.

Qu'à cela ne tienne, l'ouverture du prétoire de la CADHP aux observateurs électoraux auprès de la commission africaine des droits de l'homme et des peuples leur permet de dénoncer les cas d'irrégularité avec des preuves crédibles dans l'optique de restaurer la sincérité du scrutin. En outre, leur neutralité dans le jeu politique est un atout de plus dans la protection de la démocratie électorale qui relève clairement de la compétence du juge africain des droits de l'homme. Pour ce faire, sa saisine par rapport aux solutions nationales aux contestations des élections est étendue aux individus.

2. L'Extension Conditionnée du Pouvoir de Contestation de l'Élection Présidentielle aux Individus

L'atout important de la CADHP qui l'érige en alternative sérieuse au règlement des contestations électorales est l'extension de saisine aux individus. En effet, les solutions nationales aux contestations des élections politiques nationales n'associent pas les individus. En l'espèce, ces derniers sont exclus de la saisine du juge constitutionnel dans le cadre du contentieux post-électoral. La saisine de cette juridiction est réservée aux candidats ayant pris part aux élections ou aux représentants des partis politiques qui les ont investis. Dans ce contexte, les électeurs subissent le règlement juridictionnel des désaccords électoraux et sont plus prompts à se désolidariser de la décision du juge constitutionnel pourtant revêtue de l'autorité absolue de la chose jugée[36].

De même dans le cadre des solutions politiques concrétisées par la conclusion des accords politiques ou ententes politiques, les individus constituant le peuple souverain sont très souvent relégués au second plan. Dans le cadre des négociations politiques, ce sont les représentants des forces politiques qui se retrouvent pour définir une solution à leurs divergences de vue. L'accord aboutit le plus souvent au partage du pouvoir entre les acteurs politiques de la négociation parfois en déconsidération des intérêts du peuple. Ce faisant, les négociations cachent toujours des intentions inavouées qui animent les protagonistes de la crise. Ainsi, les accords politiques sont signés, non pas dans un but primaire de paix, mais plutôt avec le pressentiment d'avoir vaincu l'adversaire sur le terrain des pourparlers.

34 Art. 61 de la convention américaine des droits de l'homme.

35 Arrêts 13 février 2003 Refah Partisi c. Turquie, 11 janvier 2007, Parti conservateur russe des entrepreneurs c. Russie et 8 juillet 2008, Parti travailliste géorgien c. Géorgie.

36 *Télesphore Ondo*, L'autorité des décisions des juridictions constitutionnelles en Afrique noire francophone, Revue juridique et politique des Etats francophone 4 (2012), p. 453.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

En revanche, l'ouverture du prétoire de la Cour africaine des droits de l'homme et des peuples aux individus est une occasion pour ces derniers de prendre activement part à la restauration de la sincérité de l'expression de leur souveraineté. Dans ce sens, le Protocole à la Charte africaine des droits de l'Homme et des peuples[37] portant création de la Cour prévoit l'accès[38] direct des individus à la Cour[39]. Le contentieux des élections présidentiels en Côte d'ivoire s'est prolongé devant la CADHP avec la saisine des candidats recalés à la candidature en l'occurrence, Guillaume Soro et Laurent Gbagbo.[40]

Toutefois, rappelons que la compétence de la Cour pour connaître des requêtes individuelles est soumise à des conditions. En fait, les États parties doivent d'abord faire une déclaration acceptant le dépôt de plaintes individuelles contre eux.[41] En l'absence d'une telle déclaration, aucune requête individuelle dirigée contre eux ne peut être recevable[42] devant le prétoire de la Cour.

La Cour africaine des droits de l'homme et des peuples a eu l'occasion à, plusieurs reprises de rejeter les requêtes individuelles pour défaut de signature de la déclaration par l'Etat mis en cause. L'Affaire Michelot Yogogombaye c. République du Sénégal[43], fut la première opportunité pour le juge africain des droits de l'homme de rejeter une requête individuelle pour défaut de dépôt d'une déclaration. Elle a été inflexible par la suite[44] au regard du principe de droit international de la clause facultative de la juridiction obligatoire.

La doctrine n'a pas manqué de décrier ces limitations de l'accès direct des individus au prétoire de la CADHP[45]. D'après le chercheur Ilich Felipe Corredor Carvajal, il est évident que même si la Cour est chargée du respect de la Charte et de l'effectivité des droits de l'Homme[46], une telle compétence reste dans le domaine conventionnel théorique

37 *Maria-Magdalena Kenig-Witkowska*, À propos du Protocole relatif à la Charte africaine des droits de l'Homme et des peuples, African Bulletin 49 (2001), pp. 125-142.

38 *Alioune Badara Fall*, L'accessibilité à la justice en Afrique, in: OIF, Justice et droit de l'Homme, XXIIIe Congrès de l'Institut international de droit d'expressions et d'inspirations françaises, 2003, pp. 333 ff.

39 Art. 5 § 3 du Protocole relatif à la Charte africaine portant sur la création d'une CADHP.

40 Requête 012/2020, 22 avril 2020, Kigbafori Soro et autres contre Côte d'Ivoire : Requête n°025/2020 Laurent Gbagbo contre Côte d'Ivoire.

41 Ibid., art. 34 § 6.

42 *Joseph Charkes Witenberg,* La recevabilité des réclamations devant les juridictions internationales, Recueil des cours de l'Académie de droit international de La Haye, Volume III (1932), pp. 50 ff.

43 Michelot Yogogombaye c. Sénégal (compétence) (2009) 1 RJCA 1, Arrêt du 15 décembre 2009.

44 Soufiane Ababou c. Algérie (compétence) (2011) 1 RJCA 25, Décision du 16 juin 2011 ; Daniel Amare et Mulugeta Amare c. Mozambique et Mozambique Airlines (compétence) (2011) 1 RJCA 27, Décision du 16 juin 2011.

45 *Rostand Banzeu*, La Cour africaine des droits de l'Homme et des *peuples*, Sarrebruck, 2011, p. 204.

46 *Samantha Besson,* L'effectivité des droits de l'Homme. Du devoir être, du pouvoir être et de l'être en matière

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

et très limitée dans la pratique [47] à cause des exigences prévues par les articles 5 et 34 du Protocole.

À l'heure actuelle, seuls sept États parties au Protocole portant création de la CADHP permettent à leurs ressortissants de pouvoir saisir directement la Cour en cas de violations de leurs droits fondamentaux garantis par la Charte en l'occurrence, le Burkina Faso, le Ghana, le Malawi, le Mali, la Tanzanie, la Tunisie et la Gambie. Le taux de dépôt de déclaration d'acception de compétence est certes très faible par rapport aux Etats ayant ratifié aussi bien la Charte africaine des droits de l'homme et des peuples que son protocole additionnel créant la CADHP. Au demeurant, si la porte des prétoires nationaux est fermée aux individus, celle de la CADHP est potentiellement ouverte pour ceux dont les Etats ont signé la déclaration. Cette flexibilité du traitement des requêtes devant la CADHP se perçoit également par l'élargissement des référents normatifs dans la motivation de ses décisions par rapport au juge constitutionnel.

II. L'Élargissement des Référents Normatifs dans le Traitement des Requêtes en Contestation des Élections Politiques Nationales

Les référents normatifs sont des normes juridiques sur le fondement desquels le juge dit le droit dans l'exercice de sa fonction juridictionnelle. Dans ce sens, la saisine de la CADHP assure aux contestataires des élections l'élargissement des référents normatifs dans le traitement de leur requête dans la mesure où le juge africain des droits de l'homme se réfère aussi bien aux textes régionaux (1) qu'aux textes à vocation universelle relatifs aux droits de l'homme (2).

1. L'Invocation des Instruments Juridiques Régionaux Relatifs aux Droits de l'Homme

Les principaux instruments juridiques structurant la motivation des décisions du juge africain sont des textes à vocation régionale, c'est-à-dire des textes dont la force juridique est limitée sur le continent africain. Les textes constituant le régionalisme africain[48] relatifs aux droits de l'homme ont consacré le droit des citoyens de participer à des élections libres et honnêtes qui doivent avoir lieu périodiquement au suffrage universel égal et au vote secret ou suivant une procédure équivalente assurant la liberté de vote. Le juge africain des droits de l'homme et des peuples peut donc les invoquer à l'occasion du traitement des requêtes en contestation des élections politiques nationales. On peut analyser ces référents normatifs en deux approximations en considérant d'une part les textes généraux et d'autre part les textes spécifiques.

de protection des droits de l'Homme, https ://doc.rero.ch/record/28901/files/04_Besson_droits_de_l_homme.pdf (last accessed on 1 November 2025).

47 *Ait Ahmed Hocine*, Les droits de l'Homme dans la Charte et dans la pratique de l'OUA, Thèse Université de Nancy III, 1985, p. 225.

48 *Michel Levinet*, Théorie générale des droits et libertés, Bruxelles 2006, p. 276.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Relativement aux textes généraux, il s'agit particulièrement de la Charte africaine des droits de l'homme et des peuples. Arrivée tardivement de l'avis de certains auteurs[49], dans l'atmosphère de la proclamation et de la protection des droits de l'homme, la charte africaine des droits de l'homme a vu le jour à la suite d'un processus important[50] rappelé par la majorité de la doctrine.[51] Ainsi, au nombre de ses dispositions, la Charte africaine a consacré indirectement le pluralisme politique et la désignation des représentants politiques à travers des élections libres et honnêtes. A cet effet, la Charte dispose que « tous les citoyens ont le droit de participer à la décision des affaires publiques de leur pays, soit directement, soit par l'intermédiaire de représentants librement choisis et, ce, conformément aux règles édictées par la loi ».[52] La CADHP a eu à appliquer ces dispositions dans l'affaire Tanganyika Law Society et Révérend Christopher R. Mtikila c. la République unie de Tanzanie arguant la clarté de ces dispositions, la Cour estime que « exiger d'un candidat qu'il soit membre d'un parti politique avant d'être autorisé à participer à la vie politique en Tanzanie constitue une violation des droits consacrés à l'article 13(1) de la charte ».[53]

Cependant, la simple lecture de ces dispositions de la charte africaine révèle un caractère limité par rapport aux articles 25 du Pacte international relatif aux droits civils et politiques, 23 de la convention européenne des droits de l'homme, et 21(3) de la Déclaration universelle des droits de l'homme relatifs au pluralisme politique et à la désignation des représentants politiques à travers des élections libres et honnêtes. Cet article ne garantit pas expressément le droit à des élections libres et honnêtes, ni le droit de voter et d'être élu au suffrage universel et au scrutin secret[54]. Théodore Christakis fait d'ailleurs observer dans ce sens que cette lacune est d'autant plus suspecte que l'on réalise que la Charte africaine est le dernier instrument en date parmi ceux existant sur le plan universel. Il ajoute également qu'au lieu de s'inspirer des textes précédents, la Charte a préféré une formulation ambiguë qui pourrait facilement être interprétée comme compatible avec des systèmes à parti unique. Rien ne semble obliger, en effet, les États à organiser des élections périodiques assurant l'expression libre de la volonté des électeurs. Les citoyens ont théoriquement le droit de participer librement à la vie politique, voire de choisir librement leurs représentants, mais la

49 Ibid., p. 276.

50 *Fatsah Ougergouz*, La charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité, Paris 1993, p. 41.

51 Ibid.

52 Art. 13(1) de la Charte africaine des droits de l'homme et des peuples.

53 Cour Africaine Des Droits De L'homme Et Des Peuples, Jonction d'instance des affaires Tanganyika Law Society, The Legal And Human Right Centre c. République Unie de Tanzanie, Requête n°009/2011 et Reverend Christopher R. Mtikila c. République Unie de Tanzanie, Requête n°011/2011.

54 *Fabienne Quillere-Majzoub*, L'option juridictionnelle de la protection des droits de l'homme en Afrique : Étude comparée autour de la Cour africaine des droits de l'homme et des peuples, La Revue trimestrielle des droits de l'homme 44 (2000), pp. 729-785

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Charte ne précise ni comment ni de garanties en la matière[55]. La Charte laisse, par ailleurs, à l'appréciation discrétionnaire des États aux termes de l'article 13 le soin de réglementer la participation politique par la voie législative. Malgré cette marge de manœuvre laissée aux Etats, la CADHP écarte la législation nationale dans la motivation de ses décisions surtout lorsqu'elle viole la lettre et l'esprit de la charte africaine.

La Charte africaine des droits de l'homme et des peuples prévoit l'adoption de traités ou accords particuliers en cas de besoin pour compléter ses dispositions[56] et pouvant constituer un référent normatif pour la CADHP. C'est le cas de la Charte africaine de la démocratie, des élections et de la bonne gouvernance. Cette charte a été adoptée par la huitième session ordinaire de la conférence tenue le 30 janvier 2007 à Addis-Abeba (Ethiopie).

Ce faisant, le juge africain a eu l'occasion de vérifier l'application des dispositions de la charte sur la démocratie des élections et de la bonne gouvernance, en l'intégrant dans sa motivation pour débouter l'Etat qui a violé ces dispositions. Ce fut le cas dans l'affaire Action pour la protection des droits de l'homme (APDH) contre l'Etat de Côte d'Ivoire.[57] Cette décision de la CADHP est révélatrice de son potentiel à rassurer les justiciables dans le traitement de leur requête en mettant à l'épreuve la législation électorale manipulée par les dirigeants étatiques au mépris des règles de démocratie. De même, la Cour peut convoquer les dispositions des instruments juridiques internationaux relatifs aux droits de l'homme.

2. L'Invocation des Instruments Juridiques Internationaux Relatifs aux Droits de l'Homme

Si les instruments juridiques régionaux constituent l'ossature de la structure de la motivation des décisions de la Cour africaine des droits de l'homme et des peuples, il faut également relever l'apport d'autres instruments juridiques qu'on peut qualifier de complémentaires. Parmi ceux-ci, il faut distinguer les textes normatifs internationaux de référence. Le Protocole à la Charte relatif à la création de la CADHP prévoit justement que « La Cour applique les dispositions de la Charte ainsi que tout autre instrument pertinent relatif aux droits de l'homme et ratifié par l'Etat concerné ».[58] A cet égard, le Pacte international relatif aux droits civils et politiques (PIDCP) à la suite de la proclamation politique des droits de la Déclaration universelle des droits de l'homme (DUDH), fait référence au droit à des élections libres et honnêtes susceptibles de servir de référent normatif dans le traitement des requêtes en contestation des élections politiques nationales.

55 *Théodore Christakis,* Le droit à l'autodétermination en dehors des situations de décolonisation, Thèse de doctorat en science politique, Marseille 1998, p. 357.

56 Art. 66 de la charte africaine des droits de l'homme et des peuples.

57 Affaire Action pour la protection des droits de l'homme (APDH) c. L'Etat de Côte d'Ivoire, Requête n°001/2014, Arrêt du 18 novembre 2016.

58 Art. 7 Protocole relatif à la Charte Africaine portant sur la Création d'une Cour Africaine des Droits de l'Homme et des Peuples.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Adoptée et proclamée par l'Assemblée générale des Nations Unies dans sa résolution 217A du 10 décembre 1948, la DUDH est devenue le « patrimoine intellectuel commun d'une communauté des peuples, des cultures et des civilisations » qui entend hisser l'homme au-dessus de tout. Elle consacre des droits politiques. L'article 21§ 1 et 3 consacre, en effet, le droit de participation des citoyens aux affaires politiques de leur pays.[59] La rédaction de cet article impose, pour les États membres de la communauté internationale, d'organiser à des intervalles réguliers des élections libres et honnêtes. A cet égard, le juge africain des droits de l'homme et des peuples peut s'y référer pour régler les contestations des élections politiques nationales. Le Pacte international relatif aux droits civils et politiques n'est pas en reste.

Les pactes internationaux sont des traités à portée générale. Ils ont été adoptés par l'Assemblée générale des Nations Unies le 16 décembre 1966. Il s'agit d'abord du Pacte international relatif aux droits économiques sociaux et culturels qui consacre le droit au travail, le droit à la santé, le droit à l'éducation, le droit à la rémunération. C'est le texte international regroupant essentiellement les droits de deuxième génération. En outre, il faut relever le Pacte international relatif aux droits civils et politiques. La jurisprudence est abondante[60] sur l'application et l'interprétation de ces textes internationaux par la Cour.

Par l'étendue de ces référents normatifs, la CADHP a tous les moyens de faire preuve de dynamisme dans l'examen des prétentions des justiciables sans faire preuve de sclérose comme c'est le cas de l'activité juridictionnelle des juridictions constitutionnelles dans le cadre du contentieux électoral. Cette attitude confère une certaine crédibilité aux décisions qu'elle adopte pour régler les désaccords nés de l'organisation des élections politiques nationales.

C. Un Règlement Crédible des Contestations des Élections Politiques Nationales

La survivance des contestations des élections présidentielles ou parlementaires après le règlement proposé par le juge constitutionnel s'explique par la dénonciation de la légitimité des juges composant la juridiction constitutionnelle. Or, la CADHP, au regard des règles qui régissent son organisation et son fonctionnement d'une part et de sa jurisprudence d'autre part, offre plus de crédibilité dans le règlement des contestations électorales. Ceci se vérifie par un pouvoir juridictionnel étendu (I) et par un procès équitable entretenu (II).

59 *Karel Vasak*, Les normes internationales existantes relatives aux élections et leur mise en œuvre, colloque de l'université de la Laguna, Liberté des élections et observation internationale des élections, Bruxelles 1995, p. 183.

60 Tanganyika Law Society, the Legal and Human Rights Centre et Reverend Christopher R. Mtikila c.. Tanzanie (fond) (2013) 1 RJCA 34 ; Commission africaine des droits de l'homme et des peuples c. Libye (fond) (2016) 1 RJCA 158 ; Alex Thomas contre Tanzanie (fond) (2015) 1 RJCA 482.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

I. Un Pouvoir Juridictionnel Étendu

L'autorité de la Cour africaine des droits de l'homme et des peuples comme alternative sérieuse au règlement des contestations des élections politiques nationales est confortée par l'opportunité donnée aux justiciables de procéder au contrôle des lois électorales controversées (1). Bien plus pendant le règlement des contestations électorales, le juge africain des droits de l'homme a la possibilité de suspendre provisoirement les résultats en attendant sa décision définitive (2).

1. Le Contrôle Réel des Lois Électorales Contestées

Les lois électorales sont le nœud gordien des contestations des élections politiques nationales. Elles sont régulièrement dénoncées par les acteurs politiques pour violation des principes démocratiques. Malheureusement ces lois électorales passent entre les mailles du contrôle de constitutionnalité a priori devant être opéré par le juge constitutionnel. Le fait majoritaire est une des raisons qui explique l'édiction des lois électorales taillées à la mesure du parti au pouvoir. Et le juge constitutionnel en fait un référent normatif privilégié dans le règlement du contentieux préélectoral et post-électoral. En revanche la CADHP dans le cadre de ses pouvoirs juridictionnels offre une opportunité aux justiciables contestataires des élections de contrôler les lois électorales par rapport aux instruments juridiques internationaux relatifs aux droits de l'homme. Sa jurisprudence confirme cet atout pour la renforcer comme sérieuse alternative aux solutions nationales aux contestations des élections politiques.

Ainsi, l'affaire Tanganyika law society et Révérend Christopher R. Mtikila c. la République unie de Tanzanie est la première espèce dans laquelle la CADHP a contrôlé une loi régissant entre autres, le processus électoral. En effet, dans ces affaires traitées par la jonction de procédure, accusé d'avoir limité le droit de participer aux affaires publiques et la liberté d'association, l'Etat tanzanien justifie les restrictions en invoquant le principe de la nécessité fondée sur les nécessités sociales du peuple tanzanien. Cette position ne va pas emporter la conviction de la Cour qui va mener une interprétation rigoureuse des dispositions de la Charte africaine des droits de l'homme et des peuples.[61] L'article 27(2) de la Charte prévoit des restrictions aux droits et aux libertés individuelles, mais uniquement sur la base des libertés d'autrui comme la sécurité collective, la moralité et l'intérêt commun. A cet égard, la Cour s'accorde avec la Commission africaine pour dire que les limitations aux droits et aux libertés prévues dans la Charte ne peuvent être uniquement que celles qui sont précisées à l'article 27(2) de la Charte et que ces limitations doivent prendre la forme d'une loi d'application générale. Elles doivent aussi être proportionnées à l'objectif légitime poursuivi.

61 Cour africaine des droits de l'homme et des peuples, Jonction d'instance des affaires Tanganyika law society, the legal and human right centre c. République Unie de Tanzanie, Requête n°009/2011 et Reverend Christopher R. Mtikila contre République Unie de Tanzanie, Requête n°011/2011.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

La CADHP a poursuivi sa hardiesse dans le contrôle des lois relatives au processus électoral dans l'affaire Actions pour la protection des droits de l'homme c. Côte d'Ivoire à l'occasion de laquelle elle a procédé au contrôle de la loi régissant la composition, l'organisation et le fonctionnement de la Commission électorale ivoirienne. Dans cette espèce, la Cour observe, néanmoins, que l'indépendance institutionnelle, à elle seule, ne suffit pas pour garantir la tenue d'élections transparentes, libres et justes prônées par la Charte africaine sur la démocratie et le Protocole de la CEDEAO sur la démocratie. L'organe électoral mis en place doit, en outre, être composé selon la loi de façon à garantir son indépendance et son impartialité et à être perçu comme tel. La Cour observe que la majorité des membres qui composent l'organe électoral ivoirien sont désignés par des personnalités et partis politiques participants aux élections. La Cour considère que pour qu'un tel organe puisse rassurer le public sur sa capacité à organiser des élections transparentes, libres et justes, sa composition doit être équilibrée. Dans son dispositif, elle prescrit à l'Etat défendeur de réviser la composition de la commission électorale indépendante pour la rendre impartiale.

Ces deux espèces indiquent, à n'en point douter, que la Cour africaine des droits de l'homme et des peuples présente des atouts et des prédispositions crédibles pour constituer une alternative dans le règlement des contestations électorales. Ainsi, par sa jurisprudence, la Cour africaine prête une attention au mode de fabrication de la règle électorale, selon qu'il reflète le consensus minimal de la classe politique ou non, selon que cette fabrication intervient à la veille des élections ou non. Au-delà de la possibilité de contrôler les lois électorales par rapport aux principes de démocratie pluralisme et de transparence dans l'organisation des élections, la Cour offre des garanties de sécurité juridique par la suspension potentielle des résultats des élections en attendant sa décision définitive.

2. La Suspension Potentielle des Résultats des Élections durant la Procédure devant le Juge Africain des Droits de l'Homme

Pour empêcher que les résultats des élections politiques contestées puissent produire leurs effets de droit après la décision du juge constitutionnel, la CADHP dispose d'un pouvoir juridictionnel de les suspendre en attendant sa décision définitive. Dans ce sens, elle peut prononcer potentiellement des mesures provisoires. La consécration de ces dernières des mesures provisoires s'inscrit dans un souci de de célérité et d'accélération de la justice.[62] Par leur définition et leur raison d'être, les mesures provisoires apparaissent comme des mesures qu'ordonnent les juges dans le but de régler une situation d'urgence aux conséquences potentiellement irréparables.[63] Elles consistent à enjoindre au défendeur ou à toutes

62 *Georges Wiederkehr*, L'accélération des procédures et les mesures provisoires, Revue internationale de droit comparé 50 (1998), p. 449.

63 *Bamba Nonféni / Michel Zarationon*, Les mesures provisoires de la Cour ADH. Le contentieux du provisoire devant la Cour africaine des droits de l'homme et des peuples, Paris 2024, p. 35.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

les parties de s'abstenir de poser certains actes pouvant affecter gravement ou aliéner l'objet du litige.[64]

Cette définition des mesures provisoires sont celles que les traités ou conventions octroyant cette compétence à la Cour africaine des droits de l'homme et des peuples ont prévu. Ainsi, le Protocole à la charte africaine des droits de l'homme et des peuples qui crée la Cour prévoit que « Dans les cas d'extrême gravité ou d'urgence et lorsqu'il s'avère nécessaire d'éviter des dommages irréparables à des personnes, la Cour ordonne les mesures provisoires qu'elle juge pertinentes. ».[65] Ces dispositions ont été reprises par le règlement intérieur de la Cour africaine des droits de l'homme et des peuples.[66]

De la définition et de la consécration des mesures provisoires, il ressort deux principaux motifs devant structurer la motivation du juge africain à cet effet. Il s'agit de la gravité de la violation et de l'urgence de la situation. Ces notions sont étroitement liées à telle enseigne qu'il y a urgence de rétablir les droits d'une personne parce que l'écoulement du temps normal du procès devant la Cour rendra irréparable le dommage subi. La motivation des mesures provisoires fondées sur l'urgence par le juge africain se fera au cas par cas car l'urgence est une notion de pur fait.[67] Mais pour le cas du contentieux des élections nationales, le motif de l'édiction d'une mesure provisoire devrait concerner l'urgence de la situation. Celle-ci devrait être aisément appréciée par la Cour car il serait urgent pour les contestataires des opérations électorales tant en ce qui concerne l'éligibilité des candidats que les résultats du scrutin que les décisions qui en découlent ne produisent pas d'effet de droit en l'occurrence la disqualification à l'élection ou la prestation de serment du Président de la République élu. A cet égard, la Cour affirme dans l'affaire Guillaume Soro que « le cas révèle une situation d'urgence dès lors que lesdites échéances électorales sont prévues pour se tenir dans moins de six mois de la date de la présente requête ».[68]

Lorsque la mesure provisoire est prononcée la Cour fait toutes les recommandations qu'elle estime appropriées.[69] Malheureusement, c'est plutôt laisser l'exécution de ces mesures à la seule volonté de l'Etat face au silence du protocole à la charte relatif à la Cour africaine des droits de l'homme sur le caractère contraignant des mesures provisoires.

64 *Samson Mwin Sôg Mè Dabiré*, Les ordonnances de la Cour africaine des droits de l'homme et des peuples en indication de mesures provisoires dans les affaires Sébastien Ajavon c. Bénin et Guillaume Soro et autres c. Côte d'Ivoire: souplesse ou aventure?, Annuaire africain des droits de l'homme 4 (2020), p. 481.

65 Art. 27(2) du Protocole à la charte africaine des droits de l'homme et des peuples relatif à la Cour africaine des droits de l'homme et des peuples.

66 Art. 51 du règlement intérieur de la Cor africaine des droits de l'homme et des peuples.

67 *Christian Gabolde*, Essai sur la notion d'urgence en droit administratif français, Thèse de droit, Paris 1951, p. 71.

68 Requête 012/2020, 22 avril 2020, Kigbafori Soro et autres c. Côte d'Ivoire (Ordonnance mesures provisoires, 22 avril 2020) (Ordonnance Guillaume Soro), para. 35.

69 Commission africaine des droits de l'homme et des peuples contre Libye (mesures provisoires 2) (2015) 1 RJCA 155 Ordonnance portant mesures provisoires (No 2), 10 août 2015.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Cependant, la Cour africaine a fait preuve d'hardiesse dans l'arrêt Sébastien Germain Marie Aikoué Ajavon c. Bénin (Ajavon) du 29 mars 2021 en décidant à la demande du requérant, de déterminer les effets juridiques de l'inexécution de ces mesures. Ces effets concernent le droit à la réparation du préjudice né de l'inexécution des mesures provisoires. La Cour laisse ainsi entendre que la simple inobservation de l'ordonnance de mesures provisoires entraîne en soi la responsabilité de l'État défaillant.[70]

A titre de droit comparé, sur le terrain de la valeur juridique des mesures provisoires, la réponse apportée par le droit interaméricain a été plus aisé qu'en contentieux africain ou européen.[71] En effet, l'article 63(2) de la convention américaine des droits de l'homme ne laisse guère de doute sur la valeur contraignante des mesures provisoires ordonnées par la Cour (Hilaire et autres c/ Trinité-et-Tobago, 2002).[72] Qu'à cela ne tienne, en attendant la révision du Protocole qui l'organise pour le renforcement du régime de l'exécution de ses décisions, la CADHP offre tout de même aux contestataires des élections politiques nationales dans le cadre de sa compétence matérielle, les garanties d'un procès équitable dans le règlement des contestations électorales par le juge constitutionnel.

II. Un Procès Équitable Entretenu

La garantie d'un procès équitable est une exigence consubstantielle du fonctionnement de toute juridiction dans le constitutionnalisme contemporain. Sous cet angle, le procès équitable conjugue dans son contenu le principe d'égalité devant la justice qui opère essentiellement comme vecteur des autres normes de procédure, notamment l'impartialité du tribunal. C'est par cette dernière occurrence que la CADHP se démarque notamment de la juridiction constitutionnelle. Elle offre la garantie de l'indépendance et de l'impartialité de ses juges dans l'examen des requêtes (1). Bien plus, la protection de l'indépendance et de l'impartialité de la CADHP est assurée par la lisibilité du régime de récusation de ses membres (2).

1. L'Offre de Garantie de l'Indépendance des Juges dans l'Examen des Requêtes

Dans l'esprit de la définition donnée par Jean-Marc Varaut, l'indépendance est la situation d'une collectivité, d'une institution ou d'une personne qui n'est pas soumise à une autre

70 *Marie Fall*, Les conséquences juridiques du non respect des ordonnances de mesures provisoires de la Cour africaine des droits de l'homme et des peuples: observations sous l'arrêt du 29 mars 2021 (fond et réparations), Sébastien Germain Marie Aikoué Ajavon c. Bénin, Annuaire africain des droits de l'homme 7 (2023), p. 428.

71 La convention européenne des droits de l'homme est également silencieuse sur la valeur juridique des mesures provisoires.

72 *Joël Andriantsimbazovina / Hélène Gaudin / Jean-Pierre Marguenaud, Stéphane Rials / Frédéric Sudre,* Dictionnaire des droits de l'homme*,* Paris 2008, p. 687.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

collectivité, institution ou personne.[73] Il faut que son titulaire n'ait rien à attendre ou à redouter de personne. L'indépendance se manifeste par la liberté du juge de rendre une décision non liée par une hiérarchie ou des normes préexistantes.[74] Sous cet angle l'indépendance du juge a des rapports de connexité avec l'impartialité. En effet, celle-ci désigne une exigence déontologique et éthique inhérente à toute fonction juridictionnelle. En vertu de l'impartialité, le juge doit bannir tout *a priori*, excluant pareillement faveur et préférence, préjugé et prévention, ne céder à aucune influence de quelque source qu'elle soit, ne pas se mettre en situation de conflit ou de conjonction d'intérêts avec l'une des parties. Cela étant, le recours à la CADHP offre aux justiciables contestataires des élections politiques nationales des garanties d'indépendance et d'impartialité de ses juges contrairement aux juges des juridictions nationales dont la légitimité est contestée.

Dans certains pays d'Afrique[75], le Président de la République détient le monopole du pouvoir de nomination des juges constitutionnels. La prééminence du chef de l'Etat apparait dans ses rapports avec le juge constitutionnel. Ce qui laisse planer une grande suspicion sur l'impartialité des juges constitutionnels.[76] Le devoir d'ingratitude, comme l'avait fait remarquer le Président Robert Badinter au Président de la République française qui l'avait nommé, n'a pas été pris en compte par certains juges constitutionnels africains. Ce qui discrédite le juge constitutionnel auprès des acteurs des processus électoraux dans certains Etats. Le juge constitutionnel subit les emprises du pouvoir politique à l'instar du pouvoir judiciaire auquel il appartient dans certains pays. Cette situation de dépendance au pouvoir politique entrave réellement la mission pacificatrice du juge électoral. C'est à juste titre que Jean du Bois de Gaudusson considère que les élections en Afrique sont « entre démocratie et crises ».[77]

Cependant, la création de la CADHP dans le système africain de protection des droits de l'homme offre plus de garantie d'indépendance et d'impartialité des juges pouvant régler les contestations électorales. Ceci se vérifie tant du point de vue de la qualification que de celui du mode de désignation des juges.

En ce qui concerne la qualification des juges, la première condition en la matière est posée par l'article 11 du protocole, qui exige que le candidat ait la nationalité d'un État membre de l'Union africaine, et non pas nécessairement d'un État partie au protocole. Selon ce même article, le candidat doit être élu « à titre personnel parmi des juristes jouissant

73 *Jean -Marc Varaut*, Indépendance, in: Presses universitaires de France, Dictionnaire de la justice, Paris 2004, p. 623.

74 *Loïc Cadiet*, Dictionnaire de la justice, Paris 2004.

75 Art. 182 de la Constitution du Congo de 2015; art. 115 de la Constitution du Bénin de 1990; art. 130 de la Constitution de la Côte d'ivoire de 2016 ; art. 158 de la Constitution de la RDC.

76 *Ismaïla Madior Fall,* Le pouvoir exécutif dans le constitutionnalisme des États d'Afrique*,* Dakar 2008, pp. 310, pp. 83-84.

77 *Jean Du Bois De Gaudusson*, Les élections entre démocratie et crises: l'enjeu stratégique des opérations électorale, in: Jean-Pierre Vettovaglia et al. (eds.), Démocratie et élections dans l'espace francophone: Prévention des crises et promotion de la paix, Bruxelles 2010, p. 176.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

d'une très haute autorité morale, d'une compétence et expérience juridique, judiciaire ou académique reconnue dans le domaine des droits de l'homme et des peuples ». Dans une note verbale adressée dès le 5 avril 2004 à tous les États membres de l'Union[78], la Commission avait tenu à souligner que « l'autorité morale, la crédibilité et la réputation » de la Cour seront dans une large mesure tributaire des onze premiers juges élus. Elle leur adressait également quelques directives quant à la nomination des candidats, insistant sur l'importance de respecter les prescriptions des articles 11, 14 et 18 du protocole, relatives à l'intégrité et à la compétence des juges, à la représentation adéquate des deux sexes ainsi qu'à une représentation géographique équitable et une représentation équilibrée des grands systèmes juridiques, et aux incompatibilités de fonctions, respectivement.

Relativement au mode de désignation, les juges de la CADHP, contrairement aux membres des juridictions constitutionnelles, sont élus au scrutin secret par la Conférence de l'Union sur proposition des États parties à la Charte africaine[79] sur la base d'une liste de candidats dressée par le secrétariat général.[80] Pour lui permettre de dresser cette liste, chaque Etat peut présenter jusqu'à trois candidats dont au moins deux doivent être de la nationalité de cet Etat.[81] A cet égard, force est de constater que la Cour africaine est composée de juges de différentes nationalités, ce qui la prémunit de l'influence d'un quelconque Etat lorsqu'elle statue sur une requête contentieuse. Ce faisant, l'organisation du scrutin par la conférence des présidents débouche sur l'élection de onze juges. Les membres de la Cour sont élus pour une période de six années et sont rééligibles une seule fois. Afin d'assurer un renouvellement progressif de la composition de la Cour, le mandat de quatre des membres élus lors de la première élection prend fin au bout de deux années, et celui de quatre autres au bout de quatre années[82]; les noms des membres concernés sont tirés au sort par le président de la Commission de l'Union africaine, auquel l'acte constitutif de l'Union attribue des fonctions similaires à celles de l'ancien Secrétaire général de l'OUA. Immédiatement après la première élection, c'est le directeur du département des affaires juridiques de la Commission de l'Union qui procède à ce tirage au sort.

Toutefois, selon la doctrine[83], l'indépendance et la souveraineté de la Cour en la matière méritent toutefois d'être relativisées dans la mesure où l'article 19, § 2 précise que toute décision prise pour suspendre un juge qui ne présente plus de garantie d'impartialité « est définitive à moins que la Conférence n'en décide autrement lors de sa session suivante ». Pareilles dispositions, qui offrent clairement un droit d'interférence à l'organe politique

78 Note verbale, BC/OLC/66.5/8/Vol. V.

79 Art. 14 du protocole à la charte africaine des droits de l'homme et des peuples.

80 Ibid., art. 13(2).

81 Ibid., art. 12(2).

82 Ibid., art. 15.

83 *Olivier Delas / Eugène Ntaganda*, La création de la Cour africaine des droits de l'homme et des peuples : mécanisme efficace de protection des droits de l'homme?, Revue Québécoise de droit international 12 (1999), p. 110.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

suprême de l'Union africaine, ne se retrouvent ni dans le statut des deux autres cours régionales ni dans celui de la Cour internationale de Justice par exemple.[84] Toute chose qui conforte la thèse du décloisonnement rebelle entre les trois cours.[85] Cependant, la procédure de récusation prévue par le protocole, offerte au justiciable permet de contourner cette éventuelle immixtion de la conférence des chefs d'Etat dans l'office de la Cour.

2. L'Offre de Lisibilité du Régime de Récusation des Membres de la CADHP

La justice n'étant pas exclusive de méfiance envers les juges, le système africain de protection juridictionnelle des droits de l'homme a consacré avec hardiesse un régime lisible de la récusation des membres de la Cour africaine des droits de l'homme et des peuples. En effet, de façon générale, la récusation est appréhendée comme la mise en accusation des agents de la Justice par ses usagers eux-mêmes. Grave renversement des rôles qui fait muer les justiciables en justiciers des juges, récuser un juge, c'est le refuser, personnellement et ponctuellement.[86] Le terme récusation est lui-même évocateur de ce rejet de ceux qui sont sans doute des juges mais dont une partie au procès ne veut pas qu'ils soient ses juges, tant leur situation les disqualifierait, réclamant donc qu'ils soient, en tout cas sur cette affaire, interdits de juridiction.[87]

Ainsi, le Protocole relatif à la Charte africaine portant création de la CADHP consacre la récusation de ses membres pour assurer leur parfaite neutralité dont ils peuvent se prévaloir pour régler avec efficience et efficacité les contestations relatives aux élections politiques nationales. Il prévoit de ce fait que si « un juge possède la nationalité d'un État partie à une affaire, il se récuse ».[88] Plus loin le règlement intérieur étend les motifs pour lesquels un juge de la Cour doit se récuser. Il prévoit ainsi qu'aucun membre de la Cour ne peut participer à l'examen d'une affaire s'il est antérieurement intervenu dans celle-ci, comme agent, conseil, ou avocat de l'une des parties, membre d'un tribunal national ou international, d'une commission d'enquête, ou à tout autre titre ; s'il a un intérêt personnel dans cette affaire, du fait par exemple d'un lien conjugal ou parental, d'un autre lien de proche parenté, d'un lien personnel ou professionnel étroit, ou d'un lien de subordination avec l'une quelconque des parties; s'il a exprimé en public, par le truchement des médias, par écrit, par des actions publiques ou par tout autre moyen, des opinions qui sont objectivement de nature à nuire à son impartialité; si, pour quelque autre raison que ce soit, son

84 *Ludovic Hennebel / Hélène Tigroudja,* Traité de droit international des droits de l'homme*,* Paris 2018, p. 258.

85 *Laurence Burgirgue-Larsen*, Les 3 Cours régionales des droits de l'homme in context: La justice qui n'allait pas de soi, Paris 2020, p. 249.

86 *Bernard Pacteau*, La récusation des juges administratifs, Revue du droit public 3 (2012), p. 543.

87 *André Heurte*, La récusation des juges administratifs, Semaine juridique (1964), p. 1824.

88 Art. 22 du protocole relatif à la charte portant création de la Cour africaine des droits de l'homme et des peuples.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

indépendance ou son impartialité peuvent légitimement être mises en doute.[89] En cas de doute sur l'existence de l'une des causes de déport énumérées au présent article, la Cour entend le juge concerné ; elle délibère et vote hors sa présence.[90]

La jurisprudence de la CADHP est illustrative de l'application sans ambages de la récusation de ses membres lorsqu'une des situations consacrées par le protocole ou le règlement survient. Ainsi, pour le cas de coïncidence entre la nationalité de l'Etat défendeur et celle d'un juge de la Cour, ce dernier n'hésite pas à se retirer de l'affaire. Ce fut le cas dans les affaires Frank David Omary et autres c. Tanzanie[91], Michelot Yogogombaye c. Sénégal où le juge El Hadji Guissé, de nationalité sénégalaise, s'est récusé[92]; et Association Juristes d'Afrique pour la Bonne Gouvernance c. Côte d'Ivoire avec la récusation du juge Sylvain ORE, de nationalité ivoirienne.[93] En tout état de cause, la jurisprudence de la CADHP est constante sur ce point.[94] Cela étant, l'analyse de la jurisprudence de la CADHP permet d'inférer de ce que la récusation d'un juge est systématique voire automatique dès lors que survient un des motifs de la récusation.

Cet état d'esprit est de nature à rassurer les justiciables contestataires des élections politiques nationales en Afrique ; ce d'autant plus que le régime de récusation des membres de la Cour est une originalité du système africain des droits de l'homme. Pourtant, dans les systèmes européens et américains de protection des droits de l'homme, le principe de la récusation des juges n'est pas consacré. Dans ces deux systèmes, non seulement aucune procédure de récusation n'est prévue, mais l'Etat partie à une affaire peut s'assurer qu'un de ses ressortissants siège. Devant la Cour européenne, le juge élu au titre d'un Etat partie est membre de droit dans la grande chambre. Si celui-ci était absent ou n'était pas en mesure de siéger, l'Etat partie désigne un juge ad hoc.[95] C'est également le cas devant la Cour interaméricaine où tout Etat partie à une affaire peut nommer un juge ad hoc si aucun de ses nationaux ne figurent parmi les juges élus.[96] Qu'à cela ne tienne, dans un contexte africain où les juges sont désignés par le pouvoir exécutif, le régime de la récusation des membres de la CADHP trouve toute sa place et sa pertinence.

89 Art. 8(2) du règlement intérieur de la Cour africaine des droits de l'homme et des peuples.

90 Ibid.

91 Frank David Omary et autres c. Tanzanie (recevabilité) (2014) 1 RJCA 371, Arrêt du 28 mars 2014.

92 Michelot Yogogombaye c. Sénégal (compétence) (2009) 1 RJCA 1 Arrêt du 15 décembre 2009.

93 Association Juristes d'Afrique pour la Bonne Gouvernance c. Côte d'Ivoire (compétence) (2011) 1 RJCA 29 Décision du 16 juin 2011.

94 Delta International Investments SA et M. AGL de Lange et Mme M. de Lange c. Afrique du Sud (compétence) (2012) 1 RJCA 106 Décision du 30 mars 2012 ; Ernest Francis Mtingwi c. Malawi (compétence) (2013) 1 RJCA 197 Décision du 15 mars 2013. Le juge Bernard M. Ngoepe, membre de la Cour de nationalité sud-africaine, s'est récusé. Le Juge Duncan Tambala, étant de nationalité du Malawi, s'est récusé.

95 Art. 27(2) de la convention européenne des droits de l'homme.

96 Art. 55 de la convention américaine des droits de l'homme.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

D. Conclusion

Au regard de la persistance des crises post-électorales après le règlement national du contentieux électoral, il reste judicieux de trouver des voies et moyens pour apaiser les tensions. Dans ce sens, la Cour africaine des droits de l'homme et des peuples peut constituer une alternative sérieuse pour régler les contestations des élections politiques nationales. Le protocole qui l'a créée et la jurisprudence qu'elle a structurée mettent en exergue ses atouts qui se résument d'une part par un traitement flexible des requêtes contentieuses et d'autre part par un règlement crédible des contestations électorales. Le traitement flexible des requêtes contentieuses que la cour peut proposer se justifie par l'extension du pouvoir de contestation des élections aux observateurs électoraux et aux individus. D'un autre point de vue, la Cour fait preuve de flexibilité en élargissant les référents normatifs servant de motivation à ses décisions par rapport aux juges nationaux. En outre, l'office de la CADHP est teinté de crédibilité dans le règlement au fond des litiges au regard de l'étendue de ses pouvoirs juridictionnels et de la garantie d'un procès équitable.

© Aubran Donadoni Ntolo Nzéko

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

La Constitutionnalisation de l'Ethnie dans les États d'Afrique Subsaharienne de Succession Coloniale Française

By *Moustapha Ndiaye* *

Abstract: By replicating the French Constitution at the time of independence, the constitutions of sub-Saharan African states emerging from French colonization incorporated its model of nationhood. Consequently, they largely disregarded the existence of pre-colonial political entities, commonly referred to as "ethnic groups". Indeed, the French model, shaped by the Revolution of 1789, does not recognize historical or identity-based communities. The French nation is conceived as a community of citizens rather than a federation of distinct communities. Overlooked by postcolonial constitutions, ethnic groups nevertheless asserted themselves as fundamental components of African political life, both in peacetime and during periods of conflict. Beginning in the 1970s, with the constitutional recognition of national languages—corresponding to ethnic languages—the formal acknowledgment of ethnicity within constitutional frameworks became increasingly prevalent, particularly during the constitutional reforms of the 1990s. This constitutionalization of ethnic identity is characterized by two key features. First, the constitutions recognize ethnic plurality as an integral component of the nation, marking a paradigmatic departure from the French nation-state model. Second, they establish the legal framework defining the scope of ethnic rights.
Keywords: Ethnic Plurality; French Colonial Legacies; Sub-Saharan Africa

***

A. Introduction

Les sociétés politiques des États d'Afrique subsaharienne de succession coloniale française —nation ivoirienne, peuple sénégalais, etc.—sont le produit de l'histoire coloniale européenne. Du début de la colonisation à la Constitution française du 4 octobre 1958, les populations africaines, vivant sur les territoires conquis par la France, étaient des nationaux français,[1] mais privées de la citoyenneté.[2]

* Enseignant-chercheur en droit public, assistant à l'Université Assane Seck de Ziguinchor, Sénégal. Email: m.n105@univ-zig.sn.

1 Cour de cassation, chambre civile, 15 février 1864, Bâtonnier de l'ordre des avocats de la cour impériale d'Alger, Bulletin des arrêts de la Cour de cassation rendus en matière civile, Bulletin N°2, Arrêt N° 27, Paris, p. 46.

2 *Olivier Beaud*, Préface, in: Yerri Urban (ed.), L'indigène dans le droit colonial français : 1865-1955, Paris 2010, p. XX.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Les constitutions des indépendances vont, sur les bases territoriale et sociologique des colonies, créer de nouvelles sociétés politiques africaines (nation ou peuple) et de nouveaux pouvoirs politiques africains (État). Par ces constitutions, les populations indigènes des colonies françaises d'Afrique subsaharienne retrouvent leur droit à disposer d'eux-mêmes, droit dont elles avaient été privées depuis l'annexion de leurs territoires. Par l'acte constituant, elles vont passer du statut d'une population administrative au statut d'une société politique.

Toutefois, en retrouvant leur droit à l'autodétermination constitutionnelle, les populations africaines vont certes rompre avec la domination politique française mais elles ne s'émancipent pas du modèle politique français. Les constitutions des indépendances ne font pas le choix d'un retour aux sociétés politiques précoloniales, au *statu quo ante bellum.* Elles vont, par mimétisme, consacrer le modèle français de l'État-Nation, caractérisé par l'unicité du pouvoir politique (État unitaire) et de la société politique (nation).

Le modèle français de nation issu de ce mimétisme constitutionnel est le produit de la Révolution française de 1789. Né contre la société féodale, une société de castes, ce modèle est foncièrement antinomique à la reconnaissance des communautés identitaires. Il est juridiquement indifférent aux communautés historiques (auvergnat, basque, breton, catalan, corse, etc.) qui composent la population nationale.[3] Comme le souligne Éric Millard, « l'approche française largement inspirée de la Révolution et de l'Empire », entraine nécessairement « un principe de non-reconnaissance des nationalités à l'intérieur de la nation française ».[4] Le modèle français de nation s'oppose donc à la reconnaissance des ethnies. La France refusa par exemple de signer la Convention relative aux droits de l'enfant parce que comportant des notions comme « minorités ethniques ».[5] Selon l'article 7 de la Constitution française de 1793 le Peuple français est défini comme « l'universalité des citoyens français ». Dans sa décision du 9 mai 1991 relative à la loi portant statut de la collectivité territoriale de Corse,[6] le Conseil constitutionnel français a censuré l'article 1er de la loi mentionnant l'existence « [d']un Peuple corse ». Il a rappelé que le « Peuple français » est « composé de tous les citoyens français sans distinction d'origine, de race ou de religion ». À l'occasion de sa décision relative à la Charte européenne des langues régionales et minoritaires, il a réaffirmé « [l'] unicité du Peuple français ».[7]

Ainsi, en imitant la Constitution française et partant son modèle de société politique, les constitutions des indépendances ont décidé d'ignorer formellement les communautés

3 *Geneviève Koubi*, La « gestion » de la diversité culturelle en France, in: Alain Dieckhoff (ed.), La constellation des appartenances, Paris 2004, p. 283.

4 *Éric Millard*, La " nation " du Droit, in: Patrick Cabanel, La fabrique des Nations, Paris 2003, p. 207.

5 Voir l'article 30 de la Convention relative aux droits de l'enfant.

6 Conseil constitutionnel*,* Décision n° 91-290 DC, 9 mai 1991, Loi portant statut de la Collectivité territoriale de Corse.

7 Conseil constitutionnel, Décision n°99-412 DC, 15 juin 1999, Charte européenne des langues régionales ou minoritaires.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ethniques formant réellement leurs populations nationales. À cette indifférence juridique résultant du mimétisme constitutionnel, s'ajoutait une justification politique. En effet, certains dirigeants africains comme Félix Houphouët-Boigny et Amadou Ahidjo considéraient que la construction de la nation postcoloniale était incompatible avec la reconnaissance des ethnies. Pour l'ancien président camerounais Amadou Ahidjo:

> *« L'unité nationale veut dire qu'il n'y a sur le chemin de la construction nationale ni Ewondo, ni Douala, ni Bamiléké, ni Boulou, ni Bassa, etc., mais partout et toujours des Camerounais ».*[8]

Ces sociétés africaines, dont le président Ahidjo propose la négation juridique sur le chemin de la construction nationale, sont communément désignées par le terme ethnie. Il convient d'en préciser l'acception retenue dans le cadre de cette étude.

Popularisée par le discours colonial, la notion d'ethnie est investie d'une charge idéologique. Comme le souligne Jean-Loup Amselle, il y a une congruence entre l'utilisation de la notion d'ethnie et le colonialisme. Dans le contexte colonial, les sociétés politiques africaines, amérindiennes ou asiatiques furent désignées par ce terme pour les rendre « dissemblables et inferieures »[9] aux sociétés politiques européennes qualifiées de nations.

La présente étude ne souscrit pas à cette conception « coloniale » de l'ethnie. Au lieu de chercher une quelconque différence ou hiérarchie entre les notions de peuple, nation ou ethnie, elle retient une synonymie. Par exemple, la définition française de la « conception allemande » de la nation, dite conception objective parce que fondée sur des critères tels que la langue ou la culture, est similaire à la définition généralement donnée de l'ethnie. C'est notamment le cas de la définition proposée par Paul Mercier qui considère l'ethnie comme un groupe «descendant d'un ancêtre commun ou plus généralement ayant une même origine, possédant une culture homogène et parlant une langue commune, c'est également une unité d'ordre politique ».[10] Toutefois pour des raisons pédagogiques propres à cette étude, le terme ethnie sera ici utilisée pour désigner les sociétés politiques précoloniales et la nation pour nommer les sociétés politiques postcoloniales. Cette distinction offre plus de repères au lecteur, notamment de culture française.

Ignorée par la constitution postcoloniale, étouffée et combattue souvent de façon partisane par les gouvernants, l'ethnie va pourtant s'imposer *de facto* comme un élément « incompressible » de la vie politique africaine postcoloniale. En effet, dès les premières heures des indépendances, l'Afrique subsaharienne est le théâtre de nombreux conflits politiques et l'ethnie en est souvent au centre. Que ce soit dans la conquête violente (guerre civile ou changement anticonstitutionnel de gouvernement) ou démocratique (élection) du

8 *Ahmadou Ahidjo,* Contribution à la construction de l'unité nationale, Paris 1964, p. 29.

9 *Jean-Loup Amselle*, Ethnies et espaces : pour une anthropologie topologique, in: Jean-Loup Amselle / Elikia M'Bokolo (eds.), Au cœur de l'ethnie. Ethnies, tribalisme et État en Afrique, Paris 2005, p. 14.

10 *Paul Mercier,* Remarques sur la signification du "tribalisme" actuel en Afrique noire, Cahiers internationaux de sociologie XXI juillet-décembre (1961), p. 65.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

pouvoir comme dans son exercice (népotisme, clanisme, régionalisme), les antagonismes s'appréhendent et s'expliquent à l'aune de l'ethnie. En effet, il est difficile de contester que les guerres civiles au Tchad, en Centrafrique, en Côte d'Ivoire, au Congo n'ont pas de base ethnique. Il parait tout aussi impossible d'exclure l'ethnie dans l'explication des élections (partis politiques, sens du vote, etc.), ainsi que les violences qu'elles charrient, au Gabon, au Congo, en Côte d'Ivoire, en Guinée Conakry, au Togo, etc. L'ethnie est au centre du phénomène politique africain postcolonial, en temps de paix comme en temps de guerre.

Les constituants États d'Afrique subsaharienne de succession coloniale française vont finir par se saisir de l'ethnie ou du fait ethnique, entamant ainsi un processus d'africanisation ou d' « endogénéisation » de la forme de la société politique africaine postcoloniale. Cette rupture constitutionnelle débute timidement à la fin des années soixante-dix au Bénin, au Burkina Faso et au Sénégal. Au Bénin, la constitutionnalisation de l'ethnie résulte de l'adhésion au constitutionnalisme d'obédience marxiste-léniniste.[11] Au Burkina Faso[12] et au Sénégal,[13] elle s'opère par le truchement de la constitutionnalisation des langues nationales.[14] En effet, comme le remarquait Nazam Halaoui « toute langue étant celle d'une ethnie, le plurilinguisme est ainsi naturellement associé au pluriethnisme ».*[15]*

Puis, le mouvement constitutionnel des années quatre-vingt-dix va généraliser la constitutionnalisation de l'ethnie. Avec ces constitutions issues principalement des Conférences nationales[16] et depuis lors, l'ethnie est sortie définitivement du domaine des « tabous » du constitutionnalisme.[17] De l'indifférence voire de l'indignité constitutionnelle, l'ethnie accède à la dignité constitutionnelle. Elle est saisie par la constitution. D'ailleurs, certaines

11 Par mimétisme de la Constitution de l'URSS de 1924 et de la Constitution de la « République socialiste fédérative de Yougoslavie » de 1974, l'article 3 de la Loi fondamentale du 9 septembre 1977 énonce que « La République Populaire du Bénin est un État unifié multinational. Toutes les nationalités sont égales en droits et en devoir. (…) Toutes les nationalités jouissent de la liberté d'utiliser leur langue parlée et écrite et de développer leur propre culture (…) ».

12 La Constitution est adoptée par référendum le 27 novembre 1977 et promulguée le 13 décembre 1977.

13 Loi constitutionnelle n° 78-60 du 28 décembre 1978 publiée au *Journal officiel de la République du Sénégal* du 6 janvier 1979. Il convient de souligner que les langues nationales avaient déjà obtenu la reconnaissance juridique avec le décret n° 68-871 du 24 juillet 1968 relatif à la transcription des langues nationales, abrogé et remplacé par le décret n° 71-566 du 21 mai 1971 relatif à la transcription des langues nationales.

14 Toutefois, il convient de préciser que la Constitution de la République centrafricaine de 1964 avait déjà érigé le sango au statut de langue nationale.

15 *Nazam Halaloui*, L'identification des langues dans les Constitutions africaines, Revue française de Droit constitutionnel 45 (2001), p. 35.

16 *Fabien Eboussi Boulaga*, Les conférences nationales en Afrique noire une affaire à suivre, Karthala 1993; *Maurice Kamto*, Les conférences nationales africaines ou la création révolutionnaire des Constitutions, in: Dominique Darbon / Jean du Bois de Gaudsson (eds.), La création du droit en Afrique, Paris & Karthala 1997.

17 *Jean Du Bois de Gaudusson*, Les tabous du constitutionnalisme en Afrique. Introduction générale, Afrique Contemporaine 242 (2012), p. 53.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

constitutions vont clairement affirmer que cette reconnaissance était rendue nécessaire par l'échec de la construction de l'unité nationale, donc l'échec de sa construction selon le modèle français. La Constitution tchadienne de 1996 est l'une des plus explicites sur le sujet en déclarant dans son Préambule que : « Le Tchad connaît une évolution institutionnelle et politique mouvementée », une situation due « aux différents régimes qui se sont succédé ont créé et entretenu le régionalisme, le tribalisme, le népotisme (…) dont les conséquences ont été la guerre, la violence politique, la haine, l'intolérance et la méfiance entre les différentes communautés qui composent la Nation tchadienne ».[18] Dans le Préambule de la Constitution congolaise du 15 mars 1992, le constituant fait le même constat : « l'intolérance et la violence politiques ont fortement endeuillé le pays, entretenu et accru la haine et les divisions entre les différentes communautés qui constituent la Nation congolaise ».[19]

Ce mouvement de constitutionnalisation de l'ethnie, comme le fait ethnique lui-même, a fait l'objet de peu d'intérêt de la part de la doctrine. Si la doctrine politiste[20] a longtemps pris en compte l'ethnie dans l'explication et la compréhension du phénomène politique en Afrique subsaharienne postcoloniale, ce n'est pas le cas des juristes. Une frange minoritaire des constitutionnalistes[21] tente de résorber cette lacune. Cette présente étude a pour but d'y contribuer. Pourtant ce manque d'intérêt que la doctrine a réservé à la constitutionnalisation de l'ethnie tranche avec la rupture paradigmatique qu'elle représente. Il s'agit de l'une des rares fois où le constituant africain francophone a rompu avec le mimétisme du modèle constitutionnel français de l'État-Nation pour tenter d'adapter la constitution africaine aux réalités africaines.

L'entrée de l'ethnie dans la constitution soulève un certain nombre d'interrogations. La principale est sans doute les rapports entre les ethnies et la nation postcoloniale. L'ethnie constitue-t-elle une société politique concurrente à la nation ou est-elle incluse dans celle-ci? Son existence consacrée par la constitution, l'ethnie devient-elle un sujet de droit(s)? Si oui, lesquels? etc. Ces interrogations peuvent être subsumées sous la question: quels sont

18 Le projet de constitution issu des travaux de la Conférence Nationale Souveraine est approuvé par référendum le 31 mars 1996 et promulgué le 14 avril 1996.

19 Constitution du 15 mars 1992.

20 *Serge Paulin Akono Evang,* Contribution à une science africaine de l'ethnie à partir de l'expérience camerounaise, Droit et société 86 (2014), p. 157; *René Otayek*, La démocratie entre mobilisations identitaires et besoin d'Etat: y-a-t-il une "exception africaine"?, Autrepart 10 (1999), p. 5; *Christian Coulon*, Les dynamiques de l'ethnicité en Afrique noire, in: Pierre Birnbaum (ed-), Sociologie des nationalismes, Paris 1997, p. 37.

21 A ce propos, on peut citer : *Frédéric-Joël Aivo*, Le Président de la République en Afrique noire francophone : genèse, mutations et avenir de la fonction, Paris 2007; *Dodzi Kokoroko*, L'idée de constitution en Afrique, Afrique contemporaine 242 (2012), p. 117; *Koffi Ahadzi-Nounou,* Préface, in: Placide Moudoudou (ed.), La Constitution en Afrique, Paris 2012, p. 12; *Francisco Meledje Djedjro*, Le système politique ivoirien dans la géopolitique ouest-africaine, Revue du Droit Public 3 (2006), p. 701; *Vivien R. Manangou,* L'ethnie dans les constitutions de troisième génération des États de l'Afrique francophone, Revue Cames 1 (2020); *Moustapha Ndiaye*, La construction constitutionnelle du politique en Afrique subsaharienne francophone, Montpellier 2016.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

les traits caractéristiques de la constitutionnalisation de l'ethnie en Afrique subsaharienne francophone?

A l'analyse, la constitutionnalisation de l'ethnie revêt deux traits saillants dans les États d'Afrique subsaharienne de succession coloniale française. Les constitutions reconnaissent l'existence des ethnies composant leurs populations nationales, consacrant ainsi le modèle de la nation pluriethnique (I). En outre, elles ont aussi pris le soin de déterminer ou de délimiter l'étendue des droits de l'ethnie (II).

I. La Consécration de la Pluralité Ethnique Composant la Nation

Les constitutions des États d'Afrique subsaharienne de succession coloniale française reconnaissent toutes, et de façon explicite, le caractère pluriethnique de leurs nations (1.). Toutefois, si elles admettent que leurs populations sont constituées de plusieurs ethnies, la plupart des constitutions ne les nomment pas, du moins directement. Leur identification, quand elle intervient, se fait par le truchement de l'identification des langues nationales, c'est-à-dire de façon implicite (2.).

1. Une Affirmation Explicite du Caractère Pluriethnique de la Nation

La reconnaissance de la diversité ethnique composant la nation par les constitutions des États d'Afrique subsaharienne de succession coloniale française est une révolution par rapport à leur modèle d'emprunt. À la lecture des constitutions, cette reconnaissance se fait selon trois grands cas de figure.

Le premier cas de figure est celui instauré par la Constitution béninoise du 11 décembre 1990. En son article 11, elle dispose que « Toutes les communautés composant la Nation béninoise jouissent de la liberté d'utiliser leurs langues parlées et écrites et de développer leur propre culture tout en respectant celles des autres ». Certaines constitutions ont repris une formule similaire à celle du constituant béninois. Il s'agit de la Constitution nigérienne du 12 mai 1996 dont l'article 3 énonce que « Toutes les communautés composant la nation nigérienne jouissent de la liberté d'utiliser leurs langues en respectant celles des autres ».[22] Il en est de même de la Constitution congolaise du 15 mars 1992 dont le Préambule déclarait que « L'intolérance et la violence politiques ont fortement endeuillé le pays, entretenu et accru la haine et les divisions entre les différentes communautés qui constituent la Nation congolaise ».[23] Dans cette catégorie, il semble possible de ranger la Constitution sénégalaise du 22 janvier 2001 dont le Préambule affirme que « le peuple du Sénégal souverain proclame (…) - le principe intangible de l'intégrité du territoire national et de l'unité nationale dans le respect des spécificités culturelles de toutes les composantes

22 Disposition reprise à l'identique par l'article 5 de la Constitution du 25 novembre 2010.

23 Cette reconnaissance ne figure pas dans le Préambule de la Constitution du 25 octobre 2015 en vigueur. Toutefois, son article 16 confirme le caractère pluricommunautaire du peuple en disposant que « La loi garantit et assure la promotion et la protection des droits des peuples autochtones ».

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

de la Nation ». Dans la même veine, le Préambule de la Constitution camerounaise du 18 janvier 1996 énonce que « L'État assure la protection des minorités et préserve les droits des populations autochtones conformément à la loi ».[24]

Le deuxième cas de figure regroupe les constitutions qui utilisent formellement les expressions « d'ethnie », de « diversité ethnique » ou de « pluralité ethnique » composant la nation. Il s'agit du Préambule de la Constitution centrafricaine du 30 mars 2016 disposant que « Le peuple centrafricain souverain, Fier de son unité nationale, linguistique et de sa diversité ethnique, culturelle et religieuse qui contribuent à l'enrichissement de sa personnalité » ou encore celui de la Constitution ivoirienne du 8 novembre 2016 déclarant que « Nous, peuple de Côte d'Ivoire, (…) Tenant compte de notre diversité ethnique, culturelle et religieuse, et résolu à construire une Nation pluriethnique et pluriraciale fondée sur les principes de la souveraineté nationale;». La Constitution gabonaise du 26 mars 1991 intègre cette catégorie au regard de l'alinéa 13 de son article 1er : « Les associations, partis ou formations politiques, syndicats, sociétés, établissements d'intérêt social, ainsi que les communautés religieuses dont les activités sont contraires aux lois, ou à la bonne entente des groupes ou ensembles ethniques peuvent être interdits selon les termes de la loi ».

Le troisième cas de figure combine les deux expressions précédentes, c'est-à-dire que la constitution affirme d'une part que la nation est composée de communautés et utilise d'autre part la notion de diversité ethnique. Cette catégorie ne comporte qu'un seul exemple à savoir la Constitution tchadienne du 14 avril 1996 dont le Préambule contient les passages suivants : « différentes communautés qui composent la Nation tchadienne *» et* « Affirmons par la présente Constitution notre volonté de vivre ensemble dans le respect des diversités ethniques, religieuses, régionales et culturelles ».

Quelle que soit la formule choisie, il y a lieu de constater que les constitutions d'Afrique subsaharienne de succession coloniale française reconnaissent désormais que leurs nations sont composées de plusieurs communautés ou ethnies. La nature ethnique des communautés composant la nation est désormais ouvertement assumée.

Alors que les constitutions des indépendances, copiées sur le modèle français, ignoraient les ethnies, les constitutions des années quatre-vingt-dix ont décidé de reconnaitre la composition ethnique de leurs populations. Il s'agit d'une révolution constitutionnelle. Elles ont abandonné le modèle français de la « communauté des citoyens »[25] pour construire un modèle endogène d'une nation pluriethnique. Toutefois, si elles reconnaissent l'existence des ethnies elles ne les nomment pas directement. Pour le moment, l'identification des ethnies se fait pas le biais des langues nationales.

24 Article 57 de la Constitution du 18 janvier 1996.

25 *Dominique Schnapper*, La communauté des citoyens, Sur l'idée moderne de nation, Paris 1994.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

2. Une Identification Implicite des Ethnies Composant la Nation

Au moment des indépendances, toutes les Républiques de succession coloniale française d'Afrique subsaharienne adoptent la langue française comme langue officielle.[26] Pendant longtemps, les langues africaines sont ignorées par les constitutions notamment du fait de leur valeur identitaire et des supposées conséquences néfastes que la reconnaissance de l'ethnie pourrait avoir sur la cohésion nationale.[27]

Dans les années soixante-dix, un mouvement d'affirmation identitaire va s'exprimer sur le continent, opposant l'identité culturelle africaine à l'identité culturelle européenne issue de la colonisation.[28] La langue fut l'un des symboles de ce mouvement de « décolonisation culturelle ». Il convient de rappeler que durant la colonisation, l'enseignement des langues africaines, jugées par le discours de la mission civilisatrice comme des langues de cultures primitives, était interdit. L'arrêté du 22 août 1945 réorganisant l'Enseignement primaire en Afrique occidentale française, J.O. de l'AOF énonçait que l'enseignement primaire élémentaire qui « a pour objet essentiel d'agir sur les populations africaines en vue de diriger et d'accélérer leur évolution [...] est donné uniquement en français ».[29] Naturellement, la question de l'identité linguistique de l'État-nation postcolonial va donc opposer la langue française héritée de la colonisation aux langues africaines autochtones.

Ce nationalisme linguiste africain[30] va aboutir à l'érection constitutionnelle des langues africaines au statut de langues nationales. Les langues africaines consacrées au rang de langues nationales sont les langues des ethnies composant la population nationale. L'iden-

26 Voir *Pierre-François Gonidec*, Constitutions des États de la Communauté, Paris 1959; *Georges Dimitri Lavroff / Gustave Peiser*, Les constitutions africaines, Tome I: L'Afrique noire francophone, Paris 1964.

27 « Soixante-cinq langues, soixante-cinq partis politiques », telle est l'affirmation prêtée au Président Félix Houphouët-Boigny de Côte-d'Ivoire pour justifier son refus de prendre en considération la multitude des langues nationales de son pays, laquelle constituerait une reconnaissance des ethnies correspondantes et ne pouvait que donner naissance à autant de partis politiques.

28 En réalité, le mouvement de résistance identitaire contre le projet de la mission civilisatrice est en cours depuis le début de la colonisation. Les courants de pensée de la négritude, de l'égyptologie africaine ou du panafricanisme furent les voix intellectuelles de cette affirmation identitaire.

29 Arrêté du 22 août 1945, n° 2576, réorganisant l'Enseignement primaire en Afrique occidentale française, J.O. de l'AOF, 15 septembre 1945, pp. 707-735. Dans la même veine, on peut citer l'arrêté du gouverneur général de l'Afrique équatoriale française, Victor Augagneur, signé le 28 décembre 1920 à Brazzaville disposait *:* « Aucune école ne sera autorisée si l'enseignement n'y est donné en français. L'enseignement de toute autre langue est interdit » et l'arrêté du 12 novembre 1912 concernant l'Afrique occidentale française énonçait : « Le but de l'enseignement élémentaire est la diffusion parmi les indigènes du français parlé [...]. La langue française est seule en usage dans les écoles. Il est interdit aux maîtres de se servir avec leurs élèves des idiomes du pays. ».

30 Ce nationalisme linguistique n'est pas spécifique à l'Afrique. C'est le cas au Canada ou en Espagne. En Espagne, la langue constitue le symbole des affirmations autonomiques voire indépendantistes (catalan, galicien, basque, asturien, langue aragonaise). A la mort de franco, le projet de construction d'un État espagnol plurinational avait pour base fondamentale le plurilinguisme.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

tité entre langues nationales et langues ethniques est clairement établie.[31] Le statut de la langue française dans les constitutions vient corroborer cette identité. Depuis le début la colonisation, le français est une langue utilisée par les africains; c'est la langue officielle des États. Pourtant, aucune constitution ne l'a inclus parmi les langues nationales. S'il y a un fait notable en matière de constitutionnalisation des langues nationales, c'est l'exclusion de la langue française. Le constituant sénégalais disait en 1978 qu'il s'agit d'une langue étrangère.[32] L'exclusion de la langue française des langues de l'identité nationale africaine et sa réduction utilitaire au statut de langue officielle de l'État n'est pas propre aux constitutions des États d'Afrique subsaharienne de succession coloniale française. Il s'agit d'une règle commune aux constitutions des États nés d'une décolonisation. Comme le souligne le professeur Stéphane Pierré-Caps, Guy Héraud situe l'apparition de la distinction constitutionnelle entre langue officielle et langue nationale dans la Constitution de la République d'Irlande de 1937 dont l'article 8 disposait : « 1. La langue irlandaise en tant que langue nationale est la première langue officielle ; 2. La langue anglaise est reconnue comme une seconde langue officielle ».[33]

Ce sont les constituants béninois, burkinabé et sénégalais qui inaugurèrent le mouvement de constitutionnalisation des langues nationales dans les années soixante-dix. En vérité, la Constitution mauritanienne a toujours connu la notion de langue nationale et ce dès 1959[34] avec l'arabe comme langue nationale et le français comme langue officielle.[35] Au Bénin, la loi fondamentale du 9 septembre 1977 consacre le droit pour les nationalités d'utiliser leurs langues écrites et parlées. Au Burkina Faso, la Constitution du 13 décembre 1977 énonçait dans son troisième article que : « la langue officielle est le français. Une Loi fixe les modalités de promotion et d'officialisation des langues nationales ».[36] L'année

31 *Halaoui*, note 15, p. 32.

32 Pour justifier son projet « [d']introduction de la nation de langues nationales » dans la Constitution, le gouvernement de Senghor disait, lors de la présentation du projet de loi constitutionnelle devant la Commission de la Législation de l'Assemblée, ceci : « A l'alinéa 2 de l'article 1er la modification a pour objet de faire mention expresse de nos langues nationales dans le texte même de la constitution. Le français que l'histoire et les nécessités ont conduit à adopter comme langue officielle ne perd rien de son importance. Elle reste la langue de travail et de communication au plan interne comme dans les relations internationales. La mesure est une nouvelle manifestation de la politique de promotion des langues nationales. Déjà pour la plupart les règles de base sont fixées en vue de la généralisation de leur enseignement. Pour en souligner à la fois l'importance, la dignité et le rang la constitution les énumère désormais à côté du français, la langue étrangère et seconde, aux termes du décret 72-861 du 13 juillet 1972. Il s'agit du Diola, du Malinké, du Poular, du Sérère, du Soninké et du Wolof […] ».

33 *Stéphane Pierre-Caps*, Le statut constitutionnel de la langue nationale et/ou officielle. Étude de droit comparé, in: Anne-Marie Le Pourhiet (ed.), Langue(s) et Constitution(s), Actes du Colloque organisé à Rennes les 7-8 décembre 2000, Paris 2004, p. 95.

34 Journal officiel de la Communauté, Première année, n° 5, 15 juin 1959, p. 79.

35 Article 3 « La langue nationale de la Mauritanie est l'arabe. La langue officielle est le français ».

36 La Constitution est adoptée par référendum le 27 novembre 1977 et promulguée le 13 décembre 1977.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

suivante, au Sénégal, ce fut la loi constitutionnelle du 28 décembre 1978 portant révision de la Constitution du 7 mars 1963 qui introduisit la notion de « langues nationales »[37] dans la Constitution.[38] A l'alinéa 2 de l'article premier, la Constitution disposait désormais : *«* la langue officielle de la République du Sénégal est le français. Les langues nationales sont le diola, le malinké, le poular, le sérère, le soninké et le wolof ».[39]

Avec le mouvement constitutionnel des années quatre-vingt-dix, la constitutionnalisation des langues nationales se généralise. La notion de « langues nationales » est consacrée dans toutes les constitutions d'Afrique subsaharienne francophone : Bénin (article 11 de la Constitution du 11 décembre 1990),[40] Burkina Faso (article 35 de la Constitution du 11 juin 1991),[41] Cameroun (article 1er, alinéa Constitution du 18 janvier 1996[42]), Centrafrique (Constitution du 30 mars 2016),[43] Congo (Constitution du 6 novembre 2015),[44] Gabon (Constitution du 26 mars 1991),[45] Guinée (Constitution du 23 décembre 1990),[46]

37 N° 78-60 du 28 décembre 1978 publiée au Journal officiel de la République du Sénégal du 6 janvier 1979. Il convient de préciser que ces langues africaines avaient déjà le statut juridique de langues nationales avec le décret n° 71-566 du 21 mai 1971 relatif à la transcription des langues nationales.

38 *Bruno Cheramy*, Nouvelle révision constitutionnelle au Sénégal, Éthiopiques: revue socialiste de la culture négro-africaine 18 (1979).

39 Il convient de préciser que ces langues africaines avaient déjà le statut juridique de langues nationales avec le décret n° 71-566 du 21 mai 1971 relatif à la transcription des langues nationales.

40 « Toutes les communautés composant la Nation béninoise jouissent de la liberté d'utiliser leurs langues parlées et écrites et de développer leur propre culture tout en respectant celles des autres. L'État doit promouvoir le développement de langues nationales d'intercommunication ».

41 « La langue officielle est le français. Une Loi fixe les modalités de promotion et d'officialisation des langues nationales ».

42 La Constitution du 2 juin 1972 a fait l'objet d'une révision générale le 18 janvier 1996 : loi n° 96-06, publiée au Journal officiel le 30 janvier : « 3. La République du Cameroun adopte l'anglais et le français comme langues officielles d'égale valeur. Elle garantit la promotion du bilinguisme sur toute l'étendue du territoire. Elle œuvre pour la protection et la promotion des langues nationales.

43 La consécration intervient pour la première avec la Constitution du 14 janvier 1995, article 17 « la forme de l'Etat est la République … Ses langues officielles sont le Sango et le français ». La Constitution en vigueur du 30 mars 2016 dispose à l'article 18 au cinquième alinéa que la « langue nationale est le Sango » et au sixième alinéa que les « langues officielles sont le Sango et le Français ».

44 Les langues nationales sont consacrées pour la première fois par la Constitution du 15 mars 1992, à l'article 3 « La langue officielle est le français. Les langues nationales véhiculaires sont le lingala et le munukutuba ». La Constitution de 2015 en vigueur dispose désormais, à l'article 4, « La langue officielle est le français. Les langues nationales véhiculaires sont le lingala et le kituba ».

45 A l'avant-dernier alinéa de l'article 2, il est énoncé « La République gabonaise adopte le français comme langue officielle de travail. En outre, elle œuvre pour la protection et la promotion des langues nationales ».

46 La reconnaissance des langues africaines fut d'abord l'œuvre de la Constitution du 23 décembre 1990 disposant au second alinéa du premier article « La langue officielle est le français. L'État

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Mali (Constitution du 25 février 1992),[47] Mauritanie (Constitution du 20 juillet 1991),[48] Niger (25 novembre 2010),[49] le Sénégal (Constitution du 22 janvier 2001)[50] et le Tchad (Constitution du 14 avril 1996).[51] Aujourd'hui, les seules exceptions sont les Constitution ivoirienne[52] et togolaise.[53]

En matière de constitutionnalisation des langues nationales, il y a d'une part les constitutions qui se limitent à consacrer les langues nationales sans les nommer et d'autre part celles qui, en outre, identifient nommément ces langues nationales. Dans ce deuxième cas de figure, on dénombre, les Constitutions centrafricaine,[54] congolaise,[55] mauritanienne,[56] sénégalaise[57] et tchadienne.[58] Avec ces dernières, la relation entre langue et ethnie est sans ambiguïté. Les appellations des langues nationales renvoient aux noms des ethnies. Le cas du Sénégal peut servir d'exemple d'illustration du lien entre langues nationales et ethnies composant la nation. Depuis 1978, la Constitution sénégalaise cite nommément les langues nationales. L'alinéa 2 de l'article premier de la Constitution de 2001 en vigueur est ainsi libellé: « La langue officielle de la République du Sénégal est le français. Les langues nationales sont le diola, le malinké, le pular, le sérère, le soninké, le wolof et toute autre

assure la promotion des cultures et des langues du peuple de Guinée ». Le même libellé figure au troisième alinéa du premier article de la Constitution actuelle.

47 Aux deux derniers alinéas de l'article 25, il est écrit : « le Français est la langue d'expression officielle. La loi fixe les modalités de promotion et d'officialisation des langues nationales »

48 La Constitution du 20 mai 1961 avait d'abord reconnu l'arabe comme langue nationale (article 3). La Constitution du 12 juillet 1991 dispose dans son article 6 « les langues nationales sont l'arabe, le poular, le soninké et le wolof ; la langue officielle est l'arabe »

49 La Constitution du 12 mai 1996 fut la première à introduire le terme de langues nationales. Elle dispose dans son article 3 « toutes les communautés composant la nation nigérienne jouissent de la liberté d'utiliser leurs langues en respectant celles des autres. Ces langues ont, en toute égalité, le statut de langues nationales. La loi fixe les modalités de leur promotion et de leur développement. La langue officielle est le français. ». Aujourd'hui, l'article 5 de la Constitution du 25 novembre 2010 légifère sur cette question en ces termes « toutes les communautés composant la Nation nigérienne jouissent de la liberté d'utiliser leurs langues en respectant celles des autres. Ces langues ont, en toute égalité, le statut de langues nationales. L'Etat veille à la promotion et au développement des langues nationales. La loi fixe les modalités de leur promotion et de leur développement. La langue officielle est le français ».

50 L'Article premier alinéa 2 dispose « la langue officielle de la République du Sénégal est le français. Les langues nationales sont le diola, le malinké, le pular, le sérère, le soninké, le wolof et toute autre langue nationale qui sera codifiée ».

51 L'article 9 énonce « les langues officielles sont le français et l'arabe. La loi fixe les conditions de promotion et de développement des langues nationales ».

52 Constitution du 8 novembre 2016.

53 Constitution du 14 octobre 1992.

54 Constitution du 14 janvier 1995; Constitution du 30 mars 2016

55 Constitution du 15 mars 1992; Constitution du 20 janvier 2002; Constitution du 6 novembre 2015

56 Constitution du 20 juillet 1991.

57 Constitution du 7 mars 1963; Constitution du 22 janvier 2001.

58 Constitution du 31 mars 1996.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

langue nationale qui sera codifiée ». A la lecture de cette disposition, il possible d'en déduire que « les composantes ethniques » de la nation sénégalaise évoquées par le Préambule, sont les peuples diola, malinké, pular, sérère, soninké et wolof. Plus exactement, il conviendrait de dire que parmi les « composantes ethniques » dans la mesure où bien que les ethnies citées représentent la majorité de la population sénégalaise, cette dernière compte d'autres ethnies telles que les Bassari, les Bedik, les Manjak, les Mancagne, etc. Une fois codifiées, les langues de ces ethnies senegalaises devront être intégrées dans la Constitution.

Concernant les constitutions qui se limitent simplement à consacrer l'expression de langues nationales sans les nommer, comme les Constitutions du Bénin, du Burkina Faso, du Congo ou du Gabon, le mutisme pourrait s'expliquer pour une raison de commodité. En l'occurrence, devant le grand nombre des langues ethniques, les constituants ont peut-être décidé de ne pas les citer dans le texte constitutionnel. Au Cameroun par exemple, les études officielles dénombrent entre 238 à 249 langues ethniques.[59] Il y a donc lieu de considérer que par « langues nationales », ces Constitutions font implicitement référence à leurs langues autochtones comme c'est le cas pour les Constitutions qui les nomment de façon explicite.

Aussi, la dénomination des langues nationales peut se trouver dans les textes juridiques auxquels renvoient les constitutions. C'est notamment le cas du Mali avec la loi du 23 août 1996 portant modalités de promotion de treize langues nationales :[60] bamanankan, bomu, bozo, dogoso, fulfulde, kassonké, malinké, mamara, maure, soninké, songhoï, syenara et tamasheq. Ces treize langues avaient été déjà consacrées par le décret du 19 juillet 1983 fixant l'alphabet pour la transcription de langues nationales qui énumère treize langues nationales.[61]

Au Niger, en application de l'article 3 de la Constitution du 18 juillet 1999,[62] l'article 2 de la loi n° 2001-037 du 31 décembre 2001 fixant les modalités de promotion et du développement des langues nationale*s* a identifié dix langues nationales: « Sont proclamées langues nationales: l'arabe, le budurna, le fulfuldé, le guimancema, le hausa, le kanuri, le sonay-zarma, le tamajaq, le tassawaq et le tubu. ». Ces langues nationales renvoient aux ethnies éponymes comme en atteste l'article 1[er] de la même loi qui dit reconnaitre « comme langue nationale du Niger, la langue commune à un groupe établi de citoyens au sein

59 *Michel Dieu / Patrick Renaud* (eds.), Atlas linguistique du Cameroun, Paris 1983.

60 Loi n°96-049 du 23 août 1996 portant modalités de promotion de treize langues nationales.

61 L'article 1[er] du Décret n° 159 PG-RM du 19 juillet 1983 fixant l'alphabet pour la transcription de langues nationales dispose que « L'alphabet figurant au tableau I est adopté pour la transcription des langues nationales suivantes : bambara (bamanan), bobo (bomu), bozo, dogen (dogo-so), peul (fulfulde), soni (soninke), songhoy (sonoy), sénoufo-minianka (syenara-mamara), tamasheq (tamalayt).

62 L'article 3 de la Constitution du 18 juillet 1999 dispose que « Toutes les communautés composant la Nation nigérienne jouissent de la liberté d'utiliser leurs langues en respectant celles des autres. Ces langues ont, en toute égalité, le statut de langues nationales. La loi fixe les modalités de leur promotion et de leur développement. ».

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

du territoire du Niger à sa formation ». La même disposition a pris le soin de préciser qu'est « considéré comme groupe établi de citoyens au sein du territoire du Niger à sa formation un groupe historiquement identifié à ce territoire par l'existence d'un village ou d'un campement au moment de l'établissement de la territorialité du Niger » et dénombre les groupes ou communautés suivants: « les Arabes, les Buduma, les Fulbé, les Gulmance, les Hausawa, les lsawghan, les Kanuri, les Kel-tamajaq, les Sonay-Zarma et les Tubu ».

Au final, qu'elles soient nommées ou pas, directement ou indirectement, les langues nationales renvoient aux langues des ethnies composant la population nationale. Ainsi, l'ethnie est implicitement reconnue par la constitution. Les constitutions ne se sont pas limitées à consacrer l'existence juridique de l'ethnie. En tant que sujet de droit, elles ont précisé l'étendue de ces droits.

B. La Détermination des Droits de l'Ethnie

Que cela soit de façon implicite ou explicite, les constitutions reconnaissent l'existence de l'ethnie. Toutefois, il semble que les constituants des États d'Afrique subsaharienne de succession coloniale française ont reconnu l'ethnie dans le but de mieux la maitriser ou la brider. En effet, s'ils lui reconnaissent, expressément, des droits linguistiques ou culturels (I.) ils ont en même temps pris la précaution de lui refuser, de façon tout aussi expresse, le bénéfice de tout droit politique (II.).

I. Une Ethnie Reconnue au Bénéfice des Droits Linguistiques

Aujourd'hui, à l'exception de la Côte d'Ivoire et du Togo, les constitutions consacrent les ethniques comme langues nationales. Outre la reconnaissance des langues ethniques, nommément identifiées ou pas, les constituants ont érigé la langue nationale en droit ou liberté et ont précisé ses sujets ou bénéficiaires.

Le droit à la langue est un droit constitutionnel. En la matière, les textes constitutionnels ont consacré le droit d'utiliser et le droit de valoriser ou de promouvoir les langues nationales. Le droit d'utiliser les langues nationales apparait expressément dans plusieurs constitutions. Il en est ainsi de l'article 11 de la Constitution béninoise de 1990 qui dispose que « Toutes les communautés composant la Nation béninoise jouissent de la liberté d'utiliser leurs langues parlées et écrites et de développer leur propre culture tout en respectant celles des autres » ou de l'article 5 de la Constitution nigérienne de 2010 qui énonce que « Toutes les communautés composant la Nation nigérienne jouissent de la liberté d'utiliser leurs langues en respectant celles des autres ».

Consacré officiellement par la constitution, le droit d'utiliser les langues nationales peut impliquer plusieurs choses. La première garantie qu'offre ce droit est la liberté de pouvoir l'utiliser dans la vie privée. Ce droit implique aussi le droit pour toute personne d'utiliser cette langue dans ses rapports avec les pouvoirs publics et dans le cadre des services publics.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

L'utilisation des langues nationales par les pouvoirs publics et dans les services publics est déjà une réalité dans de nombreux États. Au Mali et au Sénégal par exemple, le Chef de l'État tient ses discours à la nation (à l'occasion du nouvel an et de la fête de l'indépendance) en français et dans une langue nationale, notamment la langue comprise et parlée par la grande majorité de la population (bambara au Mali et wolof au Sénégal). Dans ces deux pays toujours, les parlementaires comme les ministres s'expriment souvent en langues nationales lors des débats parlementaires. A cet égard, au Sénégal, l'Assemblée nationale s'est dotée en 2014 d'un système de traduction simultanée des débats dans les six langues nationales consacrées par la Constitution.[63]

Le droit à la langue nationale connait également quelques applications dans les rapports du citoyen avec les services publics. C'est le cas dans le secteur public de l'audiovisuel. En effet, les médias publics diffusent le journal en français et dans les langues nationales au Burkina Faso, en Côte d'Ivoire, au Mali, au Sénégal, etc. Au Tchad, l'article 3 de l'Ordonnance du 9 juillet 2012 portant création de l'Agence Tchadienne de Presse et d'Édition (ATPE) assigne à cette agence l'obligation de « assurer la confection, l'impression et la vente du quotidien national en français et en arabe, la diffusion de toutes les informations en langues nationales ».[64]

Le droit à la langue s'exprime aussi dans le service public de la justice. Au Niger, l'article 5 de la loi n° 2001-037 du 31 décembre 2001 fixant les modalités de promotion et du développement des langues nationales dispose que « Tout citoyen nigérien a droit de bénéficier des services de la justice dans la langue[nationale]de son choix ». L'article 5 de la loi du 10 mai 1993 portant organisation judiciaire[65] du Burkina Faso exige, parmi les conditions requises pour être nommé membre du tribunal départemental, de savoir « écrire et parler couramment le français et si possible, la langue [nationale] la plus parlée dans le département ».

Le droit d'utiliser la langue nationale s'applique également dans le cadre du service public de l'enseignement. Les nationaux ont le droit à l'éducation et à l'instruction dans leurs langues nationales. À ce sujet, le constituant sénégalais est l'un des plus explicites. L'article 22 de la Constitution de 2001 dispose que « Toutes les institutions nationales, publiques ou privées, ont le devoir d'alphabétiser leurs membres et de participer à l'effort national d'alphabétisation dans l'une des langues nationales ». Ceci est déjà le cas, timidement certes, dans des pays comme le Sénégal avec l'introduction des langues nationales dans le

63 Dans son discours officiel tenu lors de la cérémonie d'inauguration le 3 décembre 2014, le président de l'Assemblée nationale, Moustapha NIASSE déclarait que « tout député pourra, dans l'hémicycle, intervenir dans sa langue maternelle ou dans la langue nationale qu'il maîtrise le mieux et se faire comprendre de tous. De même, (...) tout député sera en mesure d'écouter et de comprendre ses collègues, à travers sa propre langue ou la langue française ».

64 L'Ordonnance 12-013 2012-07-09 PR portant création de l'Agence Tchadienne de Presse et d'Édition (ATPE).

65 Loi n°-010/93/ADP du 10 mai 1993 portant organisation judiciaire.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

système éducatif.[66] Au Burkina Faso, l'article 4 de la loi d'orientation de l'éducation nationale de 1996 disposait déjà que « les langues d'enseignement sont le français et les langues nationales ».[67] Au Bénin, l'article 8 de la loi du 11 novembre 2003 portant orientation de l'éducation nationale[68] prescrit que «l'enseignement est dispensé principalement en français, en anglais et en langues nationales».

Le droit à l'éducation dans les langues nationales constitue ainsi une obligation pour l'État. Au Niger, l'alinéa 2 de l'article 4 de la loi n° 2001-037 du 31 décembre 2001 fixant les modalités de promotion et du développement des langues nationales dispose que « Dans le secteur de l'éducation, l'utilisation et l'enseignement des langues nationales sont obligatoires ». Le droit de valoriser, de promouvoir et de développer les langues nationales constitue certes un droit. Les locuteurs d'une langue nationale ont le droit de mener toute action en vue de la promouvoir, de la valoriser ou de la développer. C'est le but de certaines associations culturelles. Mais ce droit apparait aussi comme un droit-créance. La préservation et le développement d'une langue passent par son enseignement.[69] En effet, certaines constitutions font de la promotion ou du développement des langues un devoir de l'État. C'est le cas de la Constitution béninoise de 1990 qui dispose en son article 11 que « … L'État doit promouvoir le développement de langues nationales d'intercommunication » ; de l'article 5 de la Constitution nigérienne de 2010 qui énonce, l'indicatif valant impératif, que « L'État veille à la promotion et au développement des langues nationales » ; de l'article 35 de la Constitution Burkinabè de 1991 « … La loi fixe les modalités de promotion et d'officialisation des langues nationales » ; de l'article 25 de la Constitution du Mali de 1992 « La loi fixe les modalités de promotion et d'officialisation des langues nationales » ; de l'article 1er de la Constitution guinéenne du 23 décembre 1990 et de 2020 « … L'État assure la promotion des cultures et des langues du peuple de Guinée » ou encore l'alinéa 8 du Préambule de la Constitution gabonaise du 26 mars 1991 qui affirme que « La République gabonaise (…) œuvre pour la protection et la promotion des langues nationales », etc. Le développement des langues nationales passe aussi par les programmes d'alphabétisation.

En ce qui concerne les sujets des droits linguistiques, certaines constitutions sont muettes. Dans ce cas de figure, il est possible de considérer que pour des constitutions

66 Loi n° 91-22 du 30 janvier 1991 d'orientation de l'Éducation nationale dispose en son article 6 que « L'Éducation nationale est sénégalaise et africaine : développant l'enseignement des langues nationales, instruments privilégiés pour donner aux enseignés un contact vivant avec leur culture et les enraciner dans leur histoire, elle forme un Sénégalais conscient de son appartenance et de son identité ».

67 Loi n° 013/96/ADP portant loi d'orientation de l'éducation. La même disposition est reprise par l'article 10 de la loi n° 013-2007-AN du 30 juillet 2007 portant loi d'orientation de l'éducation : « Les langues d'enseignement utilisées au Burkina Faso sont le français et les langues nationales aussi bien dans la pratique pédagogique que dans les évaluations ».

68 Loi n° 2003-17 du 11 novembre 2003 portant orientation de l'éducation nationale.

69 En Côte d'Ivoire, la Loi du 18 août 1977 n° 77-584, portant réforme de l'enseignement dispose en son article 67: « L'introduction des langues nationales dans l'enseignement officiel doit être conçue comme un facteur d'unité nationale et de revalorisation du patrimoine culturel ivoirien.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

d'obédience libérale bourgeoise, le sujet de droit commun est l'individu. Le droit linguistique est un droit individuel. Le titre 2 de la Constitution béninoise de 1990 est intitulé « Des droits et des devoirs de la personne humaine » et son article 10 dit « Article 10. Toute personne a droit à la culture. L'État a le devoir de sauvegarder et de promouvoir les valeurs nationales de civilisation tant matérielles que spirituelles, ainsi que les traditions culturelles ». C'est aussi le cas de la Constitution sénégalaise de 2001 dont l'article 22 dispose que « Toutes les institutions nationales, publiques ou privées, ont le devoir d'alphabétiser leurs membres et de participer à l'effort national d'alphabétisation dans l'une des langues nationales » est inséré dans le titre 2 intitulé « des droits et libertés fondamentaux et devoirs des citoyens ».

En revanche, d'autres constitutions énoncent clairement, ce qui est une rupture fondamentale avec le modèle français, que le droit à la langue est également reconnu aux communautés. L'article 11 de la Constitution du Bénin de 1990 dispose que: « Toutes les communautés composant la Nation béninoise jouissent de la liberté d'utiliser leurs langues parlées et écrites et de développer leur propre culture tout en respectant celles des autres… ». Donc au Bénin, les droits linguistiques ont pour sujet aussi bien l'individu que la communauté. Il en est de même de la Constitution nigérienne de 2010 dont l'article 5 prévoit que: « Toutes les communautés composant la Nation nigérienne jouissent de la liberté d'utiliser leurs langues en respectant celles des autres ». En reconnaissant les communautés ethniques comme des sujets du droit à la langue, les Constitutions béninoise et nigérienne confirment qu'elles sont des personnes juridiques à part entière.

Si les constitutions reconnaissent expressément des droits culturels, notamment linguistiques, aux ethnies, elles leur refusent tout aussi clairement le bénéfice des droits politiques.

II. Une Ethnie Exclue du Bénéfice des Droits Politiques

Dans un État démocratique, la constitution doit régler deux questions politiques majeures. Elle doit déterminer le titulaire de la souveraineté et les modalités de son exercice. Pour chacune de ces questions, les constituants africains sont restés fidèles, encore aujourd'hui, à la conception française. Non seulement, elles affirment que la souveraineté et son exercice appartiennent exclusivement à la nation mais en outre, elles ont expressément exclu tout droit politique de souveraineté au profit de l'ethnie.

Sur la question du titulaire de la souveraineté, la fidélité à la conception française est totale. En effet, s'il y a une disposition de la Constitution française de 1958, reprise par les constitutions africaines et qui est restée fondamentalement inchangée jusqu'aujourd'hui, c'est l'article 3 affirmant l'unicité du titulaire de la souveraineté qui elle-même est indivisible.[70] Le mimétisme est tel que le numéro de la disposition (3) copié sur la Constitution française est demeuré le même pour bon nombre de constitutions. C'est le cas de la

70 Article 3 : « La souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum. Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice ».

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Constitution béninoise de 1990,[71] de la Constitution sénégalaise de 2001[72] ou encore de la Constitution tchadienne du 14 avril 1996.[73] Même si d'autres constitutions sont légèrement différentes dans la formulation, elles demeurent substantiellement similaires à la Constitution française. C'est par exemple le cas l'article 4 de la Constitution nigérienne de 1990.[74]

Avec ces dispositions, les constitutions affirment que le peuple, considéré comme une « unité indissoluble »[75] pour reprendre l'expression de l'article 2 de la Constitution espagnole de 1978, est le détenteur exclusif de la souveraineté. En d'autres termes, même si la nation est caractérisée par une diversité ethnique, la souveraineté n'est pas divisible en autant d'ethnies que compte la population nationale. Par conséquent, aucune communauté ou ethnie ne peut se voir reconnaitre une parcelle de la souveraineté. En affirmant que le peuple est le seul détenteur de la souveraineté à l'exclusion de ses composantes ethniques, les constituants ont sans doute voulu écarter toute prétention des ethnies au droit à l'autodétermination politique ou du droit des peuples à disposer d'eux-mêmes.

Aussi, pour ce qui relève de l'exercice de la souveraineté, les constitutions ont conservé religieusement la tradition constitutionnelle française. Elles ne reconnaissent le droit de vote et d'éligibilité qu'aux citoyens. Les constitutions ont même pris le soin d'exclure l'ethnie de toute forme de participation à la conquête du pouvoir politique et donc à l'exercice de la souveraineté. A cet effet, elles ont prévu toute une série d'interdictions.

La première de ces interdictions et qui constitue une liberté fondamentale dans une démocratie électorale, libérale et pluraliste, c'est le droit de former un parti ou une association politique en vue de conquérir et d'exercer le pouvoir souverain. Selon la formule française consacrée, les partis politiques concourent à l'expression du suffrage. En principe, dans le cadre d'une démocratie libérale et pluraliste, la formation des associations politiques doit être libre. Les formations politiques doivent permettre l'expression de la pluralité des valeurs et des opinions. Par exemple, il est courant dans les démocraties européennes,

71 Article 3 : « La souveraineté nationale appartient au peuple. Aucune fraction du peuple, aucune communauté, aucune corporation, aucun parti ou association politique, aucune organisation syndicale ni aucun individu ne peut s'en attribuer l'exercice »

72 Article 3 : « La souveraineté nationale appartient au peuple sénégalais qui l'exerce par ses représentants ou par la voie du référendum. Aucune section du peuple, ni aucun individu, ne peut s'attribuer l'exercice de la souveraineté »

73 Article 3 : « La souveraineté appartient au peuple qui l'exerce soit directement par référendum, soit indirectement par l'intermédiaire de ses représentants élus. Aucune communauté, aucune corporation, aucun parti politique ou association, aucune organisation syndicale, aucun individu ou groupe d'individus ne peut s'en attribuer l'exercice. Les conditions de recours au référendum sont déterminées par la présente Constitution et par une loi organique. ».

74 « La souveraineté nationale appartient au Peuple. Aucune fraction du Peuple, aucune communauté, aucune corporation, aucun parti ou association politique, aucune organisation syndicale ni aucun individu ne peut s'en attribuer l'exercice […] ».

75 L'article 2 énonce que « la Constitution se fonde sur l'unité indissoluble de la Nation espagnole, patrie commune et indivisible de tous les Espagnols, et reconnaît et garantit le droit à l'autonomie des nationalités et des régions qui l'intègrent et la solidarité entre l'ensemble d'entre elles ».

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

que des partis politiques se réclament des valeurs du christianisme comme la CDU[76] en Allemagne ou le Parti démocrate-chrétien en France.

Mais dans les démocraties d'Afrique subsaharienne francophone, les constitutions interdisent, explicitement ou implicitement, que les partis politiques soient constitués sur des bases ethniques et même religieuses. C'est un trait commun aux constitutions africaines francophones et une différence avec le modèle français. Parmi les constitutions qui l'interdisent explicitement, il y a la Constitution du Sénégal de 2001 dont l'article 4 interdit aux partis politiques de s'identifier « à une race, à une ethnie, à un sexe, à une religion, à une secte, à une langue ou à une région ».[77] Il y a aussi l'article 7 de la Constitution togolaise du 14 octobre 1992 qui dispose que « Les partis politiques et les regroupements de partis politiques doivent respecter la Constitution. Ils ne peuvent s'identifier à une région, à une ethnie ou à une religion ». Dans le même sillage, l'article 9 de la Constitution nigérienne de 2010 affirme que « Les partis politiques à caractère ethnique, régionaliste ou religieux sont interdits. Aucun parti ne saurait être créé dans le but de promouvoir une ethnie, une région ou une religion, sous peine des sanctions prévues par la loi ».[78]

D'autres constitutions posent l'interdiction de manière systémique. Il s'agit par exemple de la Constitution tchadienne de 1996 qui indique à l'article 4 que « Les partis et les groupements politiques concourent à l'expression du suffrage. Ils se forment librement et exercent leurs activités dans les conditions prévues par la loi et dans le respect des principes de la souveraineté nationale, de l'intégrité territoriale, de l'unité nationale et de la démocratie pluraliste » et précise à l'article 5 que « Toute propagande à caractère ethnique, tribaliste, régionaliste ou confessionnaliste tendant à porter atteinte à l'unité nationale ou à la laïcité de l'État est interdite ».

La seule exception à l'interdiction formelle ou explicite de l'identification des partis politiques à l'ethnie, la race ou la religion est la Constitution camerounaise. Elle a repris en substance l'énoncé de l'article 4 de la Constitution française de 1958.[79] En effet, l'article 3 de la Constitution camerounaise de 1972 dispose que « Les partis et formations politiques

76 En allemand: Christlich Demokratische Union Deutschlands; en français: Union chrétienne-démocrate d'Allemagne.

77 L'article 4 énonce que « Les partis politiques et coalitions de partis politiques concourent à l'expression du suffrage. Ils sont tenus de respecter la Constitution ainsi que les principes de la souveraineté nationale et de la démocratie. Il leur est interdit de s'identifier à une race, à une ethnie, à un sexe, à une religion, à une secte, à une langue ou à une région ».

78 L'article 9 dispose que : « Les partis et groupements de partis politiques concourent à l'expression des suffrages. Les mêmes prérogatives sont reconnues à tout citoyen nigérien jouissant de ses droits civils et politiques et remplissant les conditions d'éligibilité prévues par la loi. Les partis politiques à caractère ethnique, régionaliste ou religieux sont interdits. Aucun parti ne saurait être créé dans le but de promouvoir une ethnie, une région ou une religion, sous peine des sanctions prévues par la loi ».

79 L'article 4 énonce que « Les partis et groupements politiques concourent à l'expression du suffrage. Ils se forment et exercent leur activité librement. Ils doivent respecter les principes de la souveraineté nationale et de la démocratie. Ils contribuent à la mise en œuvre du principe énoncé au second alinéa de l'article 1er dans les conditions déterminées par la loi. La loi garantit

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

concourent à l'expression du suffrage. Ils doivent respecter les principes de la démocratie, de la souveraineté et de l'unité nationales. Ils se forment et exercent leurs activités conformément à la loi ».

Il ressort de ce qui précède que les ethnies ne peuvent former de partis politiques. Il est aussi interdit aux partis politiques de s'identifier aux ethnies. Mais dans la réalité, l'identification existe dans bon nombre de pays.[80] Le sens du vote aussi. C'est le cas au Congo, en Côte d'Ivoire, au Tchad, au Cameroun, en Centrafrique, en Guinée, etc.

C. Conclusion

La constitutionnalisation de l'ethnie dans les États africains issus de la colonisation française constitue une manifestation, certes timide, de l'adaptation des constitutions aux réalités africaines. Toutefois, cette constitutionnalisation n'a permis ni la construction de l'unité nationale ni la pacification de la vie politique africaine. La crise multiforme du politique en Afrique subsaharienne porte souvent l'empreinte ethnique. Cela signifie-t-il que les constitutions devraient s'acheminer vers la reconnaissance de droits politiques aux ethnies ? Le continent africain offre déjà des modèles de reconnaissance de ces droits. C'est notamment le cas du Burundi où les ethnies participent à l'exercice du pouvoir politique[81] dans le cadre d'un État unitaire. C'est aussi le cas de la Fédération d'Éthiopie dont la Constitution fait de l'ethnie la base de formation des États fédérés,[82] lesquels participent naturellement à l'exercice du pouvoir politique fédéral, et lui reconnait même le droit à l'autodétermination politique.[83] Il convient de souligner que ces deux États aussi sont confrontés aux crises politiques. Cela veut donc dire que la constitutionnalisation de l'ethnie, comme l'effort d'adaptation des constitutions postcoloniales aux réalités africaines, ne peut que s'inscrire que dans le temps long de l'histoire pour trouver la formule adéquate. Ce qui semble sûr est que la constitution postcoloniale ne se fera pas sans l'ethnie.

© Moustapha Ndiaye

les expressions pluralistes des opinions et la participation équitable des partis et groupements politiques à la vie démocratique de la Nation ».

80 Lire à ce sujet, *Philippe Marchesin*, Origine et évolution des partis et groupes politiques, Politique africaine 55 (1994), p. 20; *Richard Gunther / Larry Diamond*, Species of Political Parties. A New typology, Party Politics 9 (2003), pp. 167-199.

81 Par exemple, l'article 169 de la Constitution du 7 juin 2018 dispose en son alinéa 1 que : « l'Assemblée nationale est composée d'au moins cent députés à raison de 60% de Hutu et de 40% de Tutsi, y compris un minimum de 30% de femmes, élus au suffrage universel direct pour un mandat de cinq ans et de trois députés issus de l'ethnie Twa cooptés conformément au code électoral ».

82 Alinéa 2 de l'article 47 de la Constitution du 8 décembre 1994.

83 L'article 39 énonce que : « chaque nation, nationalité et peuple d'Éthiopie a un droit inconditionnel à l'autodétermination, y compris le droit de sécession ».

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The Colonial Architecture of Exclusion: The Personal Law Exemption and the Institutionalisation of Gender Subordination in West Africa and the Caribbean

By *Satang Nabaneh*[*]

Abstract: This article investigates the enduring impact of colonialism on gender equality in post-colonial Commonwealth nations, focusing specifically on examples from West Africa and the Caribbean. It focuses on discriminatory provisions embedded in the constitutions of countries in the Caribbean and West Africa that routinely exempt personal and customary laws from non-discrimination protections. This uniformity is traceable to the "Neo-Nigerian Bill of Rights" model, which serves as the foundational template. This article uses process-tracing to show how this model established a structural approach that guaranteed a general right, while simultaneously authorising its suspension. The article argues that this flawed constitutional design constitutes a colonial suspension of women's rights. Drawing on feminist legal theory and postcolonial studies, the analysis examines the enduring impact of colonialism on gender equality, particularly on the structural failure embedded in their founding documents, an issue that manifests differently in the plural legal systems of West Africa versus the common law systems of the Caribbean. By comparatively analysing The Gambia, Sierra Leone, The Bahamas, and Dominica, this article illustrates how colonial legacies continue to shape gender relations and legally institutionalise gender subordination.
Keywords: Neo-Nigerian Model; Personal Law Exemption; Constitutional Architecture; Gendered Colonialism; Decolonial Feminist Theory

***

A. Introduction

It is widely acknowledged that discriminatory personal, customary, or traditional laws have a negative impact on women's human rights and have very tangible and often quite harmful consequences for women and girls' well-being. How issues of marriage, divorce, inheritance, and other family and personal matters are decided directly affects women and girls' economic prospects, for example, their ownership of land and property and their actual ability to participate in political and social life, including freedom from forced

* Assistant Professor of Practice, University of Dayton Human Rights Center, USA; Email: satang.nabaneh@gmail.com, ORCID: https://orcid.org/0000-0003-0543-0555.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

marriage and gender-based violence. Discriminatory personal law regimes have a profound and far-reaching effect on women's lives.

Ironically, constitutional non-discrimination provisions have often been deliberately limited in their ability to address this issue. Many constitutions contain what are known as "clawback clauses", or exclusionary clauses, which exempt personal law from their guarantees of non-discrimination. These clauses effectively transform constitutional protections against discrimination into open invitations to discriminate as they place customary or personal laws outside of constitutional review and protection. In African countries such as Kenya and Zimbabwe, advocates have been successful in constitutional reform efforts to promote women's equal rights in personal matters. In others, such as Botswana, women's rights advocates continue to pursue litigation and reforms to undo the exemption of customary and other personal law norms from anti-discrimination protections.[1]

However, women's rights advocates still face multiple challenges to overcoming this discrimination. Article 1 of the Convention on the Elimination of All Forms of Discrimination (CEDAW) defines the term "discrimination against women" as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. For the African region, Article 1(f) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) defines "Discrimination against women" as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres in life." While the Maputo Protocol provides the regional human rights framework for the African countries under analysis, a parallel instrument exists for the Caribbean nations. Several countries in the region, including two of the case studies (Dominica and The Bahamas), are party to the Inter-American human rights system. The key regional instrument is the American Convention on Human Rights, also known as the Pact of San José, Costa Rica. The Convention provides a general non-discrimination guarantee and prohibits discrimination on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

Despite these comprehensive commitments at the international and regional levels, the fundamental structural flaw persists within the national constitutional architecture itself. This flaw is not an isolated local development but a pervasive, deliberately imposed colonial template. The structural flaw and its widespread implementation are empirically

1 Open Society Foundations, For Women in Botswana, Victory Against a 'Clawback Clause', Open Society Voices, 27 September 2013, https://www.opensocietyfoundations.org/voices/women-botswana-victory-against-clawback-clause (last accessed on 21 October 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

supported. Using the UN Women's public database of constitutional provisions relating to women's human rights, the *Global Gender Equality Constitutional Database*, I performed an exhaustive analysis of all former British territories catalogued therein.[2] My analysis confirms a world-wide pattern of colonial imposition, as I identified remarkably similar non-discrimination provisions appearing in the constitutions of the Bahamas, Barbados, Belize, Botswana, Dominica, Fiji, The Gambia, Ghana, Kiribati, Malaysia, Sierra Leone, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Singapore, the Solomon Islands, Turks & Caicos, and Zambia. Not only do they all have very similar structures, but identical terms and phrases appear such as "no law shall make any provision that is discriminatory either of itself or in its effect" except for "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

While promising equality, these constitutional provisions often contain significant limitations. Firstly, they frequently exclude personal or family law issues from their scope, meaning that matters such as marriage, divorce, inheritance, and property rights are often not subject to constitutional guarantees. Secondly, they may also exclude customary law from non-discrimination scrutiny, allowing discriminatory practices rooted in tradition to persist. As a result, women are denied equal protection under the law in these crucial areas.

Against this background, this article describes how an exclusionary gender order was built into the modern constitutions of post-colonial Commonwealth countries. It aims to explore the colonial origins of exclusionary clauses in post-independence constitutions of former British colonies and its detrimental impact on women's rights. In doing so, this article examines the plural legal systems established during colonial rule and the subsequent drafting of independence constitutions, highlighting the inclusion of provisions that exempt personal and customary laws from constitutional guarantees of equality and non-discrimination.

This contribution illustrates the enduring impact of colonialism on women's rights. The roadmap for this analysis is structured as follows: Section B establishes the historical foundation of the debate, tracing the colonial genesis of legal pluralism and identifying the precise moment the Neo-Nigerian model was structurally imposed. Section C then examines the discriminatory provisions within the constitutions of the selected African and Caribbean countries. This empirical foundation leads to Section D, which is dedicated to detailing the implications on women's rights, unmasking how the constitutional architecture institutionalised gender subordination. Building on this critique, the fifth section advocates for a decolonial feminist framework, providing the critical lens necessary to dismantle these colonial legacies and develop legal frameworks grounded in local contexts. The conclusion summarises the imperative for reform, calling for the elimination of exclusionary clauses and advancing a dialogic constitutionalism where women's voices are integral to shaping legal and social norms.

2 UN Women, UN Women-Headquarters, http://www.unwomen.org (last accessed on 21 October 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

B. Gendering Colonialism: The Structural Imposition of Exclusionary Constitutionalism

The foundation of modern-day constitutionalism in Africa can be traced back to the colonial era. The Berlin Conference, which occurred in 1884-1885, marked the start of the "Scramble for Africa" and led to the loss of African autonomy and self-governance.[3] During the colonial era, African countries were ruled with the sole aim of extracting wealth through domination and imperialism.[4] Mamdani argues that the end of slavery resulted in Europeans needing to colonise Africa in order to support the growth of cotton for "the Satanic Mills."[5]

A parallel development of modern constitutionalism unfolded in the Commonwealth Caribbean. Shaped by a shared history of British colonialism, these nations possess common legacies of law, constitutional design, and political institutions. Although the motivations for colonial administration differed from the resource extraction model in Africa, the groundwork for constitutional imposition was similarly laid. The Westminster Model system, derived directly from the former colonial power, was implanted throughout the region.[6]

However, after World War II, European powers realised that they could no longer maintain indefinite control over their colonies.[7] As a result, most African and Caribbean countries were hastily granted representative government in the decade leading up to independence. A decade later, in the mid-1950s, decolonisation began, and African and Caribbean nations regained their independence from their former European colonial rulers.[8] Decolonisation represented a moment of both rupture and continuity within the geopolitical system.[9] The British authorities set the parameters and conditions for the constitutional conferences, often with a paternalistic or condescending attitude toward Caribbean leaders. The enduring legacy of colonialism continues to shape legal systems in many African and

3 *Yolanda Spies*, The Right to Equality in Customary Law: What Role for the Constitutional Court?, Stellenbosch Law Review 19 (2008), p. 333.

4 *Mahmood Mamdani*, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton 1996, p. 192.

5 Ibid., p. 37.

6 *Cynthis Barrow-Giles / Ronnie R. F. Yearwood*, Mandatory constitutional referendums in Commonwealth Caribbean constitutions: Placing "people" at the centre of the constitution?, King's Law Journal 34 (2023), p. 215.

7 *Jeffrey Herbst*, States and Power in Africa: Comparative Lessons in Authority and Control, Princeton 2014, p. 90.

8 *Olusegun Adeyeri / David Kehinde Adejuwon*, The Implications of British Colonial Economic Policies on Nigeria's Development, International Journal of Advanced Research in Management and Social Sciences 1 (2012), p. 5.

9 *Danielle Bonilla Maldonado / Michael Riegner*, Decolonization, in: Rainer Grote / Frauke Lachemann / Rüdiger Wolfrum (eds.), Max Planck Encyclopedia of Comparative Constitutional Law, Oxford 2020.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Caribbean nations, including the concept of a public-private divide, and the imposition of a "constitutional gender order".[10]

Feminist scholars have highlighted the "double colonisation" experienced by women, who faced both general discrimination as colonised subjects and specific gender-based discrimination.[11] Within the framework of "exclusionary gender constitutionalism", a woman's relationship with the nation or state is often perceived as secondary, largely defined and understood through her role within the family and her marital connections.[12]

I. Legal Pluralism and Colonial Architecture

The colonial era introduced a complex system of legal pluralism, where statutory, customary, and religious laws coexist, though the resulting systems varied significantly between regions. Legal pluralism not only acknowledges the existence of multiple legal spheres but also formulates hypotheses about the relationships between them. The existence of legal pluralism itself is less compelling than the dynamics of change and transformation it entails. Historically, there has been a shift in how the interaction between legal orders, particularly between state law and nonstate law, is characterised. The development of customary law was a continuous and collaborative process where power imbalances were evident. This system of legal pluralism, therefore, was not a mere preservation of tradition, but a selective codification designed to manage both the colonial economy and local political control. As a result, legal pluralism, which preserved the co-existence of "general law" (the common law inherited from Britain) and "customary law" (often indigenous rules selectively codified or distorted by colonial administrators), was entrenched primarily in the African context. In the Caribbean, the legal system remained more unified under Common Law, with family matters being governed by inherited statutory and common law, but the distinction between "general law" and "personal law" was nonetheless established as a structural feature. These customary and personal laws were predominantly governed by traditional male authorities whose support was essential for a stable transfer of power. However, it is important to note that subordinate groups were not entirely passive or without influence in this process.[13] As Sally Engle Merry explains, customary law was "itself of the colonial period, shaped by the efforts of "native" modernising elites to create law attuned to the new market economy and the efforts of European officials to preserve traditional culture and the power of tribal

10 *Ruth Rubio-Marin*, The Constitutional Establishment of the Gender Order: Revolutionary Times and Exclusionary Constitutionalism, in: Ruth Rubio-Marin, Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion, Cambridge 2022, p. 26.

11 *Chandra T. Mohanty*, Under Western Eyes: Feminist Scholarship and Colonial Discourses, Boundary 2 (1984), p. 333; *Gayatri C. Spivak*, Three women's texts and a critique of imperialism, Critical Inquiry 12 (1985), p. 242.

12 See *Ruth Rubio-Marin*, Global Gender Constitutionationalism and Women's Citizenship, Cambridge 2023; *Helen Irving* (ed.), Constitutions and Gender, Cheltenham 2017.

13 *Sally Engle Merry*, Legal Pluralism, Law and Society Review 22 (1988), p. 880.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

political leaders."[14] Similarly, Chanock points out, "[t]he development of customary law was a vital part of African political assertion under colonialism."[15]

This feature of constitutionally recognising customary or religious law, common in Africa and Asia, was largely absent in the Caribbean because the pre-colonial society had been so thoroughly replaced by colonial rule. Nevertheless, the distinction between "general law" and "personal law" was established as a structural feature across both regions, creating the vehicle for institutionalised gender exclusion.

II. The Neo-Nigerian Bill of Rights Model and its Export

The structural imposition of this gendered legal framework intensified during the rapid constitution-making of the late 1950s and 1960s across all decolonising territories. The sheer volume and speed of transitions led the Colonial Office to rely on templates, resulting in independence constitutions that bore striking similarities. A Ibhawoh noted, initial constitutional provisions were drawn overwhelmingly from departing colonial power, "hence reflecting assumptions far more common in the metropole than in particular African societies."[16] Indeed, the role of constitutions in structuring gender hierarchies is a deeply rooted aspect of the modern constitutional endeavour, which cemented the alliance between emerging liberal democracies and the burgeoning capitalist system in industrialising nations.

The uniformity across Commonwealth nations, particularly in the structural limitations placed on rights can be directly traceable to the constitutional model pioneered for Nigeria. As Parkinson has documented in *Bills of Rights and Decolonization*,[17] the British Colonial Office was closely engaged in the negotiations and drafting processes for the constitutions of countries exiting their empire and advocated strongly for rights inclusion. In 1962, the Colonial Office adopted an official policy to promote the inclusion of bills of rights based on the model that had been incorporated into the Nigerian constitution, one that Stanley de Smith famously dubbed the "Neo-Nigerian Bill of Rights."[18]

The constitutional architecture that would define gender relations across the decolonising Commonwealth stemmed from the Colonial Office's reliance on an expedient, piece-

14 Ibid., p. 893.

15 *Martin Chanock,* Neither customary nor legal: African customary law in an era of family law reform, International Journal of Law, Policy and the Family 3 (1989) ,pp. 75–76 as cited in *Johanna E. Bond,* Constitutional exclusion and gender in Commonwealth Africa, Fordham International Law Journal 31 (2007), p. 289.

16 *Bonny Ibhawoh*, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State, Human Rights Quarterly 22 (2000), p. 845; see also *HK Prempeh*, Africa's Constitutionalism Revival: False Start or New Dawn?, International Journal of Constitutional Law 5 (2007), pp. 469-506.

17 *Charles Parkinson*, Bills of Rights and Decolonisation: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories, Oxford 2007, pp. 19-20.

18 *Stanley De Smith*, The New Commonwealth and its Constitutions, London 1964, p. 193

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

meal methodology in drafting the Nigerian Bill of Rights.[19] The development of the official policy was an evolutionary process, shaped by the experiences of Malaya and Ghana, but ultimately crystallised with the Nigerian one. As the Colonial Office placed a great institutional importance on precedent, once the decision was made to grant Nigeria a bill of rights, the Neo-Nigerian model became the standard template for all territories requesting similar provisions. The Colonial Office's reliance on the Neo-Nigerian model became the standard template for all territories requesting similar provisions, including most of those in the Caribbean.

It is important to note that the adoption of these templates in the Caribbean followed a rapid, sequential pattern. The Bill of Rights in the British Guiana Constitution 1961 was the first introduced in an Anglo-Caribbean Constitution, quickly followed by the Bill of Rights in Chapter III of the Jamaica Independence Constitution 1962.[20] This rapid constitutional layering ensured that the structural flaws of the Nigerian precedent were rapidly institutionalised across much of the Caribbean. However, from the outset, one key nation proved an outlier. Trinidad and Tobago rejected the structural style of the Bill of Rights found in the Nigeria Independence Constitution 1960. Instead, Trinidad and Tobago opted to borrow from the statutory Canadian Bill of Rights 1960 , despite the British Colonial Office's documented poor opinion of the Canadian instrument as a model for constitutional Bills of Rights.[21] Though the Colonial Office ultimately permitted Trinidad and Tobago to establish its own constitutional Bill of Rights, this alternative approach, dubbed the "antimodel", was subsequently abandoned.[22] No succeeding decolonisation or territorial constitutions within the British Empire chose to incorporate the Canadian model. This meant the structural limitations inherent in the Neo-Nigerian template continued as the constitutional standard for most newly independent nations. The methodology used by the Nigeria Working Group to create this foundational template was one of legal pastiche, or "cut and paste", rather than original drafting.[23] According to Eastwood, the Assistant Under-Secretary responsible for West Africa in the Colonial Office, who led the process, the group adopted the European Convention on Human Rights as the main model, supplementing it with specific provisions borrowed from the constitutions of Sudan, Pakistan, Malaya, and other Commonwealth territories.[24] This choice was not expansive; no precedents outside the Commonwealth or international sphere were utilised. This limitation was deliberate, stemming from the Colonial Office's rigid adherence to the British legal tradition of drafting in detail, which

19 CO 554/1534.

20 Jamaica (Constitution) Order in Council 1962.

21 The Constitution of the Republic of Trinidad and Tobago Act 4 of 1976; see also *Tracy Robinson*, The Bill of Rights at Sixty-Two: Assessing Trinidad and Tobago's Constitutional Experiment, The UWI St. Augustine Law Journal 3 (2025), p. 5.

22 *Robinson,* note 21, p. 5.

23 Christopher Eastwood*,* 27 August 1958, CO 554/1535.

24 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

meant only documents prepared by British-trained lawyers were deemed useful. This insular methodology, rooted in British professional pride and a self-imposed limitation on knowledge, restricted the constitutional team's gaze and ensured that only Commonwealth and international examples were ever employed.[25]

In a candid internal assessment of the process, Eastwood noted on 11 January1960, that the Sierra Leonean draft was the first attempt "to rehash of the corresponding Nigerian brief."[26] This reliance on *rehash* underscores the institutional priority given to speed and bureaucratic conformity over original deliberation. The expedient approach resulted in a flawed, structurally compromised document. Nevertheless, by March 1960, this precedent had rapidly shifted Colonial Office policy, leading to the approval of bill of rights requests from Sierra Leone, British Guiana, and Kenya.

In a telling correspondence from 4 January 1960, Colonial Office official P.A Carter to Aaron Emanuel, from the West Africa Department and part of the Nigeria Working group, revealed the underlying lack of due process in subsequent exports, noting regarding Sierra Leone:

> *"I do not think that delegates are likely to wish to get down to detailed discussion on the provisions, but will be content to follow the Nigerian precedent. I think that it will be sufficient, subject to the Governor's views, to circulate the Nigerian provisions as a basis for discussion, and after a preliminary conversation, subject to general agreement, that the Nigerian provisions will be appropriate for Sierra Leone to conclude that they should be incorporated in the Sierra Leone Constitution.*[27]

This internal document dramatically underscores the operative reality: the incorporation of a nation's foundational rights was treated as a pro forma bureaucratic exercise, not a serious deliberative process. The Nigerian model's adoption was driven by the assumption that delegates would be "content to follow the Nigerian precedent", allowing the Colonial Office to impose the rights architecture with minimal local engagement. The official expectation was that merely circulating the Nigerian text would suffice to establish its appropriateness, reducing the constitution-making process to an administrative rubber-stamp.

Thus, the structurally weak template, characterised by broad exceptions that enabled the constitutional perpetuation of gender discrimination through the exclusion of personal law, was not an accidental feature but a deliberate imposition of convenience. The flawed architecture was exported not through careful, rights-based deliberation but by the sheer power of administrative precedent, ensuring that newly independent nations inherited a constitutional foundation that institutionally guaranteed the colonial suspension of women's rights under the guise of legal uniformity.

25 *Parkinson*, note 22, p. 153.

26 Christopher Eastwood, 11 January 1960, CO 554/828.

27 P.A. Carter, 4 January 1960, CO 554/828. Emphasis added.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The Nigerian-model export lies in its sui generis structure, which deliberately undermined the integrity of the rights it proclaimed. Despite its reliance on the European Convention on Human Rights, this model thinly and mostly negatively described the rights and provided copious exceptions that further compromised the integrity of the bill of rights. This is why Ghai noted that the detailed rights were "struggling to stay afloat in the sea of exceptions."[28] These exceptions, which permitted the restriction of fundamental rights in the name of "public order" or "existing law", became the precise constitutional mechanism through which gender discrimination was preserved.

This structural choice was an act of constitutionalising patriarchal control. The British incorporated the legal mechanism for weakening or reversal of non-discrimination safeguards within the newly established constitutions. Crucially, the non-discrimination provision in the Nigerian model, and its successors, typically contained an explicit clause exempting laws relating to marriage, divorce burial, devolution of property on death, or other matters of personal law or custom from the constitutional guarantees. The Colonial Office, in its pursuit of administrative and political stability during decolonisation, prioritised two key objectives over women's fundamental autonomy: legal pluralism and political expediency. Exempting these laws from the anti-discrimination clause was an act of deference to these traditional gatekeepers, securing their political assent by protecting their authority over women and family matters. In Africa, by protecting the jurisdiction of customary and religious laws, the Colonial Office ensured that the emerging national elite did not have to confront or dismantle deeply entrenched local power structures. This choice reveals that women's fundamental equality was deemed a negotiable commodity, a concession readily traded for the administrative convenience of maintaining the colonial-era legal status quo and the political expediency of securing a smooth handover to a male-dominated post-colonial government. With this history in view, it appears that the real imposition from "the West" is *not women's human rights*, it is rather the *colonial suspension of women's right*s.

C. Analysing Discriminatory Constitutional Provisions in African and Caribbean Nation

Many African and Caribbean constitutions, while ostensibly guaranteeing equality and non-discrimination, contain provisions that perpetuate gender inequality. The existence of these broad non-discrimination clauses, guaranteeing basic rights regardless of religion, race, place of origin, political opinions, colour, or creed, stands in direct tension with subsequent specific exclusions. This paradox is rooted in the common heritage of the Neo-Nigerian Bill of Rights model, which established a structural approach to rights that granted a general guarantee while simultaneously authorising its suspension through specific carve-outs.

28 *Yash Ghai*, The Kenyan Bill of Rights: Theory and Practice, in: Philip Alston (ed.), Promoting Human Rights through Bills of Rights: Comparative Perspectives, Oxford 1999, p. 187.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

This section reviews the exclusionary clauses of selected West African countries (The Gambia,[29] Sierra Leone)[30] and Caribbean countries (The Bahamas,[31] Dominica),[32] highlighting how these clauses affect women's rights in areas such as marriage, divorce, inheritance, and property ownership. The four countries selected demonstrate the many similarities between African and Caribbean countries, including small size, history, political and legal traditions, while serving as important comparators absent in broader constitutional scholarship. This comparative focus illustrates the nuanced ways in which the common colonial template was adapted, revealing crucial differences in the scope of protected grounds, the nature of the exemptions, and the practical utility of the anti-discrimination provision itself.

I. Constitutional Text, History, and the Exclusionary Framework

The history of the anti-discrimination provision in these countries reveals that the exclusionary clauses were generally incorporated either as part of the pre-independence constitutional frameworks or carried over without substantive change into the independence documents.

The term "personal law" within the context of these constitutional clawback provisions requires precise definition. The constitutional clause exempts laws "with respect to adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law." For the purpose of the paper, this refers to laws related to family, domestic status, and inheritance. This definition is essential, particularly for the Caribbean case studies, wherein customary or religious laws are generally not part of the unified legal systems of The Bahamas or Dominica. However, for the West African nations, "personal law" often overlaps with or is determined by codified customary and religious systems, necessitating

29 The Gambia is located midway on the bulge of the West Africa coast and stretches over 400 kilometres inland from west to east on either side of the River Gambia, varying in width from about 50 km near the mouth of the river to about 24 km upstream. The country is bound to the north, south, and east by the Republic of Senegal and to the west by the Atlantic Ocean. The River Gambia, which runs the entire length of the country from the Futa Jallon highlands in the Republic of Guinea to the Atlantic Ocean, divides the country's land area of 10,689 square kilometres almost equally into two halves: the South Bank and the North Bank.

30 Sierra Leone is located along the West Coast of Africa bounded on the North and Northeast of Guinea and the East and Southeast of the Republic of Liberia. It covers an area of about 72,000 square kilometres (28,000 square miles) and extends from latitude 7 degrees north to 10 degrees north, and from longitude 10 degrees west to 14 degrees west. On the west and southwest, the Atlantic Ocean extends approximately 340 kilometres (211 miles).

31 The Bahamas is an archipelago State on the North-Western edge of the West Indies. The islands occupy a strategic position as the gateway to the Gulf of Mexico, the Caribbean Sea, and the entire Central American region.

32 The Commonwealth of Dominica operates as a multiparty, unicameral parliamentary democracy. Classified as having high human development, Dominica is also home to the Kalinagos, an indigenous population that preserves distinct cultural practices separate from mainstream society.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the inclusion of a separate customary law claw back in those constitutions to immunise those specific group-based legal orders. The article thus understands "personal law" as the set of rules governing private status and familial relations, which, in the post-colonial context, functions as the primary vehicle for institutionalised gender discrimination, regardless of whether it is rooted in inherited common law (Caribbean) or plural legal systems (West Africa).

II. The Caribbean Model: Narrow Grounds and Personal Law Exemptions

In the Commonwealth of The Bahamas, the anti-discrimination provision and its exception were a direct inheritance. The 1973 Constitution, after independence, in its Article 26, establishes a general prohibition against discriminatory laws and treatment. However, this clause is unique among the case studies because it does not explicitly include "sex" or "gender" as prohibited grounds of discrimination, thus significantly limiting the entire provision's utility in challenging gender inequality. While the opening provision of Chapter III (in Article 15) includes "sex" as one of the prohibited grounds in the declaration of certain basic rights, the definition of what is "discriminatory" at Article 26 is limited. Article 26 also does not apply to any law concerning adoption, marriage, divorce, burial, inheritance, or other matters related to personal law. This clause was a standard feature of the pre-independence constitutional instruments, demonstrating the commitment to gender equality was structurally limited from the moment of sovereignty. The Constitution also contains a general savings law clause (Article 30) that limits challenges to laws enacted prior to independence, rendering the anti-discrimination provision largely ineffective against inherited discriminatory legislation. The cumulative effect of these restraints meant that the clawback provision was not the central point of constitutional contention in The Bahamas; rather, the fundamental problem was the textual absence of "sex" as a prohibited ground, rendering the entire clause functionally useless for gender equity challenges.[33]

This constitutional failure necessitated direct, high-stakes political intervention to achieve reform. In August 2012, The Bahamas appointed a Constitutional Commission to review the Constitution in advance of the country's fortieth anniversary of Independence.[34] The core issue was that separate Constitutional provisions governing the transfer of nationality from parent to children and the award of nationality to foreign-born spouses granted privileges to Bahamian men that were not afforded to Bahamian women.

Consequently, in June 2016, the Government held a Constitutional referendum to address gender inequality, seeking to grant men and women equal ability to confer citizenship to their spouses and children. Current constitutional provisions governing the transfer of nationality from parent to children and the award of nationality to foreign-born spouses

33 See Report of the Constitutional Commission into a Review of The Bahamas Constitution (2013), pp. 110-113.

34 *Celeste Nixon*, Constitution under review, The Tribune, 2 August 2012, https://www.tribune242.com/news/2012/aug/02/constitution-under-review/ (last accessed on 21 October 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of Bahamian citizens currently grant privileges to Bahamian men that are not afforded to Bahamian women. The Constitutional Commission had specifically recommended amending the definition of "discrimination" to explicitly include "sex", a critical question also put to the electors. The four constitutional amendment bills dubbed "gender equality bills" and "citizenship bills" were overwhelming rejected by voters, leaving the challenge unresolved.[35] This outcome was particularly concerning given that the Bahamian population is 85% of African descent and that women constitute a larger and more active segment of the electorate, underscoring the deep, successful public mobilisation against substantive gender equality.[36] The repeated failure of the Bahamian populace to ratify amendments, as seen in the defeated 2016 referendum, serves as a powerful testament to the enduring institutional and cultural resistance spawned by the structurally inadequate colonial constitutional model.

The Commonwealth of Dominica achieved independence from the United Kingdom in 1978, resulting in the adoption of the 1978 Constitution. However, the nationalist movement that delivered independence was rooted in a black masculinist bearing, where the entire concept of equality was fundamentally hinged upon establishing the credibility of the West Indian black male elite to govern.[37] In this nationalist reasoning, equality was inseparable from liberty, and empire.[38] This populism, therefore, underwrote the initial post-colonial project, prioritising the recognition of black male governance on the global stage over the dismantling of existing gender hierarchies.

Consequently, the anti-discrimination provision in Section 13 of the 1978 Constitution, a direct inheritance of the Colonial Office's Neo-Nigerian model, is notably stronger on its face than The Bahamas's given that affirms the right to fundamental freedoms "whatever his race, place of origins, political opinions, colour, creed or sex", thus explicitly including sex as a protected ground. However, the constitutional commitment to non-discrimination is immediately undermined by the qualifying exception under Section 13(4)(c), standard to the inherited template. The constitutional provision against discriminatory law is qualified, as it does not prevent the application of personal law concerning adoption, marriage, divorce, burial, inheritance, or other similar matters to individuals of a particular description (or those connected to them). These exemptions can lead to situations where constitutional guarantees of equality are undermined.[39] Notably, neither of the Caribbean constitutions include a separate clawback for customary law, relying solely on the personal law exemption.

35 UN General Assembly, A/HRC/WG.6/29/BHS/1.

36 *Alicia Wallace*, Policymaking in a 'Christian nation': Women's and LGBT+ rights in The Bahamas' 2016 referendum, Feminist Review 25 (2017), p. 69.

37 Dominica, Report of the Dominica Constitutional Conference held in Marlborough House London (1977), p. 15.

38 *Tracy Robinson*, Gender, Nation and the Common Law Constitution,Oxford Journal of Legal Studies 28 (2008), pp. 735-762.

39 See generally, *Stephen B. Aranha,* Bahamianness as an exclusive good: Attempting to change the Constitution, International Journal of Bahamian Studies 22 (2016), pp. 16-33.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Despite this constitutional limitation, Dominica has a record of progressive political and statutory action. Dominica was the first country in the Americas to elect a female prime minister, Eugenia Charles, in 1980, and she remained in office for over 14 consecutive years.[40] It was also the first country in the English-speaking Caribbean to develop and approve a National Policy on Gender Equality.[41] Post-independence efforts to address gender inequality include the ratification of international conventions like CEDAW and the development of key legislation, such as the Protection against Domestic Violence Act (2001) and the Sexual Offences (Amendment) Act (2016), which criminalised marital rape and expanded penalties for sexual offences.[42]

Dominica's constitutional history demonstrates that even where "sex" is included as a prohibited ground, the structural flaw of the personal law exemption persists. The clause ensures that legal pluralism in matters of family status is constitutionally protected even when it leads to gender inequality, thereby institutionally embedding the colonial suspension of women's rights within the private domain from the moment of its founding.

III. The West African Model: Broad Grounds and Dual Clawbacks

In Africa, particularly in West Africa, the pattern of inheritance and subsequent evolution shows varied degrees of commitment to change regarding the prohibited grounds, though the structural exclusion persists. The initial Gambian Constitution, enacted in 1970, included the archetypal savings clause limiting the scope of non-discrimination protections. This same exclusionary language was carried over into the second and most recent version of the Constitution, adopted in 1996.[43] Section 33 of the 1997 Constitution is significant as it contains a more extensive list of prohibited grounds of discrimination than its Caribbean counterparts, making it valuable for addressing intersectional harms.[44] Yet, this provision does not extend to matters concerning "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law".

40 *Imaobong Umoren*, 'It's Only Leftist Women Who Talk that Damn Nonsense About Women Being at a Disadvantage': Eugenia Charles's Gender Politics in Dominica, Gender & History 33 (2021), pp. 269-285.

41 *Ramona Biholar*, Masculinities and the Practice of Dominica's National Gender Policy, in Politics, Power, and Gender Justice in the Anglophone Caribbean: Women's Understandings of Politics, Experiences of Political Contestation and Possibilities for Gender Transformation (2014).

42 Human Rights Council, National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21 (2024), A/HRC/WG.6/47/DMA/1, paras. 53 and 56.

43 *Satang Nabaneh*, Women's political participation in The Gambia—One step forward or two back?, in: Satang Nabaneh et al. (eds.), The Gambia in Transition: Towards a new constitutional order, Pretoria 2022, pp. 125-152.

44 *Satang Nabaneh*, The Impact of the African Charter and the Maputo Protocol in The Gambia, in: Victor Ayeni (ed.), The Impact of the African Charter and Maputo Protocol in Selected African States, Pretoria 2016, pp. 5–94.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

This structural flaw is juxtaposed against a bold, post-independence commitment to gender parity. The 1997 Constitution also introduced a broader women's rights provision in Section 28, explicitly stating that "women shall be accorded full and equal dignity with men" and shall have "the right to equal treatment with men, including equal opportunities in political, economic and social activities." Further demonstrating this political commitment, the Women's Act 2010 was enacted specifically to domesticate international conventions like CEDAW and the Maputo Protocol. The tension between the broad, modern aspirations of Section 28 and the limiting, colonial-era personal law exemption in Section 33 remains an open question for Gambian courts. This structural contradiction institutionalises inequality, requiring statutory laws like the Women's Act to operate under a fundamental constitutional constraint.

Moreover, this constitutional battleground is further complicated by the fragility of reform. The 2020 Gambian Draft Constitution proposed a progressive legislative gender quota that would have reserved 14 seats in parliament specifically for women, a reform that ultimately failed to be enacted after the necessary bill was rejected by the National Assembly.[45] A private member bill, which sought to increase women's representation in the National Assembly also failed in 2022.[46] A subsequent gazetted 2024 Draft Constitution demonstrably rolled back these gains, notably through the deletion of a clause that had mandated gender diversity in the leadership of independent institutions was also rejected.[47] Ultimately, even when post-independence political will attempts to correct the structural flaws inherited from colonialism (such as the Section 33 exemption), the fragility of constitutional reform allows for the easy sabotage of progressive gains, ensuring that the legacy of institutionalised gender inequality persists.

The constitutional trajectory of Sierra Leone demonstrates the continuity of the colonial-era rights structure and its subsequent role in post-conflict exclusion. The nation's path to the present 1991 Constitution was marked by sharp political transitions. The 1951 Constitution, which reflected 1947 constitutional proposals, initiated the journey toward self-rule.[48] However, the subsequent decades saw democratic decline: following Siaka Stevens' victory in 1967, the parliamentary system was dismantled in favour of a presi-

45 *Satang Nabaneh,* Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?, IACL-AIDC Blog, 29 September 2020, https://blog-iacl-aidc.org/2020-posts/2020/9/29/attempts-at-constitutional-reform-in-the-gambia-whither-the-draft-constitution (last accessed on 21 October 2025).

46 *Satang Nabaneh,* Why The Gambia should fast-track gender quotas for women, The Conversation, 27 January 2022, https://theconversation.com/why-the-gambia-should-fast-track-gender-quotas-for-women-175661 (last accessed on 21 October 2025).

47 *Satang Nabaneh*, Constitution Bill Rejected at Second Reading: Halting the Reform Process in The Gambia?, ConstitutionNet, 8 July 2025, https://constitutionnet.org/news/voices/constitution-bill-rejected-second-reading-halting-reform-process-gambia (last accessed on 21 October 2025).

48 *Joseph J. Bangura,* Constitutional development and ethnic entrepreneurism in Sierra Leone: A metahistorical analysis, in: Marda Mustapha / Joseph J. Bangura (eds.), Democratization and Human Security in Postwar Sierra Leone, New York 2016, pp. 13-35.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

dential framework in 1971, which was then replaced in 1978 by a One-Party Republican Constitution that officially banned opposition parties.[49]

The current 1991 Constitution[50] was adopted during a period of immense internal strife, as rebel forces sought to dismantle the one-party system, leading to a brutal civil war that lasted eleven years.[51] Post-conflict efforts, including the establishment of the Truth and Reconciliation Commission (TRC) in 2002, urged the creation of a new constitutional framework to foster peace and reinforce democratic governance.[52] Yet, the constitutional constructs were such that human rights and democratic principles became mere obligations, rather than subjects of rigorous debate aimed at societal betterment.

The constitutional provisions in Sierra Leone offer a prime example of the compromised nature of the inherited colonial rights model. While the 1991 Constitution of Sierra Leone, in Section 27, generally prohibits discriminatory laws and treatment on grounds including sex, the nation's adherence to the Colonial Office template is starkly evident in its restrictive dual clawback structure, which severely undermines this guarantee. Section 27 is subjected to several critical exceptions. The first is the personal law exemption, Section 27(4)(d), which explicitly states that the constitutional prohibition against discriminatory laws does not apply to legislation concerning "adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law". This provision instantly immunises large swaths of law that govern women's status and economic security, ensuring that discriminatory practices in marriage and inheritance are protected from constitutional scrutiny. The second is the customary law clawback, Section 27(4)(e), which further stipulates that the anti-discrimination provision does not prevent the application of laws related to a particular race or tribe or customary law to members of that group, even if those laws exclude the general law. This dual exclusion explicitly sanctions discrimination within the crucial domains of marriage, inheritance, and personal status, ensuring that patriarchal customary law practices are entrenched despite the constitutional principle of equality. This dual exclusion explicitly sanctions discrimination within the crucial domains of marriage, inheritance, and personal status, ensuring that patriarchal customary law practices such as the exclusion of women from paramount chieftaincies and discriminatory citizenship provisions (which historically prevented Sierra Leonean women from passing citizenship to their foreign spouses) are entrenched despite the constitutional principle of equality. Indeed, patriarchal customary laws are prevalent, and traditional views often tolerate widespread inequality and gender-based violence.

49 Ibid.

50 Constitution of Sierra Leone (Act No. 6) (1991).

51 *Lesley Frances Connolly*, Post-conflict transition and development in Sierra Leone: A Case for the Transformative-Justice model, Master Thesis, University of Cape Town (2011).

52 *Proscovia Svard,* The international community and post-war reconciliation in Africa: A case study of the Sierra Leone Truth and Reconciliation Commission, African Journal on Conflict Resolution 10 (2010).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The gender-discriminatory effect of Section 27 was a major concern raised by the Constitutional Review Committee (CRC), which submitted a report recommending its deletion and replacement with a comprehensive prohibition on discrimination on any ground.[53] The post-conflict agenda and subsequent legal reform efforts have attempted to address this colonial legacy through the enactment of the Gender Empowerment Act in November 2022, which provides for a minimum 30 percent quota for women in political and appointment positions.[54] Nevertheless, the retention of Section 27(4)(d-e) in the supreme law of the land means these statutory advancements exist under the shadow of a constitutional provision that structurally exempts customary and personal law from human rights scrutiny.

Across these four Commonwealth nations, a consistent pattern emerges: while their constitutions establish general principles of non-discrimination, they all include specific exemptions for matters of personal or family law. Sierra Leone and The Gambia, consistent with their dual legal heritage, further explicitly address customary law within their exceptions. The tension inherence in these provisions underscore the complex interplay between formal legal frameworks and informal customary practices. This creates an inherent tension within the foundational legal documents themselves. While these constitutions enshrine principles of equality and non-discrimination, the inclusion of exemptions for personal laws can undermine these principles. This allows discriminatory customary and religious laws to persist, perpetuating gender inequality and limiting women's rights.

These exclusions have a demonstrably uneven impact, disproportionately affecting women's rights in critical areas governed by customary and religious laws. These legal systems often contain provisions that disadvantage women in marriage, divorce, property ownership, and inheritance, effectively permitting gender-based discrimination despite constitutional commitments to equality.

D. Implications on Women's Rights: The Institutionalisation of Gender Subordination

The enduring impact of colonialism on West African and Caribbean nations extends far beyond historical narratives as it continues to shape contemporary legal systems by embedding and legitimising patriarchal norms within the constitutional structure itself. Colonial structures deliberately marginalise women, confining them to roles centered on domestic responsibilities, such as childbearing and household duties.[55]

The inclusion of these exemptions, regardless of whether the initial anti-discrimination provision includes "sex" (as in Dominica, The Gambia and Sierra Leone) or omits it (as in The Bahamas), demonstrates a constitutional design that sanctions gender-based

53 Report of the Constitutional Review Commission (2016), pp. 132-137.

54 Act No. 23 of 2022.

55 See for example, *Cyrelene Amoah-Boampong / Christabel Agyeiwaa*, Women in Pre-colonial Africa: West Africa, in: Toyin Falola / Olajumoke Yacob-Haliso (eds.), The Palgrave Handbook of African Women's Studies, London 2019, pp. 1-13.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

discrimination in critical areas of a woman's life. In The Bahamas, this exclusion is most starkly realised by the textual omission of "sex" or "gender" as prohibited grounds in Article 26. This deliberate flaw rendered the entire anti-discrimination provision largely useless for challenging gender-based laws, shifting the political focus away from the clawback provision. Referendums aimed at amending the constitution to address gender discrimination failed repeatedly, demonstrating not just political resistance, but the deep, sustained structural inertia against equality.[56]

This institutionalised subordination finds conceptual grounding in the work of Higgins and Fink, who argue that family law is not merely a private affair but functions as legal architecture that builds and defines the political community (the nation), often through the exclusion and subordination of women[57] This is particularly relevant given that when interpreting the personal law exemptions found in the post-colonial constitutions like those of The Gambia and Dominica, it should be seen as not accidental oversights but as structural choices that deliberately define the "nation" on a gendered, exclusionary basis. By exempting personal law from the constitutional equality guarantee, the state uses family or personal law to legally construct women as dependent subjects, thereby fulfilling the logic of exclusionary gender constitutionalism.

Conversely, in Sierra Leone and The Gambia, where the anti-discrimination clauses are broader (including "sex"), the coexistence of multiple legal systems creates inconsistency and conflict. For example, 8 percent of constitutions allow customary or religious law to override constitutional guarantees of equality.[58] Here, the dual claw back for personal and customary law explicitly institutionalises inequality.[59] The decision to allow customary or religious law to override constitutional guarantees of equality, as happens in personal law matters like inheritance reflects the dynamic that Saba Mahmood analyses in which the state's choice to preserve legal pluralism, sanctions discrimination under the guise of respecting cultural or religious differences.[60] This dual legal framework often perpetuates gender-based discrimination, leaving women with limited avenues to seek justice. For instance, under customary law, a widow may be denied her late husband's property without justification despite constitutional guarantees of equality, a practice that reinforces male dominance and entrenches gender inequality in society.[61] This failure to disrupt the inherit-

56 *Wallace*, note 44.

57 See *Tracy E. Higgins / Rachel P. Fink*, The Constitutionalization of the Family: Lessons from Global Constitutionalism, Fordham Law Review 82 (2014), p. 2379.

58 *Jody Heymann / Aleta Sprague / Amy Raub,* Advancing equality: How Constitutional Rights can Make a Difference Worldwide, Oakland 2020.

59 UN Women*,* A Guidance Note on the Making and Shaping of Constitutions from a Gender Perspective, 2021.

60 *Saba Mahmood*, Politics of Piety: The Islamic Revival and the Subject of Women, Princeton 2005, p. 208.

61 For example, see *Joy Ezeilo*, Rethinking women and customary inheritance in Nigeria, Commonwealth Law Bulletin 47 (2020), pp. 706–718.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ed patriarchy confirms the critique by Tracy Robinson, who argues that the inherited Common Law constitutional model institutionalised gender hierarchy by failing to challenge patriarchal common law assumptions.[62]

By excluding women from leadership and decision-making positions, these systems have not only perpetuated gender disunity but have also deprived nations of the transformative potential of women's leadership and contributions. The combined experiences of being Black and a woman have disproportionately disadvantaged women and girls of African descent, who even today frequently remain among the most marginalised and discriminated against women globally, consistently ranking at the lowest levels across various social development indicators.[63]

The enduring structural deficiencies of the inherited constitutional provisions have translated directly into protracted public and legal battles in the post-independence era, demonstrating the persistence of this colonial imposition. The inability to challenge discriminatory personal law regimes via the anti-discrimination clause has forced advocates to pursue constitutional change through more contentious political and judicial avenues. For instance, The Bahamas has experienced profound public debate and two failed constitutional referendums related to these provisions. Similarly, in The Gambia, post-dictatorship efforts to enact a progressive new constitution were sabotaged, with the subsequent 2024 draft rolling back proposed gains such as gender quotas, a clear example of the fragility of constitutional reform against entrenched patriarchal structures.

The post-independence difficulties in reforming these entrenched provisions reveal that the colonial legal architecture continues to shape and limit contemporary efforts toward gender justice, turning what should be a legal matter into a minefield of cultural and political confrontation. Recognising this minefield, which conflates constitutional challenges with attacks on "national traditions and cultures" have sometimes focused on political measures like parliamentary quotas (as seen in The Gambia) rather than direct constitutional confrontation.[64] This strategic choice highlights how the colonial legal architecture continues to shape and limit contemporary efforts toward gender justice. Addressing gender inequality requires a critical examination and dismantling of these colonial legacies that prioritised administrative convenience and political expediency over substantive human rights.

62 *Robinson,* note 38.

63 *Satang Nabaneh*, Women of African descent, intersectionality and human rights, in: Alexandra Cosima Budabin / Jody Metcalfe / Shilpi Pandey (eds.), Minority women, rights, and intersectionality: Agency, power, and participation, London 2025, pp. 73-91.

64 *Satang Nabaneh*, The Gambia's new constitution has stalled again – 5 reasons why and what that means for democracy, The Conversation, 24 August 2025, https://theconversation.com/the-gambias-new-constitution-has-stalled-again-5-reasons-why-and-what-that-means-for-democracy-261809 (last accessed on 21 October 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

E. A Decolonial Feminist Framework: Repositioning the Clawback Clause as a Vestige of Empire

A decolonisation approach—which attends to the history and impact of the exercise of colonial power is an important tool for women's rights advocates. It helps upend the difficult dynamic that local groups currently face by creating the opportunity for constitutional reform advocacy to critique these claw back provisions as foreign vestiges of racism and colonialism. In countries of West Africa and the Caribbean, this approach undermines the stereotype that the problem is essentially African or cultural, instead identifying the structural mechanism as an imposed colonial technology.

Feminist scholars such as Jacqui Alexander advocate for a more nuanced and expansive approach to decolonization. This approach should be grounded in local realities while simultaneously addressing broader political, economic, psychological, and social dimensions.[65] Other feminist scholars, deepen this understanding by advocating for a more nuanced and expansive decolonisation that is grounded in local realities while simultaneously addressing broader political, economic, psychological, and social dimensions.[66] Feminist approaches have highlighted the limited historical narratives of constituent power that often overlook feminist activism within the broader framework of global constitutionalism.[67] Feminist critiques of constitution-making processes, as highlighted by scholars like Rubio-Marín,[68] emphasise the need for women's substantive inclusion as active participants at all levels of constitutional change. This feminist perspective advocates for women's recognition not merely as beneficiaries of rights, but as integral constitutional actors holding constituent power, participating in constituted power structures, and fully realising their status as rights holders.

This decolonial feminist approach necessitates a departure from a static, essentialist understanding of law. It calls for a historically grounded analysis that acknowledges legal pluralism as a dynamic phenomenon. Each legal order, whether state law, customary law, or religious law, mutually shapes and reshapes the others over time. Therefore, defining a fixed "essence" of law or custom becomes less relevant than understanding these concepts within the specific power relations and historical contexts that define their interplay. Plural normative orders, once established, can exhibit remarkable resilience, often legitimising

65 *M. Jacqui Alexander*, Erotic Autonomy as a Politics of Decolonization: An Anatomy of Feminist and State Practice in the Bahamas Tourist Economy, in; M. Jacqui Alexander / Chandra Talpade Mohanty (eds*.),* Feminist Genealogies, Colonial Legacies, Democratic Futures, New York 1997; see also *Vanessa Agard-Jones*, Le Jeu de Qui? Sexual Politics at Play in the French Caribbean, in: Faith Smith (ed.), Sex and the Citizen: Interrogating the Caribbean, Charlottesville 2011.

66 *Mohanty*, note 12; *Uma Narayan*, Dislocating Cultures: Identities, Traditions, and Third-World Feminism, Oxfordshire 1998.

67 *Helen Irving*, Introduction, in: Helen Irving (ed.), Constitutions and Gender, Cheltenham 2019, pp. 1–15.

68 See for example *Ruth Rubio-Marín / Helen Irving* (eds.), Women as Constitution-Makers: Case Studies from the New Democratic Era, Cambridge 2019.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

themselves through appeals to tradition; conversely, they can undergo radical transformations through contestation—a process vividly illustrated by the development of customary law within colonial societies.

By reframing the anti-discrimination clause's exemptions as a structural, colonial imposition rather than a native cultural failing, advocacy can transform the discourse. Constitutional reform efforts, where successful, have opened up legal space to bring equality principles and customary norms into conversation with each other, allowing for a balancing that recognises positive dimensions of custom that do not diminish women's equality rights. This surfacing of hidden histories is also crucial for legal cases involving the clawback provisions and transforms the discourse around international support. Financial support from entities like the United Kingdom that may once have been viewed as simple development aid now enters the more serious issue of reparations. The value lies in supporting local groups to unearth these hidden histories, create dialogue spaces that recognise colonial distortions of Indigenous conceptions of community practices, and curate new, context-specific understandings of gender equality principles.

F. Concluding Reflections

The framing by a constitution of the relationship with state, customary (and/or religious) law systems, and gender equality is crucial to the economic, social, political, and cultural status of women and girls. The analytical goal of this article is to expose the colonial genesis of exclusionary constitutional clauses, which is validated by the insight that, as Reva Siegel observes, the stories we construct about the past fundamentally shape our "common sense" intuitions about present-day legal and political realities.[69] This necessitates a critical re-examination of constitutional history to dismantle the narrative that gender inequality is purely an indigenous cultural failure.

The comparative analysis of West African and Caribbean nations reveals that the Neo-Nigerian Bill of Rights model was exported with a fundamental structural failure that guaranteed the colonial suspension of women's rights, whether through explicit exemptions or deliberate omissions. This structural legacy, regardless of its specific local manifestation, constitutes a system of legal architecture that defines the political community on an exclusionary, gendered basis.

To support us in reconceptualising constitutional arrangements that should exist in a just society, shifting away from essentialist definitions of law and toward a historical understanding of legal pluralism is critical. Recognising that legal systems constantly evolve and interact; we can move beyond simplistic distinctions between formal and informal law. Instead, we should focus on the specific historical and social contexts that shape the development and application of different legal orders.

69 *Reva Siegel*, Collective Memory and the Nineteenth Amendment: Reasoning about the Woman Question in the Discourse on Sex Discrimination, in: Austin Sarat / Thomas R. Kearns (eds.), History, Memory and the Law, Ann Arbor 1999.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

By adopting a decolonial feminist perspective, we can challenge the colonial legacy of exclusionary legal frameworks and advocate for the inclusion of diverse voices, particularly those of women. There is need for women's substantive inclusion as active participants at all levels of constitutional change. This perspective advocates for women's recognition not merely as beneficiaries of rights, but as integral constitutional actors holding constituent power, participating in constituted power structures, and fully realising their status as rights holders. In essence, decolonising the narrative around constitutions and personal laws must be a gendered project.

© Satang Nabaneh

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Recognising and Empowering Homegrown Constitutionalism: The Challenges and Opportunities Accompanying the Changing Global Order

By *Jan Erk**

Abstract: In midst of unpredictable geopolitical changes accompanying the end of the post-Cold War convergence around liberal-democratic-capitalist ideas, it is difficult to predict what the next global order would look like. What is however very likely is that multilateral agreements on constitutional design for countries emerging from conflict will no longer be within easy reach. Not only will there be deep disagreements over the blueprint of settlements among members of the international community—especially from those in the West, but there might not even be any political interest and will to be involved. This presents an opportunity for non-Western ideas on constitutions and constitutionalism to increase their international presence and pull. Recognising and empowering homegrown traditions of constitutionalism in Africa is not a straightforward uniform process. The continent has three different legal systems and a multiplicity of indigenous systems of traditional law and governance. Promises and pitfalls coexist, projected consequences and unexpected complications blend into each other. The article rests on three sections. The first one examines the potential impact the changing global order will bring to constitutions and constitutionalism in Africa. The second section looks at the fate of different homegrown systems of traditional law and governance in Africa under three different legal systems. And the final section identifies five distinct categories of challenges and opportunities depending on the choice of the legal and political path to recognising and empowering homegrown constitutionalism.
Keywords: Africa; Constitutions; Constitutionalism; Received (Western) Constitutional Traditions, Homegrown (Endogenous) Constitutional Traditions; Changing Global Order; Constitutional Design; Traditional Law and Governance; Developing World / Global South

***

* Africa Institute for Research in Economics and Social Sciences (AIRESS), Université Mohammed VI Polytechnique (UM6P), Rabat, Morocco. Email: jan.erk@um6p.ma.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

A. Between the Outgoing and Incoming Global Orders

I. We Know What Is No Longer With Us

Future historians will know how all this ends, but at the moment of writing it is not clear what type of global order will eventually emerge from the current tectonic changes the entire world is going through. It is evident that the pieces of the previous order are now being disassembled, but as the academic community of comparative constitutional law and governance, we are not certain as to which pieces will be discarded, which new ones will be added, and the way all that will be re-assembled into a new global order that will set the course for the coming decades. Various broader political, military, and economic changes had in fact been underway for a while, and various geopolitical developments—be it the failure of the coordinated international intervention in Afghanistan or the changing security landscape of the Sahel—had been taking place, but it was the inauguration of the new US President, Donald Trump, in January 2025 that brought every seemingly disconnected dynamic together. While trying to make sense of various different things happening in different parts of the world as they unfold, there is now a growing realisation that all are in fact related. President Trump has just reminded students of law and governance, perhaps a little forcefully and explicitly, what was already simmering away for a while. One era of world politics is now over, we are seeing the last bits of the afterglow. This presents an opportunity for non-Western ideas on constitutions and constitutionalism to become more visible. The article posits how homegrown African constitutional traditions might become beneficiaries of a changing world, yet potential pitfalls coexist with promises, projected consequences and unexpected complications blend into each other. The focus of the coming pages rests on the fate of the different homegrown systems of traditional law and governance in Africa and the different legal systems within which they are embedded. There are five distinct categories of challenges and opportunities depending on the choice of the legal and political path to recognising and empowering homegrown constitutionalism. But what sets the stage for all this is the potential impact of the changing global order.

The Western-led global order which defined the three decades following the collapse of the Soviet bloc in the early 1990s, the discrediting of communist ideology, the triumph and triumphalism of the West, and the universalisation of the liberal-democratic-capitalist ideas, has now completed its shelf-life.[1] In the midst of what is likely to be labelled a change to the global order by future historians, it might be a bit premature to reflect on the exact face of the new world to emerge from the current uncertainty. The whirlpool of current geopolitical dynamics might need more time until things settle into something more permanent. The new global order will take some time to fall in place, so it is impossible to foretell the type of regional geopolitical dynamics it will engender across the African

1 For a more detailed look at the impact of the Cold War in constitutionalism in Africa, see *Martin Chanock*, Constitutionalism, Democracy and Africa: Constitutionalism Upside Down, Law in Context: A Socio-Legal Journal 28 (2010), pp. 126-144.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

continent. Unshackled from the constraints and priorities of the previous global order, there is bound to be uncertainty as the pieces of the new international order are rearranged into their new positions, with the addition of a few new pieces while some of the older ones are disposed of. Once the frequency of the fits-and-starts of change subsides, the new dynamics will establish more permanence and predictability, and a new global order will then set the course for the coming decades. We do not exactly know what is awaiting us, but we can safely predict a few things regarding the future of constitutions and constitutionalism in Africa.

What will emerge will surely be marked by Western geopolitical retrenchment—and indeed, by the divisions within what was until recently seen as a unified global alliance. The new global order will have to acknowledge the continuing geopolitical strength of China—a country that is likely to be around the table of whatever new global order emerges albeit with demographic, social, and economic challenges that awaits attention at home. Changing global economic patterns will coexist with unprecedented environmental challenges. While some of the older ones pack up and leave, new international actors will set their gaze on Africa. Friends in one region could end up as adversaries in another. In the meantime, a variety of new coalitions and alliances will pop up and unravel with dizzying speed. Writing in the middle of a critical juncture between an outgoing and incoming global order, we cannot know what the face of the new world will look like in precise terms, but this does not mean we are devoid of any inkling as to the things the future might have in stock for us.

II. And We Can Predict Some of What Is Coming

While the type of global order that awaits us is not predictable, it is clear that the post-Cold War consensus is gone for good, and this has a direct impact on how we see constitutions. In the first immediate phase of change, the world is likely to see disruption. With the expiration of the previous global convergence over liberal-democratic-capitalist ideas, multilateral efforts to agree, devise, and implement constitutional solutions to divided societies will be the first in line to disappear, soon to be followed by the discontinuation of existing policies on cooperation and development. Both international interest and money is already drying up. And this is not because of President Trump. Before his shock therapy on the world, there were already signs along multiple fronts that the once unchallenged Western ability to define constitutions and constitutionalism was sputtering.

Years before Mr. Trump's second term had started, there were multiple indications that the post-Cold War wave of liberal-democratic-capitalist confidence was showing cracks—often challenged by popular disillusionment in many places where decentralised and federal constitutions of the mid-1990s had arrived with promises of democracy and development.[2]

2 In his overview of the preceding two decades of federalism reforms across the continent, the author contrasts the lofty promises that accompanied the reforms in the mid-1990s and their varied, complex, and often unintended, consequences which started to become visible in the mid-2010s. *Jan*

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The July 2020 riots in the Province of KwaZulu-Natal had exposed how vulnerable South Africa was to explosions of social upheaval. In other parts of the continent, authoritarian practices, crony capitalism, and ethnic favouritism had infiltrated and taken over the workings of formally democratic constitutions. Despite receiving more than two decades of various international reforms promising to fix their failed states, South Sudan and Somalia were still nowhere close to stability. Ethiopia has been reeling from the after-effects of a civil war between its federal government and one of its constituent regional states, which flared up after Tigray decided to hold regional elections in September 2020 without the federal government's approval. Instability has now engulfed the country's other regions. Various states of the Sahel were experiencing growing insurrections, sometimes carrying religious and sometimes ethnic colours, but none of the Western-led international initiatives to combat this were able to restore stability to the region.[3] One after another, the states of the Sahel have disengaged from military cooperation with the West and have sought new international friends.

There are new non-Western players in African geopolitics, particularly China, Turkey, and some Gulf States, but until now they have not shown much interest in the internal constitutional issues of the countries with whom they engage. Besides, there is so far little permanence in the shifting dynamics of cooperation and competition. While the scale of Western interest and involvement in Africa subsides, it is not clear how long and structured the interest of new non-Western powers in Africa will be. Regardless of how things will look once the dust of global geopolitical change settles, there are two—closely related—things that we can safely predict: we are unlikely to witness the same scale of coordinated multilateral initiatives towards constitutional reforms. But we will witness the declining ability of the West to, first, influence the type of constitutionalism to be adopted, and then, to politically and economically prop up the chosen constitutional model.[4]

Erk, Federalism and Decentralization in Sub-Saharan Africa: Five Patterns of Evolution, Regional and Federal Studies 24 (2014), pp. 1-18.

3 In a new piece, the author provides an overview of the recent developments in the Sahel – particularly the creation of a new confederation bringing together Mali, Burkina Faso, and Niger. The article addresses the tendency of the comparative federalism literature to limit its analytical focus to the national and subnational levels, and by extension, leave out the regional and international ones. It is only when these two neglected levels of analysis are integrated into federalism studies will we be able to spot some of the recent patterns across non-Western federal systems. *Jan Erk*, Africa's Contributions to Comparative Federalism: Levels of Analysis, Geopolitics, Ideas, Publius: The Journal of Federalism (forthcoming).

4 Some believe that our mainstream ideas on democracy represent but a Western variant of constitutionalism only; see *James Tully*, The Imperialism of Modern Constitutional Democracy, in: Martin Loughlin / Neil Walker (eds.), Paradox of Constitutionalism: Constituent Power and Constitutional Form, Oxford 2008, pp. 315-337.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

III. From Received to Homegrown Constitutionalism

The collapse of the Soviet-led Eastern Bloc in the early 1990s and the triumph of the West unleashed a wave of momentous political and economic changes. Socialist satellites states, allies and clients of the West which did not have liberal-democratic constitutions, and the third group of authoritarian states who had managed to flirt with both sides and sail through the Cold War geopolitical currents, almost in unison underwent constitutional reforms. The post-Cold War universalisation of liberal-democratic-capitalist ideas and Western triumphalism inevitably influenced the contents of the new constitutions. The United States played an outsized role in all this.[5] There was also much support from international aid agencies and donors, as well as technocratic advice from international experts. The conditions international donor agencies asked in return for their help added to the convergence around a number of general themes. Decentralisation was a defining component of almost all of these constitutional reforms, and to a lesser extent, also was federalism.[6] This was also the period that federalism was chosen as the path towards rebuilding conflict-torn Somalia and the newly-created South Sudan

The new world that comes next will surely be marked by a decline in the proselytising liberal-democratic-capitalist spirit which defined the post-Cold War international order and the post 9/11 developments which further consolidated the global community under the US-led Western block. Currently reeling from the shock therapy administered by President Trump, it is not yet clear whether the future would see the former allies of the US join forces in an alternative Western alliance. In the midst of all the current uncertainty, we can be certain that fewer international actors would be willing and capable to initiate, support, and finance political, economic, and military reforms across the continent. The practical limitations on the ability to project and maintain Western-led international initiatives, combined with a declining political interest in the problem-spots in the Developing World / Global South, means that the reform-initiatives in post-conflict societies will increasingly rely on more local/regional actors – and perhaps new international actors. And this will likely open up more room for Africa's homegrown traditions of constitutionalism to join the received models in the search for self-sustaining solutions that can function without international help. Out is the post-Cold War confidence that copy-pasting constitutional best practices from the West to the rest will bring democracy, development and stability. With

5 Perhaps one of the leading examples of looking at the world through the narrow lens of the United States constitution is the work of Bruce Ackerman. Ackerman projects his interpretation of American constitutionalism to the rest of the world under what he labels his 'grand claim'. *Bruce Ackerman*, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law, Cambridge MA 2019.

6 In his work examining the causes and consequences of decentralisation reforms, the author challenges the tendency of international experts and organisations to cut-and-paste 'best practices' in decentralisation from the West onto the African soil without an attention to the local context. *Jan Erk*, Iron Houses in the Tropical Heat: Decentralization Reforms in Africa and their Consequences, Regional and Federal Studies 25 (2015), pp. 409-420.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the universalisation of liberal-capitalist Western model of law and politics now dented, we are likely to see more variety in both scholarly and applied approaches to federalism. Such variety is not going to be only about who gets involved in federal design, but also about the variety in the ideas on constitutions and constitutionalism.

B. Recognising and Empowering Homegrown Constitutionalism

I. The Legal Systems of the Continent

One of the first signs of increased openness towards homegrown constitutionalism is the recent embrace of the idea of injecting an African identity into constitutions. Yet there is no one single African identity, nor is there one uniform homegrown tradition of African constitutionalism.[7] Plus, a country's political history means that different received models of constitutionalism have taken root in different parts of the African soil, over different periods of time. Colonial rule installed either a Common Law or a Civil Law system, but colonies also changed hands, new states were sometimes formed by amalgamating territories with different constitutional statutes and thus different legal systems, (the way Protectorates, Dominions, and Mandated/Trust territories were merged), and sometimes new states were formed by separating from bigger territories and adopting the legal systems of the new colonial supervisor.[8] In some federal states, different legal traditions defined the different constituent units to the federal union. For example, one part of federal Cameroon came from the British Common Law tradition, the other part from the French Civil Law tradition. Postcolonial politics added newer constitutional imports like socialism or religious fundamentalism. Put simply, there is no single path to recognising and empowering African constitutionalism. There are various promises and pitfalls associated with these paths, the legal complications that accompany the different processes of recognition representing with the different paths, and the attending long term social and political consequences.

For a continent with fifty-four countries, hundreds of ethnic communities and languages, a multiplicity of religions and belief systems, variations in economic wealth, and a

7 In a recent piece, the author challenges those who believe the injection of an overarching general reference to an undefined 'African' identity would bring constitutions closer to the people. In his historical and comparative review, he identifies two distinct forms of constitutional identity, an aspirational one seeking future economic and political goals and a representative one that captures the existing national demographics, history, and culture. Both come with a different set of challenges for African constitutions. *Jan Erk*, Aspirational and Representative Constitutional Identity in Africa, Global Constitutionalism: Human Rights, Democracy, and the Rule of Law 12 (2023), pp. 154-173.

8 This process accelerated in the years following the end of World War II and just before independence. The author's study of the failed East African Federation reveals in detail how colonially supervised amalgamation in preparation for federalism failed to meet the expectations of local populations who wanted nothing short of self-rule through majoritarian democracy. *Jan Erk*, Federal Design and Supranational Integration Plans for East Africa: Regional Geopolitics, the Changing Global Order, and the Imperial Constitutional Repertoire, Ethiopian Journal of Federalism Studies 10 (2024), pp. 1-18.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

complex history, no generalisable and stylised classification scheme of legal systems can do full justice to the details of what is nationally unique. What is more, even in the context of individual countries, throughout history there could be reversals and detours along the legal paths chosen earlier and multiple paths can come to crisscross each other. The mainland part of Tanzania is a case in point. Tanganyika used to be a German colony and thus had a Civil Law system, but it then became a League of Nations Mandated territory under British rule where Common Law replaced earlier German practices. With the aid of some very broad brushstrokes, we can categorise the received legal systems on the continent under three general labels: Civil Law systems, Islamic Law systems, and Common Law systems. The fourth distinct legal tradition, i.e. the Socialist one, was influential, especially in the early days of independence capturing the hearts and minds of a new generation, but with the collapse of the Soviet Union its short lifespan came to a sudden halt. Within the three main legal traditions, there are naturally multiple different national experiences representing the timing and the processes of recognising and incorporating indigenous forms of African constitutionalism. Plus, different combinations of legal systems might exist in different regions of the country in question.

II. The Subjugation of African Law in Civil Law Systems

The first legal tradition of the continent is also the one that has had the most pervasive impact mostly because it happened to be the legal system bequeathed by a multitude of Western powers who had colonies in Africa; namely Portugal, France, Belgium, Germany, Italy, the Netherlands, Denmark, and Spain. By definition, Civil Law systems are not open to legal pluralism and customary law. This natural characteristic of the codified Napoleonic/Roman law tradition was compounded by the colonial policies of these powers favouring direct rule and the imposition of laws from the metropolitan capital – in contrast to the British colonial policy of indirect rule we will cover in sub-heading III below.

Some colonial regimes, particularly the Portuguese in present-day Angola and Mozambique, had tried to directly control homegrown traditions of African law and governance, subsequently robbing both of the sense legitimacy in the eyes of the locals. But during the course of their long engagement with Africa going back to the 15th century, the Portuguese had also brought in linguistically, culturally, and religiously assimilated locals into the colonial system of governance, thereby creating a new social class with homegrown roots which ensured the continuation of their African colonial holdings.

The French in their self-styled *mission civilisatrice* had first tried to erase; and when failing to do so, had tried to subjugate local laws and leaders. Their playbook in governance was similar to what was happening at home in metropolitan France.[9] Following

9 The British were similarly playing from the same rulebook they used at home. In his study comparing anglophone and francophone policies towards traditional authorities, the author shows how what was prescribed to the colonies was informed by the national practices at the time. *Jan Erk*, Constitutionalisation of Traditional Authorities and the Decentralisation of Governance: Anglophone and

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the French Revolution, feudalism and the political powers of the Catholic Church were dismantled. The Republican revolutionary social engineering took on a new vigour with the Third Republic in the latter half of the 19th century. Minority languages and cultures were replaced by standardised French-language and Republican culture through education and conscription which sought the creation of free and equal citizens in a jurisdictionally uniform France. The citizens were to be part of a nominally egalitarian national *volonté générale*, which, in turn, would legitimise the one and indivisible constitution of the Republic. The quest of this ideal sometimes came with centralist domination and heavy-handed state policies as citizens often had to be made "free" against their wishes. The closer one was to metropolitan France on the continent—across the Mediterranean in North Africa and in West Africa relatively accessible by maritime means—the social engineering had more success in creating a new social class of French-speaking locals.[10] In Equatorial Africa further away, French colonialism frequently fell short of its self-styled progressive ideals. While there was no formal recognition of indigenous law, Jean-François Bayart notes that many of the traditional leaders drawn from the existing indigenous governance structures were co-opted into the ranks of the colonial state.[11] Just as was the case in Portuguese colonies, this ensured continuity.

In the Belgian King Leopold II's personal property of the Congo, the Belgians were under no such illusion that they were force for good and refused even most basic forms of acknowledging the existence of indigenous law and governance. The formal constitutional status of the colony belied the real extractive ambitions behind. Leopold's colony was in fact nominally called the Congo Free State was under the tutelage of an entity called *Association International Africaine*, which in fact was a private commercial company in which the Belgian King was a majority shareholder. When the Belgian state took over the governance of the Congo from the King and his private company in 1908, there was more of an attempt to follow the French lead of the colonial *mission civilisatrice*, but indigenous forms of constitutionalism had been fatally damaged. At the end of the First World War, Belgians had taken over the control of Rwanda and Burundi as League of Nations Mandate territories, but prior to this these two had been part of the German colony of Tanganyika and had seen the erosion of indigenous colonialism.[12]

Francophone Africa Compared, in: Charles M. Fombad / Nico Steytler (eds.), Decentralisation and Constitutionalism in Africa, Oxford 2019, pp. 459-484.

10 For an overview, see *Patrick Manning*, Francophone Sub-Saharan Africa 1880-1985, Cambridge 1998.

11 *Jean-François Bayart*, L'État en Afrique : La Politique du ventre, Paris 1989. Sèbe expands on Bayart's historical account on local leaders and the French colonial establishment and argues that it was the Masonic Lodges which played a big part in the co-optation. *Berny Sèbe*, From Post-Colonialism to Cosmopolitan Nation-Building? British and French Imperial Heroes in Twenty-First Century Africa, The Journal of Imperial and Commonwealth History 42 (2014), p. 956.

12 *Margaret L. Bates*, Tanganyika, in: Gwendolen M. Carter (ed.), African One-Party States, Ithaca, New York 1962, pp. 395-483.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Germany was a late 19th century addition to colonialism in Africa and was in the midst of an industrial/military competition with France and Britain. Its African policies in Tanganyika (mainland part of present-day Tanzania) and South-West Africa (present-day Namibia) were nakedly geopolitical and economic, and seemed to display no desire of granting recognition to indigenous forms of law and governance.[13] According to one observer of pre-independence Tanganyikan history and politics:

> *"Instead of letting Africans choose their chiefs and headmen, as they had always done, [Germans] nominated them. These nominees were rightly regarded as 'Wadachi henchmen'. The Germans feared any chief who had an independent mind, because he could mobilise his tribe against them. To lessen the position of these strong chiefs, they appointed pliable men, mostly arabs or swahilis, called akidas or liwalis […]. In some areas their activities were so damaging that the British, when they had become the Mandatory Power, were just not able to bring the Native Administration back to life".*[14]

In German Togoland (present-day Togo and parts of Ghana) and German Kamerun (covering present-day Cameroon, Gabon, and Congo-Brazzaville), which were later transferred to Britain and France as League of Nations Mandate territories, the relatively short presence of German colonialism had been driven mostly by private commercial companies operating under imperial charter.[15] Despite the different historical trajectories of the different countries discussed above, by definition Civil Law systems have been the most difficult environments for homegrown systems of traditional law and governance to survive.

III. Homegrown Customary Law Incorporated in Islamic Law

Colonialism was not within the monopoly of the West. Most of North Africa and the coastal areas along the Red Sea and the Horn of Africa had been brought into the Ottoman Empire through military conquest or tributary treaties.[16] The constitutional status of their various North African territories ranged from directly governed imperial provinces to vassal states and tributary allies. Along the Gulf of Aden and the Horn of Africa, the coastal African holdings of the Ottomans lacked a land link to imperial territories in the north of the continent and were thus more similar in status to the colonies of Western powers.

13 *John Iliffe*, Tanganyika under German Rule 1905-1912, Cambridge 1969.

14 *Judith Listowel,* The Making of Tanganyika, London 1965, p. 51.

15 *Ralph A. Austen*, Varieties of Trusteeship: African Territories under British and French Mandate 1919-1939, in: Prosser Gifford / W. M. Roger Louis (eds), France and Britain in Africa: Imperial Rivalry and Colonial Rule, New Haven, Connecticut & London 1971, pp. 515-541.

16 For more on the legal basis of Ottoman imperial expansion, see *Fatih Öztürk*, Ottoman and Turkish Law, Bloomington, Indiana 2014.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Along the East Coast of Africa and the Horn, Omanis had joined the Ottomans with their fair share of colonialism.[17] Islamic Law played a role in the colonial expansion of both countries. Without the codified rigidity of Western Civil Law, Islamic Law was able to incorporate a variety of indigenous legal traditions into its loose, complex, and regionally varied collection of, ostensibly Islamic but often indigenous, customary law.[18] The multiplicity of overlapping and cross-cutting varieties of Islamic approaches to jurisprudence made the integration of indigenous law easier. For example, the Somali system of indigenous law known as *xeer* was recognised and applied in Islamic courts nominally under the tutelage of the Ottoman sultan.[19] The fairly thin military and bureaucratic presence along the Gulf of Aden, in the Horn of Africa (and also in the Sudan) meant that an Ottoman version of indirect rule was practised through the co-optation of local leaders and indigenous governance structures – be it ethnic, tribal, or clan-based.[20]

The Omani followed the same path of using the regionally varied nature of Islamic customary law in the islands of Unguja and Pemba and the Kiswahili speaking coastal regions of East Africa. Omanis themselves had historically adopted the relatively uncommon Ibadi approach to Islamic jurisprudence which predated the consolidation of various Shia and Sunni schools of jurisprudence. They were also a seafaring nation of traders who had traditionally crisscrossed the various shores of the Indian Ocean. This meant that throughout history they had interacted with, and found ways to accommodate other traditions of Islamic jurisprudence of their neighbours and trade-partners.[21] The tradition of using ambiguity to deal with local diversity was something that was replicated in their East African colonies. At the time of its inception, incorporation of local customary laws into Islamic law was a very pragmatic form of recognition practised by both Ottomans and Omanis. In the eyes of the locals this ensured the continuation of the homegrown laws and brought popular and religious legitimacy to what was in effect more of a variety of foreign rule. In time however indigenous customary law lost its distinctiveness and—notwithstanding regional variations—was subsumed under the broader category of Islamic law.

17 *Norman R. Bennett*, A History of the Arab State of Zanzibar, London 1978.

18 *John Miles*, Customary and Islamic Law and its Development in Africa, African Development Bank Law for Development Review 1 (2006).

19 For more on the Somali system of indigenous law and governance *xeer*, see *Michael van Notten*, The Law of the Somalis, Trenton, New Jersey 2005.

20 For an account of Ottoman imperial politics in the Gulf of Aden, see *Thomas Kuehn*, Empire, Islam, and the Politics of Difference: Yemen 1849-1918, Leiden 2011.

21 *Raymond Dennis Bathurst*, Maritime Trade and Imamate Government: Two Principal Themes in the History of Oman to 1728, in: Derek Hopwood (ed.), The Arabian Peninsula: Society and Politics, London 1972, pp. 89-106.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

IV. Recognition, Manipulation and Resilience under Indirect Rule

As the only Western colonial power with the Common Law legal system, it is difficult to separate the historic impact of this legal tradition from the colonial policy of indirect rule practiced by Britain. This was a policy quite different in spirit from what other Western colonial powers practised. In British Protectorates, day-to-day governance remained in the hands of indigenous political authorities, be it kings, princes, paramount chiefs, emirs, and sultans.[22] This was not the result of a principled respect for indigenous constitutionalism, but of more pragmatic concerns of outsourcing the day-to-day governance of distant territories to co-opted local leaders.[23] Practices on the ground ranged from empowering legitimate and powerful traditional rulers to handpicking weaker and docile pretenders, so the consequences of indirect rule were not everywhere identical. The process of recognition was frequently manipulated to political ends. Whatever the local variation, however, indirect rule recognised and consolidated the office of traditional leadership, even if only in name.[24] Local autonomy also ensured the overall continuation of indigenous systems of law (as long as it did not contradict colonial prerogatives).

There was jurisdictional heterogeneity across Britain's colonial holdings, however. What were formally labelled as Colonies under the imperial constitution were under London's direct rule, while in Dominions settler communities controlled the levers of the local legislature and government as part of the system of "responsible" government, and Protectorates (and later Mandates /Trusts) were under the portfolio of the Foreign Office. The constitutional status of the Protectorates rested on the formal recognition of homegrown systems of law and governance. There was a degree of internal autonomy under the imperial constitutional umbrella mostly unavailable to other indigenous communities in the Colonies and Dominions. Indirect rule went hand in hand with the adoption of the Common Law system for dealing matters beyond the internal affairs of the indigenous community. While mostly silent on African customary law, the Anglo-Saxon system of law was also, at least theoretically, more open to uncodified laws and practices.

While acknowledging its inherent openness to the local legal traditions, one should also point out how the Common Law system also distorts the homegrown as it tries to pigeon-

22 For a more comprehensive overview, see *Michael Crowder*, Indirect Rule: French and British Style, Africa, Journal of the International African Institute 34 (1964), pp. 197-205.

23 Indirect rule was always the case in the Protectorates but the policy also existed in parts of land controlled by Royal Chartered Companies, Dominions, and League of Nations Mandates / United Nations Trust territories. In his contribution to a recent volume covering the transition from the Empire to the Commonwealth, the author unpacks the various colonial statuses used within the British Empire, and how the transition to the Commonwealth was influenced by the particular status a territory held within this imperial constitutional order. *Jan Erk*, From Dominions to Protectorates in Sub-Saharan Africa: Imperial Constitutionalism Setting the Stage for the Commonwealth of Nations, Memoria e Ricerca 31 (2023), pp. 411-428.

24 *Thomas Spear*, Neo-Traditionalism and the Limits of Invention in British Colonial Africa, The Journal of African History 44 (2003), pp. 3–27.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

hole it into Western legal categories. The classification of indigenous law and governance into distinct items based on the Western concepts and the related legal categories has a historical lineage that goes back to early colonial bureaucratic practices in the British Empire. Martin Chanock has studied the impact of colonialism on local laws and governance structures in Malawi and Zambia. In his book *Law, Custom, and Social Order*, he provides the following observation: "the development of an area of customary law depended on a correspondingly appropriate image of being available in the legal repertoire of the colonial rulers".[25]

C. Promises, Pitfalls, Complications, Consequences

I. Moral and Practical Concerns for Recognising the Homegrown

In and of itself, there are moral justifications for the constitutional recognition of the homegrown. Indigenous systems of law and governance with their roots in a community's own history and culture are part of a country's unique foundations, or put differently, of its "constitution"—to use the non-legal original meaning of the term. Independent of such moral, and more philosophical, considerations, there are also pragmatic justifications for recognition. One is to ensure constitutional longevity—a common deficiency across the continent.[26] Only a handful of observers had questioned the reformist zeal of the 1990s and warned that it was the homegrown that had more chances of longevity.[27] But recent history had not been kind to Africa's traditional systems of law and governance. Kwasi Prempeh labels this "the postcolonial exclusion of Africa's homegrown customary institutions from the formal structures of local representation and governance".[28]

Even when constitutions fall short of some of the liberal democratic constitutional blueprints deemed ideal in the West, citizens are more likely to relate to what they come to see as their own political system. A sense of national ownership of the constitution makes it more likely that the basic law laying the foundations of the nation withstand the known, and yet unknown, legal, political, social, and economic challenges ahead successfully. As

25 *Martin Chanock*, Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia, Cambridge 1985, p. 219. The same statement also exists in *Martin Chanock*, A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Africa, Journal of African History 32 (1985), p. 76.

26 *Sauda Nabukenya*, Why Constitutions in Africa do not Stand the test of Time? Lessons and Perspectives from Uganda, in: Jaap de Visser, Nico Steytler, Derek Powell, and Ebenezer Durojayé (eds), Constitution Building in Africa, Baden-Baden 2015, pp. 293-326.

27 The study is mostly based on Skalnik's three decades of research in northern Ghana and the adjacent regions of neighbouring countries. *Peter Skalnik*, Authority versus Power: Democracy in Africa Must Include Original African Institutions, Journal of Legal Pluralism and Unofficial Law 28 1996), p. 109.

28 *Kwasi H. Prempeh*, Africa's 'Constitutionalism Revival': False Start or New Dawn, International Journal of Constitutional Law 5 (2007), p. 495.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Sammy Adelman argues in his study of constitutionalism, pluralism, and democracy in Africa "it is only from the grassroots, from bottom up that democracy can emerge".[29] And it is homegrown constitutionalism is the one which has the deepest the roots of course.

There are also rather more prosaic justifications for recognising and empowering homegrown forms of law and governance such as familiarity and simplicity. According to one of the leading names in the comparative study of African law and governance – and the main investigator of the pan-African initiative to record the multitude of unofficial and uncodified forms of indigenous law, i.e. the "Restatement of African Law Project" (RALP) of the 1950s and 1960s—Anthony Allott, lays out the reasons why recognition of the homegrown is good for the legal system. To paraphrase: 1) justice was popular, understood, and people participated; 2) justice was local and speedy; 3) justice was simple and flexible.[30] What is familiar to the grassroots will work better; such familiarity means that the locals will have the inside knowledge to oppose and challenge those who challenge those who might attempt to manipulate constitutional clauses and procedures. Put simply, familiarity breeds accountability.

II. Intentions vs. Capacity

Not everything put on paper can be achieved. Action might fall short of what is promised in a letter of intent. Declarations of clearly articulated action-plans could be followed by confusion and inertia. And the goals enumerated in constitutions might be beyond reach. These are not because there is a hidden agenda to thwart things but because of a multiple of unanticipated shortcomings in capacity and capability which might hinder the realisation of the announced aims. And this is not unique to Africa. Many constitutions around the world are indeed defined by their aspirations.[31]

But to sharpen the focus a little more, under this subheading we look at the possible mismatch between idealistic reforms toward the recognition of homegrown forms of law and governance on the one hand, and shortages in the various resources to deliver on these intentions on the other—be it personnel, infrastructure, funding, knowledge, or training.

The cleft between declared intentions and the structural capacity of legal systems deliver on these is particularly pronounced in terms of the training of legal professionals who are not naturally proficient in indigenous law (that is, those who do not speak the language, who are unfamiliar with the culture in question, and lack knowledge of the oral history of the community). There are no neatly demarcated, precisely enumerated, clearly listed items of law which would correspond to existing comfort zones of legal professionals. One needs broader knowledge of indigenous law and governance, both in general in terms of

29 *Sammy Adelman*, Constitutionalism, Pluralism and Democracy in Africa, Journal of Legal Pluralism and Unofficial Law 42 (1998), p. 86.

30 *Anthony Allott*, The Future of African Law, in: Hilda Kuper / Leo Kuper (eds.), African Law: Adaptation and Development, Berkeley 1965, p. 232.

31 *Erk*, note7, pp. 154-173.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the foundations and workings of non-Western law, and also in terms of the specifics of the community in question. Falling short of such knowledge, court systems often lack the capacity needed implement the very indigenous laws that have formally been recognised.

The distance between intentions and capacity was one of the important warnings that had been articulated by various observers during the 1950s and 1960s as part of the pan-African "Restatement of African Law Project" (RALP).[32] Since then others have continued to call for ways to deal with this problem afflicting the legal profession. But shortages in knowledge of indigenous law and governance—not only the specific details of the laws of different communities but on the foundations of different legal systems continue. Law curricula still underplay the (non-Western) sources of law in contemporary legal systems. Most of our students seem to be unaware that not all laws are derived from constitutions, from the legislative passing of statutes, or from judges deciding cases. One way to start addressing this deficiency is to incorporate more comparative approaches into the curricula.[33]

III. Lawyer's Preference for Uniformity and Certainty

Even when the political will for recognising and empowering homegrown constitutionalism exists—together with the broad support of the legal profession, the court system and legal training might present hurdles along the way.[34] That is, intentions for recognition on paper might diverge from the structural capacity of legal systems to deliver on these very intentions in terms of the training of legal professionals and the necessary knowledge available to the court systems to implement very indigenous laws that have formally been recognised.

When concerns for professional training and qualification are paramount, it is only natural that expectations of certainty are prevalent. Both teaching and practice will thus be marked by preference for legal uniformity, coherence, regularity, and most importantly,

32 *Laurance C. B. Gower*, Independent Africa: The Challenge to the Legal Profession, Cambridge MA 1967.

33 In the special issue bringing together the former editors of Regional and Federal Studies to celebrate the journal's 30th anniversary and provide reflections on the state of federalism literature, the author calls for a broader and more inclusive definition of federalism studies instead of a narrower and more specialist one. *Jan Erk*, A Better Scholarly Future Rests on Reuniting the West with the Rest, the Present with the Past, the Theory with Practice, Regional and Federal Studies 31 (2021), pp. 50-72.

34 In his comparative study of federalism across the African continent, the author has observed a similar preference for uniformity and certainty in federal design. While formalisation and symmetry on paper make life easier for lawyers, bureaucrats, and international experts in the short run, when federal constitutions are cut-and-pasted from abroad and then superimposed on diverse societies, they rarely deliver on their promises of democracy and development in the long run. *Jan Erk*, Lessons from the Law and Politics of Federalism in Africa: Federalism Is Bigger Than Federation; Constitutions Are More Than Single Mega-Documents; the International Trumps the Domestic; and the Past Continues to Matter, World Comparative Law 56 (2023), pp. 633-654.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

predictability. Yet all the preceding discussion highlights the inherent complexity, and even indeterminacy, of indigenous law. And such complications multiply when indigenous law coexists with other legal systems, be it Common Law, Civil Law, or Islamic Law. To add to the complexity, the laws of each constituent ethno-linguistic community (and even within sub-tribal branches of a single community) customary laws are likely to show differences. Legal pluralism is costly, complex, it does not lend itself to quick and immediate answers, and it thus does not come with much financial remuneration for those who practice law within the narrowly defined branches of law in which they received their professional qualifications. But such preference for legal uniformity is not something that only applies to practising lawyers.

For long, policy coordination, standardisation, harmonisation of laws, centralisation, were seen as paths to modernisation and development—not only by those practising law but also by those theorising about law and governance. Writing in 1965, MG Smith called this "the traditional preoccupation of Western sociologists with legal uniformity and centralised administration".[35] The fact that preference for uniformity is a policy choice was overlooked and instead it was conceptualised and presented as the only available path to progress—even while scholars of indigenous law and governance where warning that the position "that legal systems ought to be uniform and centralised" was indeed a value stance.[36] An approach epitomising such centralist preference for uniformity happened to be influential among academic and policy circles right at the time of African countries were becoming independent. It is alternatively labelled "Law and Modernisation", "Law and Development", or "Legal Unification" movements. Almost all African countries had started their new lives with "a plurality of legal systems within the bounds of the individual state".[37] But this would not last for long. Influenced by the prevailing modernisation and development theories of the time, following a very brief period of openness to the coexistence of different systems of law, most post-colonial constitutions throughout Africa rejected legal pluralism in favour of legal unification. Nation-building was the buzzword of the times, and there was no room for what came to be seen as dated and disappearing traditional cultures in this project. The influence of modernisation theories entrusting the central state with a developmental vanguard role further underpinned the rejection of legal pluralism.

Modernisation and development came to be associated with homogeneity and uniformity.[38] New post-colonial constitutions almost always represented modernist and nation-build-

35 *Michael G. Smith*, The Sociological Framework of Law, in: Hilda Kuper / Leo Kuper (eds.), African Law: Adaptation and Development, Berkeley 1965, p. 38.

36 *Thomas W. Bennett*, Application of Customary Law in Southern Africa: The Conflict of Personal Laws, Cape Town 1985, preface.

37 *Arthur Schiller*, Introduction, in: Thomas W. Hutchison (ed.), Africa and Law: Developing Legal Systems in African Commonwealth Nations, Madison / London 1968, p. vii.

38 One of the observers of the prevailing mindset of the time prefers the label 'law and development movement'. *Francis G. Snyder*, Law and Development in the Light of Dependency Theory, Law and Society Review 14 (1980), pp. 723-804.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ing aspirations and a principled rejection of legal pluralism. Traditional structures and customary laws were left out of the constitutional architecture of most of the newly independent African states. The move toward legal unification was often seen as the fast-track to modern development by the new generation of political leaders who came to power during decolonisation; it was an approach also supported by various international agencies of the time.[39] Letting go of legal uniformity and certainty will need the wide-ranging endorsement of the legal profession.

IV. Individual Human Rights vs. Collective Group Rights

A little earlier we had discussed the ambitious but ultimately unsuccessful post-Second World War attempts to identify, recognise, and apply the various homegrown systems of law and governance across the entire African continent. Many of the common reference points we see in constitutional reforms nowadays, such as individual human rights had not yet entered the repertoire of the legal profession but the pan-African restatement of African Law project (RALP had other encountered other challenges.[40] The Cold War brought in ideological polarisation to the project. There was little in common across the various partners to keep things on track. In contrast, the various different national initiatives of constitutional restructuring of the 1990s shared a number of characteristics—political democratisation, electoral reform, economic liberalisation, and the promotion of individual human rights. While all laudable goals, there was an underlying dynamic that seemed to hope that instant solutions were achievable through a rewrite of constitutions. There are uncanny echoes of the 1960s here when the social scientists and lawyers were advocates of quick top-down fixes. TW Bennett has been comparing the two time-periods and spots parallels between the promotion of human rights defining the 1990s and what he calls the "heady days" of "law and development" and "law and modernisation" movements defining the 1960s, as both believed that "customary law was primitive and backward and should be swept aside to make way for a brave new legal order imported from the West".[41]

The shared emphasis around individual human rights defining the 1990s, and clearly delineated and neatly articulated formal laws to protect these new aspirations, did not translate seamlessly into Africa as these aspirations met the messier complexity of legal pluralism defined by the coexistence of the various indigenous conceptualisations of law

39 *Martin Chanock*, Signposts or Tombstones? Reflections on recent works on the Anthropology of Law, Law in Context 1 (1983), p. 113.

40 The four challenges were whether one needed integrated or separate legal systems for the received and the homegrown; whether one should codify, record, or restate traditional laws; how one could reconcile the different legal/bureaucratic models associated with different colonial regimes; and lastly, how the law was to work outside the traditional territory of the community in question. *Jan Erk*, The Challenges of Formalising African Traditional Law: Comparative Lessons from the Restatement of African Law Project, African Journal of Legal Studies 17 (forthcoming 2025).

41 *Thomas W. Bennett*, T W, The Compatibility of African Customary Law and Human Rights, Acta Juridica 18 (1991), p. 32.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and governance. And there was one thing common across the two time-periods. Most of the legal profession and academia continued to see traditional authorities and customary law as illiberal and backward.[42] Particularly problematic was the collectivist inclinations inherent in traditional law and governance. Homegrown laws were seen to be "imbued with the principle of patriarchy".[43] Traditional structures, customary law, legal pluralism, and local variation of laws and policies were used as shorthand for reactionary politics and inefficiency. This is not to dismiss the legitimate concerns individuals and minorities (be it ethnic, religious, or sexual) who feel disenfranchised in indigenous communities. Most indigenous systems of law and governance are defined by their inclination to prioritise communal concerns and collective rights and obligations. But the opposite dynamic also exists; that is, most human rights legislation tends to prioritise the individual over the community. This difficult moral tension between the protection of individual human rights on the one hand and the constitutional recognition of collective group rights is something that cannot be wished away.

V. Empowering the Homegrown vs. Justifying the Illiberal

In this final sub-heading of section C, we juxtapose two ends to the discussion on the constitutional recognition of indigenous law and governance. And it is perhaps the hardest tension to resolve in a logically consistent and philosophically principled way. Like our conclusion to the previous line of discussion above, what we can best hope is an awareness of such an underlying tension so that both competing dynamics are acknowledged as we move forward with the constitutional recognition of indigenous forms of law and governance.

What we mean by the underlying tension is ways to empower the homegrown without writing a blank cheque for all things traditional. As we did in all the preceding sub-headings, we contrast two opposite positions. Full-scale recognition of indigenous constitutionalism comes with the risk of moral relativism, that is, the unintentional justification of the illiberal, reactionary, and patriarchal. This might be an unintended consequence, but it is a real possibility and therefore could not be portrayed as unanticipated.[44] Good intentions alone do not justify policy choices so both sides of the discussion deserve legitimate hearing. This is not only something that applies to indigenous constitutionalism in Africa.

42 Others—including the author—believe that traditional authorities could serve democratic stability through their deep roots in the society and their subsequent power to hold the centre to account. He develops this argument in the context of the traditional kingdoms of Ghana's Asante, Uganda's Buganda, and Zambia's Lozi. *Jan Erk*, Traditional Kingdoms and Modern Constitutions: Parochialism, Patriarchy and Despotism vs. Indigenous Safeguards against Absolutism, in: Tom Ginsburg / Rosalind Dixon / Adem Abebe (eds.), Comparative Constitutional Law in Africa, Cheltenham 2022, pp. 329-360.

43 *Bennett*, note 41, p. 23.

44 *Robert K. Merton*, Unanticipated Consequences of Purposive Social Action, American Sociological Review 1 (1936).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

It has been a concern in other parts of the world going through similarly difficult processes of recognition. Canada is a prime example. The country's leading champions of indigenous legal traditions do not shy away from the difficult questions, as Val Napoleon and Hadley Friedland put it: "how do we [access and articulate indigenous laws] without romanticising the past or avoiding the tough issues of violence and internal oppressions on the ground."[45]

D. Conclusion

Whatever the precise nature of the incoming global order, we can safely predict that it will be one where the capacity, willingness and commitment of the Western-led international community to initiate and sustain constitutional reforms in the Developing World / Global South will be much more limited than what we have become accustomed to. Despite the entry of new international players, no return to something akin to the Western-led global community of collective action appears likely. But conflicts within and across states will continue of course. With the international taps mostly turned off, workable constitutional solutions will now have to run on as little as possible. What better way to address conflict than through bringing in homegrown traditions of law and governance, which have sustained themselves over periods of neglect and manipulation by the modern state.

The changing global order also presents an opportunity for non-Western ideas on constitutions and constitutionalism to increase their presence and pull. But there is no one single path to recognising and empowering homegrown constitutionalism in Africa. Political will and constitutional expertise have to meet shortcomings in capacity and capability; structural bottlenecks in personnel, infrastructure, funding, knowledge, or training will complicate things. In many ways, the challenges and opportunities are inseparable from each other. And most importantly, none of these are technical matters of policy but are political choices that contain conflicting moral and philosophical considerations. One is the protection of the human rights of dissenters or minorities within traditional systems of law and governance of the continent which tend to put collective interest above that of the individual. The other one is the risk of inadvertently legitimising the archaic and illiberal leftovers in traditional law and governance. None of these are technical legal matters. Different paths to recognition and empowerment come with different pluses and minuses for all concerned. As academics, we can best hope to identify and expose all the promises, pitfalls, complications, and consequences associated with the choices available to decision-makers. They are the ones accountable to the people for whom the decisions are made. We just try to map out the twists and turns on the road ahead.

© Jan Erk

45 *Val Napoleon / Hadley Friedland*, And Inside Job: Engaging with Indigenous Legal Traditions through Stories, McGill Law Journal 61 (2016), p. 733.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ARTICLES / ABHANDLUNGEN

Reconciling Opposites: The Original Conflict on Mining, Indigenous Lands and Development

By *Giovanni Martins de Araújo Mascarenhas*[*], *João Paulo Lordelo*[**], *Geisa Cunha Franco*[***], *Jessica Lima Rocha*[****] and *Sophia Fonsêca Morais*[*****]

Abstract: Following a series of disputes between the Judiciary and Legislative branches in Brazil, and in the face of yet another myriad of lawsuits focusing on a range of issues regarding indigenous lands, the Brazilian Supreme Court set up a conciliation process and, among the specific issues, proposed conciliation on the issue of mining on indigenous lands. The article seeks an answer to the question of whether reconciliation on the matter is possible and, to do so, it intertwines Brazil's colonization process with mining by identifying what we have chosen to call the "original conflict". This conflict brings two dichotomous positions face to face: the first is based on indigenous cosmovisions that understand that mankind cannot be dissociated from nature, and interpret mining as the activity of "earth eaters"; while the second is explained mainly through a vision that values nature in the form of natural resources and that exploits mining as means for development and growth. After the theoretical development of the original conflict, the article unfolds how this conflict continues to have repercussions and how it develops on the Brazilian legal framework, analyzing the constitutional and infra-constitutional levels and arriving at an analysis of the dispute surrounding Bill 191/2020. The article is developed through a bibliographical, legal and jurisprudential review, adopting as a theoretical reference the understanding coined by Horacio Machado Araóz in his work "Mineração, genealogia do desastre" (Mining, genealogy of disaster), according to which the roots of the modern world lie in the mining geography of Latin America. The article arrives at the understanding that there is no conciliation

* Researcher at Escola Superior do Ministério Público da União (ESMPU), Brazil, https://orcid.org/0000-0001-6363-6418, Email: giiovannimascarenhas@gmail.com.

** Researcher at Escola Superior do Ministério Público da União (ESMPU), Brazil, https://orcid.org/0000-0002-5190-2835, Email: joaolordelo@gmail.com.

*** Researcher at Escola Superior do Ministério Público da União (ESMPU), Brazil, https://orcid.org/0000-0001-5894-4432, Email: geisafranco@ufg.br.

**** Research assistant at Escola Superior do Ministério Público da União (ESMPU), Brazil - https://orcid.org/0000-0002-4283-3946, Email: jessica.rocha@ufg.br.

***** Academic assistant at Escola Superior do Ministério Público da União (ESMPU), Brazil - https://orcid.org/0009-0001-8370-792X, Email: sophia.morais@discente.ufg.br.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

possible on the theme of mining on indigenous land, and that there is a need for greater defense and certainty about indigenous rights, including the need for indigenous people to have stewardship over their rights, including the autonomous management of their lands.
Keywords*:* Mining; Colonialism; Brazilian Law No 14.701/2023; Indigenous Rights; Sustainability

***

A. Introduction

In a context of intense dispute over the demarcation and possibility of mining indigenous lands in Brazil. In an immediate legislative backlash to the judgment made by the Supreme Federal Court (STF, Brazil's highest court), which had ruled unconstitutional the "temporal milestone thesis[1]", the Brazilian parliament issued Brazilian Law no 14.701/2023, which "regulates art. 231 of the Federal Constitution, to provide for the recognition, demarcation, use and management of indigenous lands" and embraces the temporal milestone thesis. In this scenario, various constitutional actions have been brought before the STF, including Declaratory Action for Constitutionality No. 87 (ADC 87)[2], Direct Actions for Unconstitutionality Nos. 7582, 7583 and 7586 (ADIs 7582, 7583 and 7586), and Direct Action for Unconstitutionality by Omission No. 86 (ADO 86).

In the conjuncture of these constitutional actions, under the rapporteurship of Minister Gilmar Mendes, a Special Composition Commission was proposed with the declared aim of seeking conciliation on multiple socio-environmental rights linked with indigenous peoples and indigenous lands. Amongst those rights and issues is the matter of mining on indigenous lands.

In this context, the object of this research becomes even more important, as it focuses on analyzing and understanding the historical relationship between Brazil—its diverse population and different peoples—and mining, in order to identify common socio-environmental elements and historical focal points. By understanding the origin or constitutive

1 According to this thesis, indigenous peoples would only have the right to the lands they traditionally occupy if they were physically on those lands at the time of the promulgation of the 1988 Constitution of the Republic, which occurred after 21 years of an openly anti-indigenous military dictatorship, see *Rachel Dantas Libois / Robson José da Silva,* Marco temporal, Supremo Tribunal Federal e direitos dos povos indígenas: um retrocesso anunciado. Percursos 2021. The thesis arose from the Brazilian Supreme Court, which, in ruling on a specific case—known as the Raposa Terra do Sol Case—recognized the right of indigenous peoples to their territory, basing this recognition on the presence of 19 "conditions", including the fact that the indigenous peoples occupied the territory on the date the Federal Constitution was promulgated, *Thiago Rafael Burckhart*, Direitos Indígenas e Jurisdição Constitucional: uma análise crítica do caso Raposa Serra do Sol, Florianópolis 2019.

2 Supremo Tribunal Federal (STF), Ação Declaratória de Constitucionalidade n. 87 (ADC 87).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

element of mining-related conflicts in Brazil, it seeks to lay the foundations for a debate on the need for new parameters for resolving conflicts—whether these conflicts emerge from legal or juridical debates, or steam from large-scale mining disasters—such as the dam collapses which occurred in Mariana, in 2015, and in Brumadinho, in 2019.[3]

Furthermore, the present cannot be explained without the past, because "only the interpretation that reconstructs the genesis of the lived reality can actually be convincing".[4] Thus, in order to understand the unique—and problematic—relationship between Brazil and mining, it is crucial to reconstruct the genesis of mining and the contrasts of interests that are in play in Brazil, in order to understand the roots of the conflict.

Reconstructing the lived reality by analyzing the foundations of mining in Brazil goes beyond the matter of legislative and judicial disputes, and plays an important role in approaching and interpreting the fundamental aspects of the recent socio-environmental disasters in Brazil caused by mining (namely, the Mariana and Brumadinho disasters). That is, it is important to understand these disasters not as dissociated facts, divorced from their roots, but as constitutive elements in a chain of events linked to the larger reality from which they emerge, enabling the identification of how recent mining conflicts can reconstruct historical problems and reproduce conflicting positions, as tracing the broader context of economic, territorial and symbolic domination is necessary to reconstruct the totality.[5]

To achieve this goal, the article identifies one "original conflict" and unfolds through the analysis of said conflict, which is characterized by two different cultural and collective perspectives on mining in Brazil. The first is based on ancestral, markedly indigenous knowledge, and concerns an understanding that does not dissociate humankind from nature, and which has its epitome in the idea of the *"cannibal gold"*.[6] The second is explained mainly through a vision that values nature in the form of *natural resources* and that is based on the incessant struggle for *development* and growth—markedly of mercantile, capitalist and socio-economic systems.

3 The reference made concerns two mining waste dam failures that rank among the world's worst socioenvironmental disasters in the mining sector. These are the collapse of the Fundão dam, managed by Samarco (Vale S.A. and BHP), in Mariana, in 2015, and the collapse of the Córrego do Feijão dam, managed by Vale S.A., in Brumadinho, in 2019. In the first case, approximately 60 million cubic meters of toxic mud were dumped along a 663 km stretch of rivers, causing 19 direct deaths, destroying the homes of approximately 1,200 families, and affecting 35 different municipalities. In the second case, contamination by toxic substances in the mud extends over more than 300 km of river and caused 272 direct deaths - most of them employees of the mining company, who were having lunch in the cafeteria, located downstream from the dam, at the time of its collapse, see *Klemens Augustinus Laschefski*, Rompimento de barragens em Mariana e Brumadinho (MG): Desastres como meio de acumulação por despossessão, 2020.

4 *Jessé Souza*, A elite do atraso: da escravidão a Bolsonaro, Rio de Janeiro 2019, p. 14

5 Ibid., p. 39.

6 *Davi Kopenawa / Bruce Albert / Beatriz Perrone-Moisés*, A queda do céu: palavras de um xamã yanomami. Editora Companhia das Letras, São Paulo 2015, p. 356.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

After analyzing the historical and constitutive elements of this "original conflict", we move on to an investigation to identify, in the Brazilian legal framework, milestones that highlight (and attempt to deal with) this conflict, combining indigenous rights and mining, reinforcing the existence and legal/jurisprudential internalization of this dichotomy. Afterwards, the persistent and current existence of this conflict, to which a definitive solution has not yet been found in the Brazilian legal and judicial sphere, is emphasized through the analysis of the disputes behind Bill 191/2020, which are more important than the bill itself, as it reproduces, in the most part, the same interests that now are to be "conciliated".

The research is carried out through a bibliographical, legal and jurisprudential review, adopting as a theoretical reference the understanding coined by Horacio Machado Araóz in his work "Mineração, genealogia do desastre" (Mining, genealogy of disaster), according to which the roots of the modern world lie in the mining geography of Latin America, which is responsible for forming the basis for the development of the current capitalist system.[7] The legal review deals with the review of the legal framework, aimed at identifying normative acts in which it is possible to verify the existence and establishment of differentiated treatments to be given to mining projects on indigenous lands and non-indigenous lands by virtue of this qualification. The jurisprudential review concerns the identification and analysis of relevant judgments in which the differentiation between mining projects in indigenous and non-indigenous areas is the core or determining factor of the conflict or its solution. Furthermore, the research adopts a comparative method that contrasts and intertwines two dichotomous positions on mining (what is referred to here as the "original conflict"). The temporal delimitation of the analysis of the relationship between Brazil and mining is precisely the initial moment when these two perspectives began their opposition: the colonization of Brazil by Portugal. The analysis is developed by investigating the relationship between these two perspectives, separated by an "abyssal line", which coexist and oppose each other in the same country.[8]

The initial hypothesis of the research is that it is not possible to reconcile the dichotomous positions presented with regard to mining on indigenous lands. The premise of the research is that an in-depth understanding of the "original conflict", which lies at the heart of a historical relationship that reconstitutes and gives a new guise to colonial relations of exploitation and hoarding, is fundamental to establishing alternatives for resolving future collective conflicts related to socio-environmental mining disasters.

7 *Horacio Machado Araóz*, Mineração, genealogia do desastre: o extrativismo na América como origem da modernidade, São Paulo 2020.

8 *Boaventura de Sousa Santos*, Para além do pensamento abissal: das linhas globais a uma ecologia de saberes. Revista Crítica de Ciências Sociais 78 (2007), p. 71.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

B. The Original Conflict: The Opposing Worldviews and the Indigenous Understanding of Naturalness

Mining-related conflicts have gained attention in the Brazilian context over the last decade, encompassing a broad spectrum of conflicts that range from those arising from socio-environmental disasters resulting from dam collapses—such as the cases of Mariana in 2015, and Brumadinho in 2019—to conflicts relating to illegal mining in preserved areas, including even conflicts concerning the shifting interests in the ore explored and the advances of mining over new areas (focusing, for example, on the growing interest in ores associated with more refined technological production, such as lithium). However broad this spectrum may be, all mining-related conflicts ultimately refer to the same issue: the existence of mining.

Mining, as a fact with its social, political, economic and environmental dimensions, has a prior element at its core, which refers to the relationship between the human and the non-human, between man and the environment. Reconstructing the genesis of mining-related conflicts therefore requires an analysis of this relationship, which is at the root of the mining practice itself. It is precisely in this relationship (between man and nature) that an "original conflict" is identified, marked by dichotomous positions: the first has its bases on indigenous knowledge and does not dissociate man and nature, understanding both as part of a whole. The second, on opposition, distinguishes man from the environment, placing mankind in a position above nature, which is valued in the form of *natural resources* or *environmental services*.

With regard to the first position—the indigenous understanding of the world as a whole—it is important to consider that the idea of "indigenous" is not an indigenous idea, but rather a colonial designation that levels different peoples with great differences and socio-cultural-linguistic diversity. However, the colonial idea of "indigenous" contradictorily allows multiple peoples to come together in a single cause and fight for it. In the words of Fausto Reinaga, "we are not indigenous, but it is as indigenous people that we are going to liberate ourselves".[9] Although there is a vast diversity of indigenous populations, cultures, knowledge and beliefs, "if there is one extremely widespread concept that these peoples agree on, it is that everything that exists in the world is the product of cultivation and care relationships between different species".[10]

In these complex relationships, what matters is not the owner—identifiable by a legal document—but the relationship of care that directly connects beings. Rather than owner-

9 *Bruno Malheiro / Carlos Walter Porto-Goncalves / Fernando Micheloitti,* Horizontes amazônicos: para repensar o Brasil e o mundo, São Paulo 2021, pp. 222-224.

10 *Charles R. Clement / Carolina Levis / Joana Cabral de Oliveira / Carlos Fausto / Gilton Mendes dos Santos / Francineia Fontes Baniwa / Mutuá Mehinaku / Aikyry Wajãpi / Rosenã Wajãpi / Gabriel Sodré Maia*, Naturalness is in the eye of the beholder. Frontiers in Forests and Global Change, Frontiers in Forests and Global Change 4 (2021), p. 210.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ship, the relationship is characterized by a mutual respect and recognition between the many forms of life in connection with each other.[11]

This perspective is based on the comprehension that everything is natural, and that humanity is just another part of this organism called "Earth", in such a way that "I do not perceive that there is anything that is not nature".[12] Thus, it is important to understand the Earth as a breathing being with a heart, "not a deposit of natural resources" .[13] This understanding includes an "ethic that imposes limits on the human uses of the forest"[14], as catastrophe will befall everyone, "unless we understand that respect for others is the condition for everyone's survival".[15]

Thus, different indigenous cultures, with their different knowledge and know-how, have different worldviews and interpretations of the world, but agree upon the impossibility of dissociating humanity from nature. This manufactured and fictitious separation, which perceive humans as being apart and superior to its own concept of nature, marks the change in the relationship between humans and land/naturalness and constitutes the "original conflict" regarding mining. It comes from an organicity based on ignoring ties that unite everything that is human and non-human:

> *"The idea of us humans detaching ourselves from the earth, living in a civilizational abstraction, is absurd. It suppresses diversity, denies plurality of forms of life, existence and habits. Offers the same menu, the same costumes and, if possible, the same language for everyone."*[16]

This segregating vision is understood as the "original sin", a radical rupture, physical and metaphysical between the earth, and the bodies and populations,[17] which creates its own anomalies in order to justify itself. In order to fill the structural gaps left by this fragmented vision, different mechanisms are created, through which the relationship between the human and the non-human could be interpreted. In this regard, "both the concept of natural resources and of ecosystem services are based on an understanding of naturalness that is devoid of agency, on the belief that objects exist to be exploited and are understood within the logic of the market".[18] Lourenço highlights that even the concept of "environment" displays human centrality and the instrumental valuation of nature in relation to the human, as environment designates what surrounds us, and the simplistic reduction of naturalness to "natural resources", downgrades everything (including every form of life, human and

11 Ibid., p. 210.
12 *Ailton Krenak*, O amanhã não está à venda, São Paulo 2020, p. 6.
13 *Kopenawa et al*., note 6, p. 14.
14 *Clement et al.,* note 10, p. 211.
15 *Claude Lévi-Strauss*, Présentation. Chroniques d'une Conquête, Ethnies 14 (1993), p. 7.
16 *Ailton Krenak*, Ideias para Adiar o Fim do Mundo, São Paulo 2019, p. 12.
17 *Machado Araóz*, note 7, p. 253.
18 *Clement et al.,* note 10, p. 211.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

non-human) that composes naturalness to an utilitarian perspective on which its value is related to the market value given to its "resources" capable of being exploited.[19]

This view, which distances humanity from the caring relationships it has with the non-human world, as both an active and passive subject, is particularly important when it comes to mining. It is this segregation that allows and justifies humanity, under the premise of making use of "resources", to cause destruction through excavations in search of minerals—which is strictly forbidden according to multiple indigenous worldviews. According to Yanomami[20] leader David Kopenawa[21], "the whites don't understand that by extracting minerals from the earth, they spread a poison that invades the world and that, in this way, it will end up dying", adding to his explanation, Kopenawa et al. pontyate that from the minerals emerges a "dense, yellowish metal smoke, an epidemic smoke so powerful that it is launched like a weapon to kill those who approach it and breathe it in".[22]

Miners, therefore, are understood as "earth eaters", capable of destroying and razing entire territories—and the earth itself—and relegating everyone to death. Through the actions of these "earth-eating" miners, "the rivers of the forest will soon turn into muddy puddles, full of motor oil and garbage". Mining and its tailings "make the waters sick and the flesh of the fish soft and rotten. Those who eat them risk dying of dysentery, stripped bare, with violent stomach pains and dizziness". Kopenawa adds that death awaits not only those who directly ingest the water, but also those affected through the holistic system which is disrupted by mining, stressing that death may come from thirst, seeing that "by dirtying the springs of the rivers, they will all die and the waters will disappear with them. They will flee back into the earth. Then, how will we quench our thirst? We will all die with parched lips". Thus, when they destroy the earth with their bombs and great machines, "the earth will be torn apart and all its inhabitants will fall into the world below".[23]

19 *Daniel Braga Lourenço*, Qual o valor da natureza? Uma introdução à ética ambiental, São Paulo 2019, p. 30.

20 The Yanomami are an Amerindian group who live in the Brazilian and Venezuelan Amazon, with around 21,000 Yanomami living in the Brazilian area of the territory alone. The Yanomami first gained international notoriety as a result of publications about them in the 1950s and 1960s (see *Kopenawa et al*., note 6, p. 557). More recently, the Yanomami have returned to the headlines due to various incursions into their territory by illegal miners, which have brought them death and destruction, see *Oswaldo Braga de Souza*, O que você precisa saber para entender a crise na Terra Indígena Yanomami, Instituto Socioambiental. A technical note released by the Amazon Environmental Research Institute (IPAM) in 2024 reports that between 1985—the start of the "gold rush" in the Amazon—and 2022, the Yanomami Indigenous Territory "saw a more than 20,000-fold increase in the area of mining, from 15 ha to 3,278 ha", see IPAM (Instituto de Pesquisa Ambiental da Amazônia), As cicatrizes do garimpo em terras indígenas da amazônia brasileira, April 2024, https://ipam.org.br/wp-content/uploads/2024/04/NT11_portugues.pdf (last accesssed on 1 November 2025).

21 Shaman and spokesperson for the Yanomami indigenous people.

22 *Kopenawa et al.,* note 6, p. 357.

23 Ibid., pp. 336-359.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The utilitarian understanding of nature denies the intrinsic value of naturalness and creates an hierarchy in which humankind is separated and superior to all the other subjects that are endowed in this relationship between the different forms of life.[24] This false hierarchy is still alive nowadays through the understanding of "nature", in a system in which the production of wealth depends on the depredation of sources and means of life: "capitalizing on Nature— including forms of conservacionism—is the death of Nature".[25]

In the Yanomami culture, it is believed that news of the existence of metals reached the ancestors of the whites, which is why they crossed the oceans to look for minerals in Brazil.[26] Undeniably, the "original conflict" arose from colonization, forged through violence and based on two false premisses, according to Machado Araóz: the first false premise is that all culture, knowledge and technology from the colonies were inferior and outdated, and the second is that the new continent would be home to wealth and resources understood as endless—which justified the destruction of both culture and resources.[27]

C. Deepening the Original Conflict Through Colonization and Extractivism[28]: Development for the Earth-Eaters

Recounting his first contact with the "whites", Kopenawa reported that "crowds of these angry outsiders suddenly appeared from all sides and soon surrounded all our houses.[29]

24 *Felício de Araújo Pontes Júnior / Lucivaldo Vasconcelos Barros*, A Natureza como sujeito de direitos: a proteção do Rio Xingu em face da construção de Belo Monte, Descolonizar o imaginário: debates sobre pós-extrativismo e alternativas ao desenvolvimento, São Paulo 2016, p. 428.

25 *Machado Araóz*, note 7, p. 457.

26 *Kopenawa et al.,* note 6, p. 359.

27 *Machado Araóz*, note 7, pp. 92-100.

28 The concept of extractivism adopted here is not to be confused with "extrativismo" commonly used in Brazil, which refers to the activities of collecting and removing small volumes of nature. In Brazil, the closest translation to the concept adopted here would be "predatory extractivism". Scholars have approached extractivism from different perspectives and defined different variants (neoextractivism, agrarian extractivism, green extractivism and others), delimiting their analysis in relation to the type of resource, its specific effects and/or the role of the state, for example, see *Ben M. McKay*, Agrarian extractivism in Bolivia, World Development 97 (2017), pp. 199-211. This article adopts the broader concept of "extractivism", as elaborated by Acosta positioning extractivism as "a mechanism of colonial and neocolonial plunder and appropriation (...) forged in the exploitation of raw materials essential for the industrial development and prosperity of the global North", *Alberto Acosta*, Extractivism and neoextractivism: two sides of the same curse, Beyond development: alternative visions from Latin America 1 (2013), p. 62. Thus, the core of the concept of extractivism is based on the extraction of large sums of naturalness - or nature, or natural resources - to provide for international agents (countries, markets or corporations), in a dynamic based on the socialization of socio-environmental damage, left in the localities where extractivism takes place, and the concentration of profits, which are closed, in the form of enclaves, and remain in the hands of the exploiting agents.

29 *Kopenawa et al.*, note 6, p. 336.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

They searched frantically for something evil that we had never heard of and whose name they kept repeating: oro-gold". The Yanomami leader's account represents a first contact, which was also made many years before by different indigenous populations, many of whom did not survive to tell their stories.

In order to impose its perspective on the relationship between the human and the non-human, guaranteeing the exploitation of the colony in favor of the metropolis, a mechanism was forcibly imposed by the "whites" depicted in David Kopenawa's report. The mechanism was extractivism, which was based on the exploitation of slave labor and of land and nature for the plundering and appropriating of the "resources" from the colonies. As such, extractivism does not take into account any of the relationships of care nor any concept of sustainability, being solely based on the exploitation of bodies and raw materials indispensable for the industrial development and prosperity of the Global North.[30]

Thus, not only the first contact, but also the development of the relationship between colonizers and colonized portrays a process of violence, of making invisible and erasing native populations, their knowledge and cultures. Beyond genocide, this story—to which traces the "original conflict" is about exploitation, hoarding and looting.

It is founded on disqualifying as poor, backward and insufficient the knowledge and ways of living of a large part of the world's population, such as those based on relationships of care, due to the fact that these ways of reproducing knowledge and life do not conform to what was (and is) needed for the capitalist production and accumulation system.[31] Through extractivism, this "new", imposed, relation meant the complete disregard of the many different forms of lives torn apart by private appropriation of land and nature/naturalness: it is the colonial way of dealing with differences, an instrumental and pragmatic notion of nature as an obstacle.[32]

The "original conflict" arose and became a constitutive element for the analysis of mining from the colonization process onwards, especially through the implementation of extractivism. In this sense, the extractivist basis of colonial economies, such as Brazilian, created not only geoeconomic, ecological, and political asymmetries in the world and inside the exploited countries, but was also the economic and political foundation of the oligarchic regimes in Latin America that continue to reverberate to this day. As a result, "the exploration of natural resources became, from that time to our days, 'government programs', state policies".[33]

In this sense, points out a clear similarity between the geopolitical tactics adopted by current fronts aimed at deepening and spreading mining and the first whites sent to the

30 *Acosta*, note 28, p. 63.

31 *Miriam Lang*, Introdução: alternativas ao desenvolvimento, in: Gerhard Dilger / Miriam Lang / Jorge Pereira Filho (eds.), Descolonizar o imaginário: debates sobre o pós-extrativismo e alternativas ao desenvolvimento, São Paulo 2016, pp. 28, 30.

32 *Malheiro et al.,* note 7, p. 54.

33 *Machado Araóz*, note 7, p. 184.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

colonies to put colonial exploitation projects into practice: "the dirty work is done by miserable, violent and unprepared men, but those who finance and control the system, naturally taking the profit, are safe and comfortable away from the front".[34] This similarity pointed out by Kopenawa reinforces Machado Araóz's conclusion that modern mining in Brazil is the "reproduction of colonial extractive practices", which on the one hand generate wealth and accumulation, and on the other spread destruction.[35]

In the umbilical and inseparable relationship between extractivism and colonialism, mining emerges as the most extreme form of extractivism. As such, mining in Brazil is not just an "exploitation of natural resources", but a pattern of power that, to this day, structures, organizes and regulates social life as a whole around the appropriation and exploitation of nature (including human bodies). Extractivism is the perennial mark of Brazil's colonial origin and, as such, modern mining is inseparable from colonialism and capitalism: it is its foundation.[36]

As extractivism—and therefore mining—is the perennial element of Brazil's colonial origins, reverberating and being reproduced in different guises to this day, it becomes relevant to take into account the fact that extractivist practices demand the separation between the colonized and the colonizer, the zone of exploitation and the zone of accumulation. This separation comes in multiple layers, ranging from the geographical separation to the discourses and practices aimed at justifying and enabling the looting-accumulation duality.

From a legal standpoint, the separation between the zones of exploitation and of accumulation is explained, according to Boaventura de Sousa Santos, by the imposition of an "abyssal" cartographic line, which divides the legal and juridical system into two: one side of the "abyssal" line would be guided by the "regulation/emancipation" paradigm, used to concurrently regulate social relations and generate emancipation to its population; while the other side would be ruled by the "appropriation/violence" paradigm, put into place to enable the appropriation of wealth to justify violence against its population.[37]

In the same way that Machado Araóz states that mining is a pattern of power that, to this day, structures, organizes and regulates social life[38], Santos argues that "the 'abyssal' cartographical lines that used to demarcate the Old and the New World during colonial times are still alive in the structure of modern occidental thought and remain constitutive of the political and cultural relations held by the contemporary world system"; "there isn't accumulation without a center and a periphery".[39] It separates two sides with opposite functions: the peripheral is subordinate, structurally dependent, and provider of exogenous

34 *Kopenawa et al.,* note 6, p. 23.
35 *Machado Araóz*, note 7, p. 19.
36 Ibid., p. 257.
37 *de Sousa Santos*, note 8.
38 *Machado Araóz*, note 7, p. 257.
39 See also *de Sousa Santos*, note 7, p. 71.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

supply, while the center is where expropriation, genocides, ecocide and epistemicide becomes accumulation.[40]

This is a pattern of geographical domination, with the division of the world system into center and periphery, as proposed by Immanuel Wallerstein.[41] In this sense, Aníbal Quijano adds that a pattern of ethnic domination has also been imposed, dividing and hierarchizing peoples into races.[42] Therefore, in the same way that European modernity is constituted and produced by the exploitation of America, the idea of superiority/ inferiority between peoples and continents is produced in the violent encounter between different peoples and also translates into an epistemological hierarchy. European and Eurocentric knowledge is presented as superior to the knowledge of the original peoples of America and the trafficked peoples of Africa, and this is clearly reflected in the forms of relationship between man and nature, including mining.

Through colonization, the abyssal line, which currently divides the world through the concept of "developed" countries (under the "regulation/emancipation" paradigm) and "developing" countries (under the "appropriation/violence" paradigm[43]) was drawn. The distinction of developed, underdeveloped/developing substitutes the logic of colonies versus central countries, "which had a 'right' to plunder the former because of their supposed biological and cultural superiority", maintaining the same roles as before in the international division of labor and naturalness, but with sustained through different arguments.[44] Quijano explains this continuity of the division of labor through the understanding of an imposed "coloniality of power" which, even after the end of the proper colonization process in America in the 19th century, remains in the structures of power, encompassing the most diverse range of power: economic and social and racial.[45]

The complex system of relationships and mechanisms devised to justify and enable colonization has not been effectively confronted, dismantled or had its deleterious effects repaired. On the contrary, this system of relations has merely moved on to more convenient formats that suit the demands of the times: Brazil has never properly addressed its foundation over slavery and the deep inequities that resulted from it, and the colonial exploitation

40 *Machado Araóz*, note 8, p. 124.

41 *Immanuel Wallerstein*, World-systems analysis: An introduction, Durham 2004.

42 *Anibal Quijano*, Colonialidade do poder, Eurocentrismo e América Latina, in: A colonialidade do saber: eurocentrismo e ciências sociais. Perspectivas latino-americanas, CLACSO, Consejo Latinoamericano de Ciencias Sociales, 2005.

43 For more information on the different paradigms on the different sides of the abyssal line, see *de Sousa Santos,* note 6.

44 *Lang*, note 30, pp. 28, 30.

45 *Quijano*, note 41.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

system transitioned to an international division of labor based on the idea of an "ideal way of life"[46], founded on wealth and accumulation.[47]

When bringing the perspective of the "abyssal" line to Brazil's internal relations, the emergence of the phenomena of self-imperialism and internal colonialism is highlighted, as an autophagic figure of a country devouring itself.[48] Such phenomena highlight the interior of political borders, founded on the internal development of colonized nations where, replacing external colonial rule the notion of domination of natives by natives emerges, giving rise to new notions and questions about independence and development.[49] In this regard internal colonialism articulates the conquest and the establishment of domination and transformation of local societies, the reproduction—through new forms—of the structures through which the colonial order was configured, reinforcing the continuity of a cultural, social, and political hierarchy established by the colonial order.[50] It depicts the advances made within Brazil against part of its territory and population, enabled through the use of the same colonial discourses, adapted to a current context: the sacrifice of the "other" the invisible, the backward, the obstacles to growth and that "are used to living in limbo" and, therefore, "are not like us, nor do they have our needs".[51]

The discourse and practice of self-imperialism or internal colonialism advances against those relegated to the "other side" of the "abyssal" line. The appropriation/violence paradigm is practiced not by the absence or complete distinction of applicable law, but by the imposition of a true State of Exception, which, associated with political discourse focused on the incessant pursuit of growth and development, justifies the lack of implementation of rights and the vacuum in state action[52]—resulting in situations such as the perpetu-

46 To be able to sustain this way of life, a very small portion of the world's population constantly seeks access to the totality of the planet's resources - whether "natural resources", cheap labor, or the capacity of the environment to absorb contamination and waste. "In other words, luxury and saturation of some are built on the spoliation of others" (*Lang,* note 30, p. 24). For more about the "Imperial Lifestyle", see *Ulrich Brand / Markus Wissen*, Modo de vida imperial: sobre a exploração dos seres humanos e da natureza no capitalismo global, São Paulo 2021.

47 *Maristella Svampa*, As fronteiras do neoextrativismo na América Latina: conflitos socioambientais, giro ecoterritorial e novas dependências, São Paulo 2019, p. 9.

48 *Benjamin Moser*, Autoimperialismo, São Paulo 2016, see also *Bruno Malheiro*, Grandes projetos de mineração na Amazônia: o governo bio/necropolítico do território e os processos de territorialização e de exceção, Revista Nera 59 (2021).

49 *Pablo Gonzáles Casanova*, Sociologia de la explotación, Mexico City 1969, p. 186.

50 *Luis Tapia,* Dialéctica del colonialismo interno, Madrid 2022, p. 197.

51 *Verena Glass*, O desenvolvimento e a banalização da ilegalidade: a história de Belo Monte, in: Gerhard Dilger / Mirian Lang / Jorge,Prereira Filho (eds.), Descolonizar o imaginário: debates sobre pós-extrativismo e alternativas ao desenvolvimento, São Paulo 2016, p. 423.

52 *Giovanni Martins de Araújo Mascarenhas*, State of Exception and Internal Colonialism: The Construction of the Belo Monte Power Plant in Brazil, World Comparative Law 56 (2024), pp. 611-632.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ation of violations against indigenous rights, those as described in the report "Yanomami under attack: illegal mining on Yanomami indigenous lands and proposals to combat it".[53]

However, there have also been legislative and judicial progress to protect traditional populations against self-imperialist or internal colonialist advances. The Brazilian Federal Constitution of 1988 (the first after a twenty-year period of business-military dictatorship) expressly protected indigenous rights, including a provision that makes mining incursions (at least legal ones) on indigenous lands more difficult. Nevertheless, the Federal Constitution expressly provides for the need for a subsequent law to complement the constitutional provision and regulate mining on indigenous lands. More than thirty-five years after the promulgation of the Constitution, there is still no such law, despite the fact that more than thirty bills have been (or are currently being) processed in the National Congress.

D. The Brazilian Legal Framework on the Original Conflict

Machado Araóz, while pointing out that colonial models are reproduced to this day, understands that the instrumentalization of colonization under new guises, its pragmatics and rhetoric, require the development of a legal discourse and technical-legal and administrative institutions in order to be legitimized.[54] It is a matter of establishing parameters and legitimacy for relationships that replace the colonial model without, however, altering its essence based on the exploitation of territories and bodies, which continues under the paradigm of "appropriation/violence", for the enrichment of different subjects and territories, under the paradigm of "regulation/emancipation"[55].

It is from this perspective that legislative advances must be interpreted, seeing that, despite providing for protections to be granted to indigenous peoples (especially with regard to protection against mining, with attention to the original conflict already outlined), those legislative advances are not accompanied by public policies for their effective implementation.

53 The report, originally titled Yanomami sob ataque: garimpo ilegal na terra indígena Yanomami e propostas para combatê-lo" describes the advances in illegal mining in Yanomami indigenous territory with a focus on the year 2021, described as "the worst moment of invasion since the indigenous land was demarcated." It points to mining as the cause of systematic human rights violations against indigenous communities, as well as being responsible for the destruction of water bodies, increased deforestation, and "an explosion" in cases of contagious diseases, see Hutukara Associação Yanomami / Associação Wanasseduume Ye'kwana, Yanomami sob ataque: garimpo ilegal na Terra Indígena Yanomami e propostas para combatê-lo, Instituto Socioambiental, 2022, https://acervo.socioambiental.org/acervo/documentos/yanomami-sob-ataque-garimpo-ilegal-na-terra-indigena-yanomami-e-propostas-para (last accessed on 1 November 2025).

54 *Machado Araóz*, note 7, p. 148.

55 *de Sousa Santos*, note 8.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

This brings us to the point that illegal mining on indigenous lands—which has never really stopped—increased by 787% in northern Brazil between 2016 and 2022.[56] In addition, data from 2024 shows that indigenous lands lost around 13,000 hectares of forest to illegal mining in 2023 alone.[57] The original conflict has repercussions in disputes over land and mining wealth, often culminating in armed incursions of illegal miners against indigenous peoples, such as those recurrently reported involving illegal miners invading the territory of the Yanomami people.[58]

It is in this context, that Gilmar Mendes (Minister of the Supreme Court) proposed the Special Composition Commission with the aim of seeking conciliation on "irreconcilable, unavailable and non-negotiable rights that were hard-won by the Indigenous in the National Constituent Assembly of 1988" (STF, ADC 87, electronic petition 48757).

According to the Conselho Indigenista Missionário, the intended conciliatory attempt "was frustrated after eight months and 19 hearings held without any resolution, consensus or legitimacy". The successive extensions of deadlines to continue the work of the conciliation table "have led to redundant debates, while imposing an even longer wait for indigenous peoples to see the rights guaranteed to them in the 1988 Constitution come into effect" (STF, ADC 87, electronic petition 50551).

At the last meeting held within the Special Composition Commission (dated April 2, 2025), the Magistrate who chaired it informed "that issues related to mining would not be the subject of discussion in the present action", not meaning that the matter of mining on indigenous lands would be removed from the conciliation procedure, but rather that "any debates on the subject would be conducted in a specific commission to be formed within the scope of ADO[59] 86" (STF, ADC 87, electronic petition 48757).

The conciliation process over mining on indigenous lands ought to be understood as an unfolding of the original conflict, trying to open the way for the development of legal discourse and technical-legal and administrative institutions to legitimize mining interest. To better understand the legal and juridical stakes at play, we move on to analyzing the current legal framework (and its internal conflicts) on the matter.

56 *Poliana Casemiro / Arthur Stabile*, Garimpo aumentou 787% em terras indígenas entre 2016 e 2022, aponta Inpe, G1, 2 November 2023, https://g1.globo.com/meio-ambiente/noticia/2023/02/11/garimpo-aumenta-787percent-em-terras-indigenas-entre-2016-e-2022-aponta-inpe-infografico.ghtml (last accessed on 1 November 2025).

57 *Hyury Potter* / *Naira Hofmeister*, Avanço de garimpo em terras indígenas alerta para novos meios de lavagem de ouro, Repórter Brasil, July 2024, https://reporterbrasil.org.br/2024/07/garimpo-terras-indigenas-alerta-novos-meios-lavagem-ouro/ (last accessed on 1 November 2025).

58 *Nathalia Williany Lopes de Sousa*, Povos Yanomami sob ataque: violências do garimpo ilegal e os estímulos de uma colonialidade estatal, 2022.

59 ADO is the abbreviation of the Brazilian constitutional review action "Direct Action for Unconstitutionality by Omission".

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

I. The Brazilian Constitution on Mining in Indigenous Lands

The persistence of the "original conflict" and the divergent perspectives on mining that coexist within a single territory make it necessary for different legal parameters to exist and be applied to different projects. The differentiating parameter, in terms of the applicable legislation, chosen by the 1988 Federal Constitution was whether or not the mining project was located on (or inside) indigenous lands. This is an element which, despite having a certain objectivity, is largely insufficient to prevent conflicts and deserves to be debated.

Nonetheless, the Constitution recognizes indigenous people's original right to the land they traditionally occupy, considering as such the lands inhabited by indigenous people on a permanent basis, used for productive activities and essential to the preservation of the environmental resources necessary for their well-being and physical and cultural reproduction, according to their uses, customs and traditions.[60] The recognized right to traditionally occupied lands, however, is not to be confused with the right to ownership of the land, since indigenous lands are not the property of the respective indigenous peoples, but are part of the Federal Union's patrimony, and are only intended for the permanent possession of the originary populations, who are, however, entitled to the exclusive usufruct of the riches of the soil, rivers and lakes existing therein.[61]

By providing for the usufruct of the riches of the *soil*, the Constitution made it clear that the exclusive usufruct (and decision) over minerals and their exploitation does not belong to the indigenous people. In this sense, the Constitution states that mineral deposits, mineral resources and hydraulic energy potential are assets distinct from those of the soil for the purposes of exploration or exploitation, and that they are, in any case, property of the Federal Union.[62]

Thus, since it is clear that mineral deposits and other mining resources are not to be confused with the soil, and are the property of the Federal Union, it is up to the Union to authorize or grant the right to research and explore mining resources. As for mining on indigenous lands, the Constitution provides for the possibility of its occurrence, recognizing the need for different requirements, stipulating the need for a new law, subsequent to the Constitution, that "will establish the specific conditions when these activities take place on (...) indigenous lands".[63]

Despite the provision for a subsequent law to establish specific conditions when mining activities are to occur on indigenous lands, the Constitution has already defined the differentiating element (the location of the mining activity) at a constitutional level. It also provided for two specific requirements to be applied to mining in indigenous lands: the

60 Art. 231(1) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

61 Art. 231(1) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

62 Art. 176 Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

63 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

requirement is that mining on indigenous lands can only be carried out with the approval of the National Congress, after hearing the affected communities, and the second is that the participation of the indigenous peoples in the economic results has to be ensured.[64]

II. The Infra-Constitutional Legislation of the Original Conflict

Although the Federal Constitution established that mining on indigenous lands would take place under the specific conditions stipulated by law, since the promulgation of the Brazilian Constitution (October 5, 1988), more than thirty different bills have been presented to regulate the issue, and to date none of those have been converted into law.[65] There are, however, normative acts that predate the Constitution that regulate the matter and which, in the absence of complementary legislation provided for by the Constitution, continue to guide the matter at the legal level. In this regard, there is Law No. 6.001, of 1973, which institutes the so-called "Indigenous Statute", which deals in general with indigenous peoples in Brazilian society, and Decree No. 88.985, of 1983, responsible for regulating the provisions of the statute that deal specifically with mining on indigenous lands.

The Indigenous Statute merely points out that the exploitation of "subsoil riches" in areas belonging to indigenous peoples, or to the Union and occupied by indigenous people, will be carried out in accordance with the legislation, providing that any mining in indigenous lands are subject to "prior understanding with the Indigenous assistance body" and that it ought to be carried out with indigenous participation in the results of the exploitation.[66]

Decree 88.985/83 is responsible for specifically regulating the exploitation of "subsoil riches" on indigenous lands. It complements the "Indigenous Statute" (Law No. 6.001/73) by proposing that research authorizations and mining concessions on indigenous lands "or presumably inhabited by indigenous people" will only be granted "to state-owned companies that are part of the federal administration" and only "when it comes to strategic minerals necessary for national security and development".[67]

Thus, Decree 88.985/83 proposes a change in the differentiating element, establishing the need to comply with specific legislation not only for projects actually located on indigenous lands, but also for those located on lands "presumably inhabited by indigenous people". Furthermore, it also proposes two new requirements: the first is that only "strategic minerals" (an undefined juridical concept) necessary for "national security and development" (also undefined juridical concepts) could be explored; the second is that the

64 Art. 231(3) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

65 *Guilherme Carneiro Leão Farias*, Mineração e garimpagem em territórios indígenas: suas balizas no estado pluriétnico e multissocietário brasileiro, Revista de Direitos Humanos e Efetividade 6 (2020), pp. 1-22.

66 Art. 45 Lei nº 6.001, de 19 de dezembro de 1973. Presidência da República, 1973.

67 Art. 4 Decreto nº 88.985, de 10 de novembro de 1983, Presidência da República, 1983.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

exploration of minerals in areas subjected to the specific requirements regarding indigenous peoples could only happen through state-owned companies controlled by the federal administration.

In addition, in order to protect the interests of indigenous peoples, the Decree also establishes that mechanized mining can only be carried out "in compliance with the requirements that the National Indigenous Foundation—FUNAI establishes".[68] Among the possible requirements to be established by FUNAI is the right to demand, on the part of the companies benefiting from the research and mining authorization, the adoption of "precautionary measures aimed at preserving indigenous culture, customs and traditions"[69], in addition to the possibility of determining the stoppage and interruption of research and mining work "when damage to indigenous culture, customs and traditions is verified".[70]

Finally, the same Decree 88.985/83 states that FUNAI will represent the interests of the Union and will revert "to the benefit of the Indigenous and indigenous communities, the economic results arising from mining exploitation", including compensation and rents due for occupying the land.[71]

Decree 88.985/83 raises, albeit incidentally, an important discussion about the differentiating element chosen by the Constitution. The decree goes beyond the Indigenous People's Statute, as well as beyond the 1988 Constitution, by choosing as the differentiating element not only the location within indigenous lands, but also the location on lands presumably occupied by indigenous people. The definition of the differentiating element is extremely important, as it defines the legal contours of the original conflict—the existence or not of specific requirements and protection to deal with the original conflict.

E. Inside or Out: the Inadequacy of Identifying the Zone in Which the Mining Project is Located as the Only Differentiating Element

As explained above, the 1988 Federal Constitution chose an objective element as the determining factor for whether or not to apply the specific requirements for regulating mining. This differentiating element is the geographical location of the mining project, whether or not it is located on indigenous land.[72]

In practice—in addition to the absence of legislation that should regulate mining on indigenous lands—the geographical differentiating element chosen proves to be insufficient. In short, there are two major flaws in relation to the differentiating element chosen: the first concerns the very concept of indigenous land, as it relies on the bureaucratic and political process of "indigenous land demarcation"; the second concerns the insufficiency of the

68 Art. 5 Decreto nº 88.985, de 10 de novembro de 1983, Presidência da República, 1983.
69 Art. 7 Decreto nº 88.985, de 10 de novembro de 1983. Presidência da República, 1983.
70 Art. 7(1) Decreto nº 88.985, de 10 de novembro de 1983. Presidência da República, 1983.
71 Art. 6 Decreto nº 88.985, de 10 de novembro de 1983. Presidência da República, 1983.
72 Art. 176 Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

protection conferred by adopting the presence of mining activity within indigenous lands as a differentiating element, ignoring more adequate concepts, also provided for by the Brazilian legislation, such as "Directly Affected Area" (ADA), "Area of Direct Influence" (AID) and "Area of Indirect Influence" (AII).

I. The Legal Status of Indigenous Lands

The Brazilian Constitution of 1988 recognizes indigenous rights to the lands they traditionally occupy, giving indigenous people permanent possession of these lands and, to this end, defines indigenous lands as those

> *"traditionally occupied by the indigenous, those inhabited by them on a permanent basis, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions."*[73]

It turns out, however, that the process for a given territory to effectively acquire the status, or legal qualification, of indigenous land is not as succinct as a brief reading of the constitutional provision might make it seem. In order for the right of a given indigenous people to the land they traditionally occupy to be recognized, an administrative procedure (demarcation process) is required. In this context, the 1988 Constitution provided not only that the Federal Union would be responsible for demarcating indigenous lands, but also that "The Union shall conclude the demarcation of indigenous lands within five years of the promulgation of the Constitution".[74]

As can be seen from the persistent absence of the law that would deal with the development of mining projects on indigenous lands, the Brazilian Constitution establishes commitments for the Brazilian state that have not always been fulfilled as planned. This is the case with the demarcation of indigenous lands, which, according to the constitutional text, should have been completed in 1993 (but, in practice, there is still a large part of the traditional lands that remain undemarcated).

The regulation for the land demarcation process only came eight years after the Constitution was promulgated, through Decree No. 1.755/96. It states that the demarcation process is an administrative procedure through which the boundaries of each traditionally occupied territory are made clear. Furthermore, demarcation is based on anthropological work, complemented by ethnohistorical, sociological, legal, cartographic, environmental

73 Art. 231(1) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

74 Art. 67 Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and land studies to be carried out by the National Indian Foundation—FUNAI, an entity of the federal administration.[75]

Once the studies have been completed and public bodies and civil entities have expressed their opinions, a Detailed Delimitation and Identification Report (RCID) is presented, characterizing the indigenous land to be demarcated.[76] Once this report has been approved, FUNAI must publish a summary of it in the official journal (Diário Oficial da União), including a descriptive memorial and a map of the area, and the states or municipalities in which the area is located may express their opinion from the start of the demarcation procedure up to ninety days after the summary is published.[77] Once the period for manifestations is over, FUNAI must, within sixty days, forward the procedure to the Ministry of Justice so that it can, within thirty days, take the final decision—which may be to declare the limits of the indigenous land and determine its demarcation, to disapprove the identification, or even to prescribe additional steps to be taken.[78] If the Ministry of Justice determines that the indigenous land ought to be demarcated, the demarcation will be finalized by means of a presidential decree, and FUNAI, within thirty days of the publication of the decree, will register the land in the real estate registry office responsible for the area.[79]

As can be seen, the decree provided for various deadlines and procedures to be adopted and followed in the procedure for demarcating indigenous lands. This, however, has not been effective in curbing the state's delay in fulfilling its constitutionally prescribed duties. As a consequence, there are currently 255 indigenous lands with demarcation processes that have already begun but have not been finalized.[80]

The most important reason for the delay and lack of effectiveness to the demarcation of indigenous lands is the influx of political interests that have arisen over land occupation in Brazil.[81] These include discussions that are disguised as juridical matters, such as the supposed existence of a "temporal milestone", which would restrict indigenous lands to those occupied by indigenous people at the time when the 1988 Constitution was promulgated, and not those traditionally occupied (as the Constitution states)[82] up to openly political positions, such as when the then candidate for the presidency of Brazil, Jair Bolsonaro

75 Art. 1 Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

76 Art. 2(6) Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

77 Art. 2(8) Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

78 Art. 2(10) Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

79 Art. 5 Decreto nº 1.775, de 8 de janeiro de 1996. Presidência da República, 1996.

80 Instituto Socioambiental (ISA), Por que a demarcação de Terras Indígenas não avança? Entenda, 2024, https://www.socioambiental.org/noticias-socioambientais/por-que-demarcacao-de-terras-indigenas-nao-avanca-entenda (last accessed on 1 November 2025).

81 Ibid.

82 *Libois / da Silva,* note 1.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

(who was elected that year) announced that he would not demarcate a single centimeter of indigenous land.[83]

In any case, before the constitutional duty to demarcate indigenous lands has been fulfilled, adopting the criterion of whether or not the mining project is located within an indigenous land is insufficient, as it leaves out 255 indigenous lands with demarcation processes that have already begun but have not been finalized. However, even if the differentiation criterion encompassed all indigenous lands with ongoing demarcation processes, it would still be insufficient, as it establishes a geographical restriction of which environmental damages are unaware.

II. Damages That Go Beyond Borders

In the field of international environmental law, since the mid-1970s, there have been milestones recognizing that environmental issues go beyond any boundaries set by man. From "The Limits to Growth"[84] (1972), through the "Convention on Long-Range Transboundary Air Pollution"[85] (1983), to the "Our Common Future"[86] report (1987), the certainty of the inadequacy of restricting protection (and action) to borders seems unequivocal.

However, the Brazilian legal provisions that attempt to deal with the original conflict on mining go against the grain of science and international law, restricting the applicability of any specific protection to the occurrence of mining *inside* indigenous lands. In this way, any protection is limited to an element that has proven to be ineffective when it comes to environmental damage.

The insufficiency of the differentiating factor "being on indigenous land" is exemplified by two practical cases:

The first case concerns the collapse of the mining tailings dam owned by Samarco, BHP and Vale, which occurred in Mariana, Minas Gerais, Brazil, in 2015. In this case, the mining did not take place directly on indigenous land, in such a way that no differentiated legal requirements, however protective, would be applicable according to the differentiation factor in force. However, once the dam broke, the spread and repercussions of the damage caused significantly exceeded any property boundaries, to a level in which the technical report developed by the Brazilian Institute for the Environment and Renewable Resources (IBAMA) pointed out that "the level of impact was so profound and perverse in various

83 De Olho nos Ruralistas, "Nem um centímetro a mais para terras indígenas" diz Bolsonaro, 8 February 2018, https://deolhonosruralistas.com.br/2018/02/08/nem-um-centimetro-mais-para-terras-indigenas-diz-bolsonaro/(last accessed on 1 November 2025).

84 Club of Rome (1972), https://www.clubofrome.org/publication/the-limits-to-growth/ (last accessed on 11 December 2025).

85 United Nations Convention on Long-Range Transboundary Air Pollution (1983).

86 World Comission on Environment and Development (1987), https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (last accessed on 11 December 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ecological strata that it is impossible to estimate a timeframe for the fauna to return to the site".[87] In that case, one of the most affected populations was, and remain to be, the Krenak indigenous people, whose lands lie on the banks of the river over which the tailings spill occurred (Rio Doce), and whose way of life was seriously disrupted—made impossible by the death of the river—not to mention the damages caused to at least two other indigenous populations who were also affected by the advancing wave of tailings mud.[88]

The second case concerns the construction of the Belo Monte hydroelectric plant, which had its initial project modified, reducing the planned flooding area in order to avoid the incidence of specific legislation protecting the rights of indigenous peoples.[89] Regardless of the fact that specific protective legislation was not applied due to the change of the flooded area, the rights of indigenous and traditional peoples were directly affected and violated, especially due to the drastic reduction in the flow and water level of the Xingu River, which would not provide these populations with enough water to meet their needs (especially for transportation, food and economic activities based on fishing), since "in a 100 km stretch, the river's flow will decrease drastically, remaining at levels of severe drought throughout the year. This could be fatal for a number of animal and plant species".[90]

It is clear that the location of a mining project within an indigenous land is an insufficient differentiating factor to provide effective protection for indigenous populations, given the original conflict over mining. In this sense, Brazilian environmental legislation itself offers alternatives through the concepts of "Directly Affected Area" (ADA), "Area of Direct Influence" (AID) and "Area of Indirect Influence" (AII), thus conceptualized by IBAMA's Normative Instruction 125/2006:

> *"Directly Affected Area (ADA) - the area directly affected by the implementation and operation of the activity, taking into account the physical, biological and socio-economic changes and the particularities of the activity.*
>
> *Area of Direct Influence (AID) - the area subject to the direct impacts of the implementation and operation of the project. Its delimitation should be based on the social, economic, physical and biological characteristics of the systems to be studied and the particularities of the project, considering in the case of this project, with regard*

87 Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis (IBAMA), Laudo Técnico Preliminar: impactos ambientais decorrentes do desastre envolvendo o rompimento da barragem de Fundão, em Mariana, Minas Gerais, 2015, https://www.ibama.gov.br/phocadownload/barragem defundao/laudos/laudo_tecnico_preliminar_Ibama.pdf (last accessed on 1 November 2025), p. 24.

88 *Thiago Henrique Fiorott / Izabel Cristina Bruno Bacellar Zaneti*, Krenak pela morte do Rio Doce/ Uatu, no desastre da Samarco/Vale/BHP, Brasil. Fronteira: Journal of Social, Technological and Environmental Science 6 (2017), pp. 127-146.

89 *Mascarenhas*, note 51.

90 *Pontes Júnior et al*., note 22, p. 435.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

to the physical and biotic environments, the area subject to physical interventions (works and operational services).

Area of Indirect Influence (AII) - the area actually or potentially threatened by the indirect impacts of the implementation and operation of the activity, encompassing the ecosystems and the socio-economic system that may be impacted by the changes occurring in the AID."[91]

The concepts defined by the Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis (IBAMA) offer alternatives to the original conflict and to the indigenous and non-indigenous perspectives on the choice of a differentiation element to be applied to mining. Instead of delimiting the application of specific requirements only to mining projects located within indigenous lands (which restricts protection even in relation to the ADA), one could think of a differentiation factor based on the existence of indigenous lands (homologated or not) within the project's Area of Indirect Influence (AII).

In any case, the repercussions of this practical differentiation still falls far short of what was envisaged by the constituent legislator, since the law designed to deal with the issue has not yet been enacted, with the specific requirements to be applied being limited to those already existing in the legislation. Of the more than 30 (thirty) different bills presented to regulate the issue[92], Bill 191/2020 deserves to be highlighted: it is the most recent bill, and one that has received the most focus (and has even been treated as a priority) by the government of President Jair Bolsonaro (2019-2022).[93]

F. The Interests Behind Mining in Indigenous Lands: Lessons from Bill 191/2020

The "original conflict" develops and gains nuances in the political sphere—whether aiming to legislate, or to leave the matter unregulated. The various lawsuits that have been placed under the conciliation procedure emerge from disputes that ultimately aim to enable and justify the unbridled advance of extractivist mining—with indigenous lands as the battle-front for this advance. These same interests also recently moved Bill 191/2020, and the lessons learned from that bill may be useful for the current dispute.

Bill 191/2020 was presented during Jair Bolsonaro's administration (2019-2022), to regulate § 1 of art. 176 and § 3 of art. 231 of the Constitution to "establish specific conditions for the research and mining of mineral resources and hydrocarbons and for the use of water resources for generating electricity on indigenous lands". It was drafted by the Executive Branch, signed by the former Minister of State for Mines and Energy, Bento Albu-

91 Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis (IBAMA), Instrução Normativa IBAMA Nº 125, de 18 de outubro de 2006, 2006, https://www.icmbio.gov.br/cepsul/images/stories/legislacao/Instrucao_normativa/2006/in_ibama_125_2006_revogada_recifesartificiais_revogada_in_ibama_22_2009.pdf (last accessed on 1 November 2025).

92 *Farias,* note 64.

93 Câmara dos Deputados-A, Lista de prioridades do governo traz 45 propostas, 2022.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

querque, and the former Minister of State for Justice, Sergio Moro, and presented to the Legislature in 2020. In March 2022, the last year of Bolsonaro's administration, his head of government submitted a request for Bill 191/2020 to be processed through the *urgency regime* in order to speed up its processing and subsequent approval.[94]

In terms of content, Bill 191/2020 proposed, in its first article, that the specific requirements for mining on indigenous lands would not apply to a series of situations (lands owned by indigenous communities governed by their own laws, areas in the process of demarcation, "reduced capacity" electricity generation activities, energy transmission and distribution activities). In addition, article three of the bill proposed that the only specific conditions for mining on indigenous lands would be those already established, a repetition of the minimum conditions already laid down in other legal texts (technical studies, consultation with the affected communities, authorization from the National Congress, and the participation and compensation of the affected communities).

In this proposal, consultation with the affected peoples, the only moment for indigenous participation, is merely advisory and not decisive, allowing mining activities to go ahead even with the express refusal of the indigenous peoples, depriving them of agency over their territories and rights. In this sense, in order to make the possibility of mining on indigenous lands more flexible, the proposed text mitigates indigenous territories and rights.

Bill 191/2020 came in the wake of political movements aimed at expanding mineral exploration in Brazil, under the justification of "economic growth", in this context,

> *"Indigenous territory is seen as a place for the potential exploitation of wealth, given that environmental preservation within traditional territories is superior to non-demarcated territories.*
>
> *On the national political scene, a new gold rush in the Amazon has been encouraged by the federal executive branch, which defends the economic exploitation of indigenous territories, making use of a developmentalist discourse, defending economic "progress" that meets the economic interests of multinational mining companies, interests that have been pressured by the political agents who proposed the creation of PL 191/2020 to regularize mining in traditional territories."*[95]

When analyzing the political context and the economic interests that accompany proposals aimed at legitimizing mining on indigenous lands, Curi points out that Brazil is part of a neoliberal context that confuses economic growth with development through a notion

94 Câmara dos Deputados-A, Lista de prioridades do governo traz 45 propostas, 2022.

95 Articulação dos Povos Indígenas do Brasil (APIB), Nota Técnica n. 01/2022 - AJUR/APIB, 2022, p. 18,

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of progress centered on macroeconomic elements which disregards social, environmental, cultural and humanistic values.[96]

Thus, the logic of such proposals, which are gestated through socio-environmental damage in search of specific profits for specific sectors—such as Bill 191/2020 and Brazilian Law no 14.701/2023—confuses price and value, ignoring the dichotomy between the principles that underpin the different indigenous cosmovisions and the destructive search for short-term profit, especially in relation to what is at the focus of the original conflict. As a result, politicians supported by mining interests seek measures to guarantee the exploitation of the underground of indigenous lands through a minimal sharing of the economic benefits of this activity with the indigenous communities involved.[97]

The priority given by former president Jair Bolsonaro's administration to Bill 191/2020, however, generated strong social repercussions that ensured that the bill did not advance in parliament.[98] Important demonstrations, including mobilizations in front of parliament[99], public notes from the Federal Public Prosecutor's Office (Ministério Público Federal)[100] and public notes by non-governmental organizations reinforced the contrast between PL 191/2020 and the rights to an ecologically balanced environment and the rights of indigenous peoples.[101]

The Association of Indigenous Peoples of Brazil (APIB), in its technical note on Bill 191/2020, defends the understanding that the practice of mining on indigenous lands is, in itself, a practice that violates human rights and fundamental rights of indigenous peoples.[102] APIB asserts that territory is a structuring element of indigenous existence and that "mining projects tend to cause direct interference in the entire organic structure of indigenous peoples, polluting rivers, contaminating fish, bringing diseases, spreading drug use among indigenous people, etc.".[103]

The Federal Public Prosecutor's Office summarizes its position on the bill by concluding that the approval of the bill would lead to "the destruction of important environmentally

96 *Melissa Volpato Curi*, Aspectos legais da mineração em terras indígenas, Revista de Estudos e Pesquisas, FUNAI, Brasília 4 (2007), p. 225.

97 Ibid.

98 Brasil de Fato, Câmara sente repercussão negativa e desacelera PL que autoriza mineração em terras indígenas, 4 September 2022, https://www.brasildefato.com.br/2022/04/09/camara-sente-repercussao-negativa-e-desacelera-pl-que-autoriza-mineracao-em-terras-indigenas (last accessed on 1 November 2025).

99 Revista Galileu, Entenda a mobilização contra o PL que legaliza garimpo e ameaça indígenas, March 2022, https://revistagalileu.globo.com/Sociedade/Politica/noticia/2022/03/entenda-mobilizacao-contra-o-pl-que-legaliza-garimpo-e-ameaca-indigenas.html (last accessed on 1 November 2025).

100 Ministério Público Federal, Nota Pública—Mineração em terras indígenas, 2022.

101 Articulação dos Povos Indígenas do Brasil (APIB), note 90.

102 Articulação dos Povos Indígenas do Brasil (APIB), note 90, p. 17.

103 Articulação dos Povos Indígenas do Brasil (APIB), note 90, p. 18.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

protected areas, as well as the disruption or physical disappearance of several indigenous peoples, especially those located in the Amazon region".[104]

Although institutional and social repercussions were important in preventing Bill 191/2020 from moving forward, it was the change in the head of the federal executive branch that proved decisive for the proposal to be definitively withdrawn from the agenda.

After former president Jair Bolsonaro lost his re-election race to President Luiz Inácio Lula da Silva, the new administration submitted a request to withdraw Bill 191/2020. Signed by the then Minister of Justice, the request for withdrawal points out that the bill "opens up the possibility of a massive presence of mining activities on indigenous lands, a situation that would be capable of making the Yanomami tragedy repeat itself in many other parts of the national territory".[105] Furthermore, President Luiz Inácio himself has spoken out on the issue, pointing out that

> *"This bill was a way for former president Bolsonaro to confront the Indigenous Peoples, who were asking for progress in the demarcation and protection of their territories. Instead of helping them, the former president was always against indigenous peoples, creating mechanisms to confront these rights and make the lives of indigenous peoples more vulnerable."*[106]

However, despite the fact that the change in the executive branch of federal public administration meant that Bill 191/2020 was removed from the agenda, the gap in the legislation continues to exist, and business interests remain latent, as can be seen from the enactment of Brazilian Law no 14.701/2023, and the various constitutional actions that are awaiting judgment and are currently being processed from the perspective of a possible conciliation (between land hoarders, agribusiness, miners and loggers on the one hand, and indigenous and socio-environmental interests on the other).

G. Final Considerations

The history of mining in Brazil is intertwined with the history of its colonization. Not only the colonization process but also the advancement of mining has been historically marked by violence against indigenous peoples (among other forms of violence, such as the slavery of African peoples), but also the country has never directly and definitively addressed, in the political, economic and social spheres, the harmful hereditary socio-environmental aspects of these processes

104 Ministério Público Federal, Nota Pública—Mineração em terras indígenas, 2022.

105 Câmara dos Deputados, Mensagem nº 107/2023, 2023.

106 Fundação Nacional dos Povos Indígenas, Governo Lula pede retirada de tramitação de projeto de lei que prevê mineração em terras indígenas, 31 March 2023, https://www.gov.br/funai/pt-br/assuntos/noticias/2023/governo-lula-pede-retirada-de-projeto-de-lei-que-preve-mineracao-em-terras-indigenas (last accessed on 1 November 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

In this context, the "original conflict" over mining, encompassing dichotomous positions defended on one side by the indigenous worldview, and on the other by the "earth eaters", was never resolved. On the contrary, what we see today is the repetition of the same conflict and the same logic: self-imperialism[107] and internal colonialism take the place of European colonialism and American imperialism, while the justification (the vague and poorly developed concept of development) remains the same.[108] As a result, there is a tendency for the original conflict to be reproduced and perpetuated in different areas of dispute—from the legislative and judiciary branches to conciliation tables.[109]

In the field of praxis, "the invasion of indigenous lands by non-indigenous people for the illegal exploitation of natural resources is a reality that affects almost all indigenous lands in the country".[110] In the normative legal field, it is clear that, although the Federal Constitution guarantees permanent possession to indigenous peoples of the lands they traditionally occupy and the right to exclusive use of the natural resources found therein.[111] This same Constitution leaves room for the possibility of mining exploration on indigenous lands with authorization from the National Congress and financial compensation to the populations.[112] This use of the logic of compensation for extractivist acceptance—embedded in the constitutional text—highlights the enormous lack of understanding of the Brazilian State regarding the original conflict and the reality of communities that define their territories in terms of ways of life and understand that water, land, mountain air are common goods that are not susceptible to negotiation, in such a way that no compensatory offer is sufficient.[113] The same logic of compensation—based on a profound lack of understanding of the roots of the problem (and sometimes a lack of understanding of what the problem itself is)—takes on new guises and leads to erroneous conclusions that "conciliation" is possible, overlooking the fact that the parameters for conciliation are non-existent, since one side "negotiates" patrimonial matters, and the other sees itself dealing with matters of existence and survival.

Unlike what happens in other countries (notably Bolivia, through its plurinational state), the rights of indigenous peoples in Brazil are presented as a *concession* by the State. Thus, the Brazilian State reaffirms itself as the holder of the decision-making power over the future of indigenous peoples: it is the National Congress that defines the possibility of (legal) mining exploration on indigenous lands; the Judiciary created the "temporal milestone" for the demarcation of indigenous lands; and the Executive is the branch mostly

107 *Moser*, note 48.

108 *Casanova,* note 48; see also *Tapia*, note 49.

109 *Malheiro,* note 19.

110 *Curi*, note 93, p. 222.

111 Art. 231(2) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

112 Art. 231(3) Constituição da República Federativa do Brasil de 1988, Presidência da República, 1988.

113 *Machado Araóz*, note 7, p. 236.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

responsible for not fulfilling its constitutional duty to demarcate indigenous lands (which should have been completely demarcated by 1993) and that still has 255 indigenous lands with demarcation processes that have already begun but have not been finalized.

The reproduction of the conflict, characterized by the facets of current times, means that indigenous rights, including the right to their lands, are constantly under threat. Indigenous victories in this conflict (such as the shelving of Bill 191/2020) represent avoided defeats, and celebration gives way to constant vigilance for the next chapters of the dispute—such as Brazilian Law no 14.701/2023 and the possibility of conciliation over the matter of mining on indigenous lands. It is certain, thus, that the proposed conciliation is, really, a form through which mining interests and the "whites" position seek to justify a "consented" mitigation of constitutionally provided fundamental rights—with such "consent" being "given" in a context of multiple fronts of aggression and offenses against such rights.

There is, however, a clear path to achieving a definitive solution to the conflict. It involves overcoming the abysmal thinking imposed since colonization, debunking the supposed superiority of the "whites" and their techniques and ways of life to establish a coexistence of mutual learning and actual respect. In this context, it is important to recognize and give stewardship for indigenous peoples over their rights, given that indigenous peoples' perspectives are alternatives for the future, as "Indigenous Peoples and local communities are efficient stewards of their territories when they have legal rights"[114] and not a portrait of the past as "developmentalists" would portrait. Learning from the indigenous perspectives is probably the best path to a really sustainable existence, overruling current abyssal thinking, as "post-abyssal thinking can be summarized as learning from the South using an epistemology of the South".[115]

© Giovanni Martins de Araújo Mascarenhas, João Paulo Lordelo, Geisa Cunha Franco, Jessica Lima Rocha, Sophia Fonsêca Morais

114 *Clement et al.,* note 10, p. 210.

115 *de Sousa Santos*, note 8, p. 85.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

East African Court of Justice and the Supreme Court of Kenya – A Case of Two Judicial Monologues

By *Tomasz Milej*[*] and *Alvin Kubasu*[**]

Abstract: Adherence to the Rule of Law is one of the fundamental principles of the East African Community (EAC), anchored in the Treaty establishing the Community. The main judicial organ of the EAC—the East African Court of Justice (EACJ)—and the Supreme Court of Kenya, one of the EAC's Partner States, are in disagreement regarding the competence of the EACJ to review decisions of the Supreme Court of Kenya for compliance with the rule of law principle. The Supreme Court resists the EACJ's case law assuming such competence and the manner in which the EACJ exercises it. We argue that both courts should abandon their orthodox positions and engage in judicial dialogue. The Supreme Court should acknowledge that the EACJ may determine the international responsibility of a Partner State for a violation of the Rule of Law principle, even if such a violation originates from a decision made by a court of that State, including the Supreme Court of Kenya. On the other hand, the EACJ should adopt an adequate standard of deference toward the judicial organs of Partner States.
Keywords: East African Court of Justice; Supreme Court of Kenya; Judicial Dialogue

***

A. Introduction

When examining the relationship between an international court within a regional community or treaty system and the highest courts of national jurisdictions that are part of that system, the concept of "judicial dialogue" naturally arises. However, the very term "dialogue" presupposes that the when deciding similar issues or even the same issue, one court identifies the arguments used by another court and offers them some *bona fide* consideration, even if it ultimately disagrees with them. Such a dialogue would also require a degree of moderation in the exercise of jurisdiction, ensuring that one court does not excessively encroach on the jurisdiction of the other. This approach allows for the mapping of overlapping jurisdictional areas and the design of mechanisms to prevent conflicts.

* Professor, Department of Public Law, Kenyatta University, Nairobi, Kenya and Adjunct Professor, Department of Mercantile Law, University of the Free State, Bloemfontein, South Africa. Email: t.milej@gmail.com.

** Graduate Assistant, Strathmore Law School, Nairobi, Kenya. Email: alvinkubasu@gmail.com

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

A conflict which the East African Court of Justice (EACJ) and the Supreme Court of Kenya emerged against the background of the principles of the East African Community (EAC) Treaty. The case in point involved allegations of electoral irregularities. While the Kenyan Judiciary, and ultimately the Supreme Court, dismissed the case, the EACJ came to the conclusion that the Kenyan courts violated the Treaty. In an advisory opinion that followed the EACJ judgment, the Supreme Court claimed that the EACJ was usurping appellate jurisdiction which it does not have and also failed to adopt any standard of deference to the national judiciary. The EACJ's consistent position is that it adjudicates solely on the international responsibility of the EAC Partner States. According to the EACJ, this responsibility arises irrespective of whether the wrongful act violating the EAC Treaty principles was committed by the executive, legislative, or judicial organs of the Partner State.

We argue that both the EACJ and the Supreme Court could have demonstrated greater willingness to engage in a judicial dialogue, which would ultimately strengthen the rule of law in the EAC. Rather than engaging with each other, both courts appear more dismissive of each other's jurisdiction, effectively engaging in two monologues rather than a dialogue. Our objective is to examine the arguments advanced by both courts to claim and defend their jurisdictional space, particularly when adjudicating matters related to the principle of the rule of law enshrined in the Treaty establishing the EAC (EAC Treaty). We also aim to provide insights that could help shape a future judicial dialogue.

The EAC is one of the eight regional blocks in Africa. Located on the eastern side of the African continent, the EAC currently has a membership of 8 states. Its main objectives include fostering economic growth and promoting rule of law.[1] The EACJ is the judicial organ of the East African Community EAC. The EAC Treaty mandates the EACJ to ensure adherence to the law in the interpretation, application and compliance with the Treaty. The EACJ has both contentious and advisory jurisdiction, primarily interpreting and applying the Treaty in both instances.[2] The EACJ is a two-chamber court consisting of the First Instance Division and the Appellate Division. This allows parties to appeal a decision from the First Instance. However, the decisions of the Appellate Division are final and binding upon the parties. Furthermore, decisions of the EACJ take precedence over national courts decisions.[3] Currently, the EACJ is located in Arusha, Tanzania, this location is deemed temporary since the Summit (the highest EAC organ composed of the Heads of States) has not determined its permanent seat.

The Supreme Court is the apex court in Kenya. Established under Article 163 of the Constitution of Kenya, the Supreme Court has exclusive original jurisdiction to hear and

1 Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000) 2144 UNTS 255 [Treaty], Article 5.

2 Treaty, Articles 27 & 36.

3 Treaty, Article 33(2).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

determine presidential election petitions.[4] Additionally, the Supreme Court is the final appellate court for any civil, criminal or constitutional matter,[5] and it may give advisory opinions on certain issues at the request of the national government or any State organ.[6]

The present article is subdivided into six parts. In the first part, we present the case in point that led the Supreme Court of Kenya to turn against the East African Court of Justice. The dispute originated from an electoral petition filed by Martha Karua, a distinguished Kenyan lawyer and politician, whose case was dismissed on a technicality. This triggered a protracted legal back-and-forth within Kenya's domestic courts, which ultimately avoided deciding the case on its merits. Frustrated by this outcome, Karua turned to the EACJ, setting the stage for the institutional tension at the center of our analysis. In the second part, we provide the necessary context, as both courts—the EACJ and the Supreme Court—operate within distinct institutional, political, and historical frameworks. We explore the sensitivity of electoral justice in Kenya, which has historically been a matter of life and death, a reality the Supreme Court of Kenya cannot overlook. This section also examines the EACJ's broadly framed jurisdiction and its evolution from a politically contested institution into a proactive hub for public interest litigation. We further contrast the less competitive and transparent process of judicial appointments to the EACJ with the more rigorous system governing the Supreme Court, a disparity that shapes their interaction. In the third part, we address the core of the contention: the EACJ's case law on the principle of the rule of law, as enshrined in the EAC Treaty. We argue that the scrutiny standards applied by the EACJ—which the Supreme Court now contests—did not emerge suddenly but reflect a well-established jurisprudence developed in response to specific rule of law challenges in the East African region. However, we identify a critical weakness in this jurisprudence: the absence of a doctrine, similar to the margin of appreciation doctrine of the European Court of Human Rights, that would set the standard of deference the EACJ should afford to national courts. This gap renders the EACJ's case law monologic, leaving little room for judicial dialogue. In the fourth part, we turn to the second monologue—the position of the Kenyan Supreme Court—explaining why its criticism of the EACJ is only partly merited. We place this position in a comparative perspective in the fifth part, uncovering the structural deficits underlying regional integration in Africa and demonstrating why judicial dialogue is not just desirable but necessary. In the final sixth part, we engage directly with the legal arguments presented by both the EACJ and the Supreme Court. We identify positions that each court should reconsider to pave the way for a genuine judicial dialogue.

4 Article 163(3)(a) of the Constitution of Kenya (2010)

5 Article 163(3)(b) of the Constitution of Kenya.

6 Article 163(6) of the Constitution of Kenya.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

B. The Case in Point: Supreme Court's Advisory Opinion of 31 May 2024

The genesis of this case traces back to the 2017 general election in which Ms. Martha Karua was a candidate for the position the Governor in on of Kenyan counties—Kirinyaga. Upon losing to her rival, Karua lodged an election petition at the High Court alleging that the polls were not free and fair. According to her, there was widespread cheating, voter bribery, tampering with ballot boxes and violation of constitutional requirements during the voting, counting, tallying and votes transmission process. The High Court struck out her petition on a technicality stating that her petition did not state the election results and the date these results were announced. Although the Court of Appeal initially directed the High Court to hear the case on merit, Karua's case at the High Court and her subsequent appeals at both the Supreme Court and Court of Appeal were again dismissed, this time for being time-barred. This stems from the Election Act of 2011, which establishes a six-month statutory timeline for lodging, hearing, and resolving election petitions. The Court of Appeal affirmed this six-month rule as a constitutional imperative that cannot be modified, even though the delay in this case was caused by procedural delays attributable to the wrongfulness of the initial High Court decision.[7] In past rulings, the Supreme Court has underscored the importance of strict timelines in election disputes, framing them within Kenya's electoral history. Delays in resolving such disputes, the Court observed, undermine both the people's franchise and the integrity of the democratic process. Therefore, the strict timeline accords the electorate finality within a reasonable time saving them from being held captive to endless litigation.[8] In the Martha Karua case, the Supreme Court highlighted that the six-month rule was strictly applicable whether or not the delay was the fault of the petitioner.[9]

Aggrieved by the Supreme Court's decision, Karua moved to the EACJ. In her reference, she argued that despite the statutory restrictions, the Supreme Court failed to consider the special circumstances of the situation where exceeding the statutory timelines was not her fault, but a consequence of the time taken to hear and determine her petition. She thus contended that the Supreme Court had violated her right to a fair trial, consequently failing to uphold the principle of the rule of law enshrined in the Treaty.[10]

The EACJ held that the Supreme Court violated her right to access justice by failing to grant her a fair trial, therefore violating its commitment to the principle of the rule of law under Article 6(d) and 7(2) of the Treaty by failing to properly interpret and give effects to the Constitution.[11] The Appellate Division upheld this decision. Consequently,

7 Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others [2018] KE-CA 41 (KLR).

8 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.

9 Karua v Independent Electoral and Boundaries Commission & 3 others [2019] KESC 26 (KLR).

10 Hon. Martha Karua v Attorney General Republic of Kenya, reference no. 20 of 2019, First Instance.

11 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Kenya was ordered to pay Ms. Karua damages amounting to USD 25,000. It is with regard to this Supreme Court decision, that the Attorney General sought an advisory opinion of the Supreme Court on, "whether the EACJ had appellate jurisdiction over decisions made by the apex courts of member states."[12] The Supreme Court's competence to deliver the advisory opinion is outside of the scope of the present article.

C. The Context

Electoral justice and the rule of law are important pillars of good governance in East Africa. While the Supreme Court of Kenya has played a significant role in strengthening the electoral justice, the East African Court of Justice has gone through struggles defining its role in upholding the fundamental principles of the EAC.

I. Electoral Justice in Kenya

Despite elections being one of the three cornerstones of sovereignty and constitutional democracy, electoral justice remains a far cry for most Kenyans.[13] Historically, instead of electoral justice being served on a silver platter, Kenyans have had to endure significant hardships under regimes determined to retain power at any cost.[14] The 2007/2008 post-election violence is a prime example of the fatal consequences that election injustice can bring. The Commission of Inquiry on Post-Election Violence reported that 1,133 lives were lost and thousands of others were subjected to different forms of violence, including sexual while others were internally displaced.[15] A heavily contested presidential election, Kenyans divided along ethnic lines, winner declared in unclear circumstances and the absence of a transparent and reliable complaint mechanism culminated in people turning against each other out of discontent about the election process.[16]

The promulgation of the new Constitution of Kenya in 2010 was a turning point and offered a ray of hope towards the realization of electoral justice in Kenya. The Constitution empowered courts to listen to election petitions offering the much-needed complaint and dispute resolution mechanism.[17] Additionally, the Independent Electoral and Boundaries

12 Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022) [2024] KESC 21 (KLR) (31 May 2024) (Advisory Opinion).

13 *Ben Sihanya,* Electoral justice in Kenya under the 2010 Constitution implementation enforcement reversals and reforms, Sihanya Mentoring and Innovative Lawyering 1 (2017), p. 3.

14 Ibid.

15 Commission of Inquiry into Post-Election Violence (CIPEV), Report of the Commission of Inquiry into Post-Election Violence (2008) ('Waki Report') 304.

16 *Muna Ndulo / Sara Lulo*, Free and fair elections, violence and conflict, Harvard International Law Journal 51 (2010), p. 12.

17 *Yash Pal Ghai / Jill Cottrell Ghai*, Kenya's Constitution: An instrument for Change, Nairobi 2011, p. 66.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Commission was established with the mandate of conducting and overseeing free, fair, and verifiable elections.

That notwithstanding, both the 2013 and 2017 general elections were marred with irregularities.[18] Notably, in 2017, the Supreme Court made history by becoming the first court in Africa to nullify a presidential election. The court found that the irregularities and illegalities that took place in that election were not only substantial but also significant, affecting the integrity of the election and ultimately the results.[19] The Supreme Court was of the view that elections are not an event but rather a process that involved getting a voter to freely cast their vote and having that vote count equally with the rest.[20]

The nullification of the presidential elections in 2017 breathed life into the role of courts as facilitators of electoral justice, instilling confidence in the electorates on the realization of electoral justice in Kenya.[21] Therefore, the decision by the Supreme Court in 2019 to strike out Karua's petition which was raising substantial questions on the electoral process on a technicality can be likened to the proverbial one step forward three step backwards in the realization of electoral justice in Kenya.

II. Jurisdiction of the EACJ

Article 27(1) of the Treaty grants the EACJ jurisdiction over the interpretation and application of the Treaty. Furthermore, Article 27(2) provides for an extension of the court's jurisdiction which the Partner States are under the obligation to operationalize at a later date, and which is to include original appellate or human rights. Although nearly 25 years have passed since the entry into force of the EAC Treaty, the Partner States have failed to extend the EACJ's jurisdiction, despite the EACJ declaring the failure of the Partner States to adopt a protocol operationalizing the extension a violation of the EAC Treaty.[22] On the other hand however, the Treaty under Article 6(d) provides for a set principles of the EAC to include "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". Additionally, Article 7(2) calls upon the Partner States to abide by the principles of good governance

18 *Jeffrey Steeves*, The 2017 election in Kenya: Reimagining the past or introducing the future?, Commonwealth & Comparative Politics 54 (2016), p. 480.

19 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

20 Ibid.

21 *Victoria Miyandazi,* Historic Judgment: Kenya's Presidential Election Declared Null and Void and Fresh Election Ordered, Oxford Human Rights Hub, 2 September 2017, https://ohrh.law.ox.ac.uk/historic-judgment-kenyas-presidential-election-declared-null-and-void-and-fresh-election-ordered/ (last accessed on 20 October 2025).

22 Hon. Sitenda Sebalu v The Secretary General of the East African Community and Others, EACJ Ref. 1 of 2010, p. 42.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

including "adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights." Even a cursory look at the EACJ case law reveals that there is hardly any case in which the EACJ would not rely on those two provisions. The foundational stone for this case law was laid in the 2007 Katabazi case,[23] where the EACJ established that despite the failure of the Partner States to operationalize the human rights jurisdiction, the Court "will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegation of human rights violation." Most notably, this jurisdiction includes the principles of "rule of law" and "maintenance of universally accepted standards of human rights" as they are already provided for in the Treaty.[24]

Regarding access to the court, Article 30 of the Treaty grants any EAC resident the locus standi to approach the court subject to its jurisdiction to determine, "the legality of any Act, regulation, directive decision or action of a Partner State on grounds that the decision is unlawful or infringes upon the provisions of the treaty".[25] This broad jurisdiction and even broader *locus standi* has positioned the court to be vital in public interest litigation across the East Africa Community.[26] To put this into context, any action by a Partner State being complained of may be a cause of reference to the EACJ provided it violates the EAC principles provided under Articles 5, 6 and 7 of the Treaty. At that point, the action would amount to a Treaty infringement, effectively involving the Court's jurisdiction. [27]Additionally, the Treaty does not require the petitioner to show that they have been directly affected by the action being challenged. .[28]

Furthermore, Article 34 of the Treaty provides that, "where a question is raised before a national court of a Partner State concerning the interpretation or application of the Treaty, that court shall request the EACJ to give a preliminary ruling on the question, if that court considers that a ruling on the question is necessary to enable it to give judgement". The rationale behind this is to ensure consistency and uniformity in the interpretation of the

23 James Katabazi and 21 Others v. Secretary General of the East African Community and the Attorney General of the Republic of Uganda, EACJ Ref. No. 1 of 2007.

24 This case law of the EACJ attracted much scholarly attention, see *James Thuo Gathii*, Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice, Law and Contemporary Problems 37 (2016), p. 55, *Tomasz Milej*, Human rights protection by international courts; what role for the East African Court of Justice?, African Journal of International and Comparative Law 26 (2018), p. 108, *Tasco Luambano*, Litigating Human Rights Through the East African Court of Justice: Overview and Challenges, Journal of Law, Policy and Globalization 71 (2018), p. 76.

25 Article 30 of the Treaty.

26 *Milej*, note 24, p. 113.

27 Ibid, p. 111.

28 Ibid, p. 114.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

treaty within the Partner States.[29] Unfortunately, this provision has been relied upon only once in the case between the Attorney General of Uganda and Tom Kyahurwenda.[30]

III. Political Backlash Against the EACJ

Despite Treaty provisions expressly granting the court its powers and mandate, the court has been subjected to intimidation and backlash from Partner States and their institutions,[31] which became fully manifest in the famous Anyang Nyong'o case. To put the case into context, Article 9 of the Treaty establishes the East Africa Legislative Assembly (EALA) as the legislative organ of the EAC. Article 50 of the Treaty stipulates that the Parliament of each Partner State shall elect nine members who shall as much as possible represent the various political parties, shades of opinion specific interest groups.

However, in 2006 the Kenyan Parliament engaged in what can best be described as an appointment process. Names were proposed and unanimously endorsed without any debate, deliberation or election.[32] Prof. Anyang' Nyong'o, a prominent politician and an opposition leader at that time, filed a case against Kenya at the EACJ challenging this "election".[33] The EACJ held that the process was inconsistent with the EAC-Treaty, as it failed to ensure equitable representation of various interest groups. The Kenyan parliament was directed to conduct fresh elections in compliance with the EAC Treaty.[34]

This ruling sparked tension between the EACJ and Government of Kenya, with the latter describing the judgment as an overreach by a regional court into a national parliamentary process.[35] Consequently, Kenya spearheaded a motion to amend the EAC Treaty and introduced an appellate division where decisions from the first instance court can be reviewed (appealed). Similarly, the amendment introduced the procedure on removal of a judge from office and introduced a punitive two-months' time limit for filing of individual

29 *Mbori*, note 12, para. 7.

30 The Attorney General of the Republic of Uganda v Tom Kyahurwenda [2011] UGSC 1.

31 *Owiso Owiso*, Supremacy Battle between the Supreme Court of Kenya and the East African Court of Justice: A Reply to Dr Harrison Mbori, Afronomics Law, 7 June 2024, https://www.afronomicslaw.org/category/analysis/supremacy-battle-between-supreme-court-kenya-and-east-african-court-justice-reply (last accessed on 28 April 2025).

32 Prof. Anyang' Nyong'o & 10 Others v The Attorney General of the Republic of Kenya [2009] EACJ 3.

33 *A P van der Mei,* The East African Community: The Bumpy Road to Supranationalism – Some Reflections on the Judgments of the Court of Justice of the East African Community in Anyang' Nyong'o and others and East African Law Society and others, Maastricht Faculty of Law Working Paper 2009-7 (2009).

34 Ibid.

35 *James Thuo Gathii*, International Courts as Coordination Devices for Opposition Parties: The Case of the East Africa Court of Justice, Oxford 2020, p. 55.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

references with the EACJ.[36] It has been argued that these changes aimed at invoking fear among EACJ judges, curtailing the independence of the court and discouraging the EACJ's proactivity in upholding the rule of law.[37]

The backlash following *Anyang' Nyong'o* is one of the very few global examples of State Parties amending a treaty to penalize a judicial body for a decision they disliked and opposed**.** It showed that the strategic space within which the EACJ operates is quite constrained in that politicians are prepared to respond to bold judicial decisions by attempts to bring the Court under their control, ultimately undermining its independence and legitimacy.[38] Significantly, the national judiciaries in the EAC Partner States are also under pressure coming from politicians.[39] What is thus required is judicial solidarity within the region, rather than infighting, such as the current clash between the EACJ and the Supreme Court of Kenya. Mutual supportiveness and the embedding of regional jurisprudence within domestic legal frameworks play a crucial role in strengthening the credibility of Treaty commitments.[40]

Beyond these institutional dynamics, however, the Treaty framework itself reveals a critical vulnerability within the EACJ, one that persists even though the political backlash against the EACJ is unwarranted. It is the regulation of the procedure for the appointment of EACJ judges which is too vague and cursory. Article 24 of the Treaty provides that the judges will be appointed by the Summit (Heads of State) among persons recommended by the Partner States who are of proven integrity, impartiality and independence. Additionally, the persons are supposed to fulfil conditions required in their own countries for holding such a high judicial office, or who are jurists of recognized competence in their respective Partner State. However, the Treaty does not put in place any vetting system for the EACJ judges. This gap predisposes the court to politically motivated appointments. The Heads

36 The provisions amended were, Articles 23, 25 (1), 27 (2), and 140. See also *Mary Wandia,* Stop manipulating and bullying the EA court to serve the interests of regional elites, The East African, 12 May 2012, https://www.theeastafrican.co.ke/oped/comment/Stop-manipulating-and-bullying-the-EA-court-/434750-1404590-aae67k/index.html (last accessed on 20 October 2025).

37 *Gathii*, note 35, p. 57

38 Another method of bringing the Court under control is the politicization of judicial appointments discussed further below.

39 For Kenya, see *Tomasz Milej / Evans Ogada*, Upholding judicial independence in Kenya. Challenges, context and solutions, Friedrich Naumann Foundation for Freedom, September 2024, https://ir-library.ku.ac.ke/server/api/core/bitstreams/469a7006-dd5f-4186-9e9d-fb4f7700d9f4/content (last accessed on 3 January 2025). For Uganda see *Musinguzi Blanshe / Julian Pecquet*, Uganda Supreme Court rebel hires US lobby shop in showdown with Museveni, The Africa Report, 9 January 2024, https://www.theafricareport.com/332351/uganda-supreme-court-rebel-hires-us-lobby-shop-in-showdown-with-museveni/ (last accessed on 3 January 2025), see also Centre for Human Rights of the University of Pretoria, Centre for Human Rights condemns unlawful interference with judicial independence in Uganda, 12 April 2023, https://www.chr.up.ac.za/latest-news/3359-press-statement-centre-for-human-rights-condemns-unlawful-interference-with-judicial-independence-in-uganda (last accessed on 3 January 2025).

40 *Milej*, note 24, p. 127.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of State may decide to opt not for individuals with a track record of professionalism and independence but rather those who are likely to dance to the tunes of the appointing authority shaping case law in line with its expectations. The process of appointment of judges to the Supreme Court judge in Kenya is much more rigorous. In addition to meeting the constitutionally prescribed qualifications,[41] candidates undergo a highly competitive and publicized vetting process by the Judicial Service Commission. The crucial difference in the appointment process may well shape the Supreme Court's view of the EACJ. While the far less competitive and transparent appointments to the EACJ cannot be the sole reason for the Supreme Court's backlash against the regional court, the connection remains too significant to overlook.

D. The Core of Contention: Case Law of the EACJ

The core of contention between the EACJ and the Supreme Court is the former's long-established case-law regarding the principle of the rule of law. This case law boils down to the claim that since the principle of the rule of law as enshrined in the EAC Treaty requires adherence of the State authorities to domestic law, any violation of the domestic law amounts to the violation of the principle of the rule of law and accordingly also of the EAC Treaty.

I. The EACJ's Rule of Law Doctrine: From Kyarimpa to UTC Mall

The EACJ's leading case is Henry Kyarimpa v AG of Uganda. In this case the petitioner acting in the public interest challenged the legality of a Memorandum of Understanding (MoU) concluded between the Government of Uganda and a Chinese investor concerning construction of a power plant. The applicant alleged a violation of the Public Procurement & Disposal of Assets, which is a piece of Ugandan legislation, and the disregard of orders made by Ugandan courts.[42] According to Ugandan authorities, the selection of the investor and the ensuing conclusion of the MoU was effectuated based on an arrangement between Uganda and China, an arrangement, however, which the Ugandan authorities failed to produce before the EACJ. It was this inter-governmental arrangement that justified the conclusion of the MoU outside of the domestic statutory framework. The State organ which according to the applicant was responsible for the violation was the Cabinet of Uganda. Also listed was the Permanent Secretary in the Ministry of Energy and the Ministry's committees. The case was therefore about the abidance of the rule of law by the executive branch.[43]

41 Article 166(3) of the Constitution of Kenya.

42 Kyarimpa, paras. 10-11.

43 Ibid., para. 20.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The EACJ's First Instance Division endorsed the definition of the rule of law laid out by the applicant's counsel in reference to a number of leading cases according to which "the law in our society is supreme; no one, no politician , no government, no Judge, no union, no citizen is above the law."[44] Summarizing its position on the rule of law as a principle of the EAC Treaty, the Court stated that "the activities of Partner States must be transparent, accountable and undertaken within the confines of both their municipal laws and the Treaty".[45] However, in examining the case, the Court underlined that "it is not the role of this Court to superintend the Republic of Uganda in its executive or other functions. Whereas of course where there is obvious and blatant violation or breach of the principles of good governance and rule of law, this Court will, without hesitation, so declare, we are unable to do so in the present case".[46] On the issue of the disobedience of the court orders, the First Instance Division stated that it is first for the Ugandan courts to address it,[47] and as the Ugandan courts were not seized, the First Instance Division dismissed the reference.

It is important to note that while the EACJ's First Instance Division endorsed the idea that the principle of the rule of law is justiciable and that it implies that the Partner States must act "within the confines of municipal law", but it sought it fit to intervene only, if the violation is "obvious and blatant". In other words, although the Court did not exclude testing the Partner State's actions on compliance with its own domestic legislation—the Court suggested that such compliance is an element of the principle of the rule of law—, it limited the scope of the review to "obvious and blatant" violations. This limitation is not explained in detail. As its rationale, the EACJ's First Instance Division merely states that its role is "not to superintend" the Republic of Uganda. The First Instance division did not, however, specify whether according to the bench, there was no violation at all or such a violation did occur but it was not obvious or blatant. The applicants appealed and the EACJ Appellate Division disagreed with the First Instance on both issues.

The Appellate Division went to great lengths to emphasize the importance of the principle of the rule of law. According to the judges:

> *"Observance of the Rule of law restrains the arbitrary will of the strong, it is the sure protection of all, it equalizes the unequal, it is the antithesis of arbitrariness, and it is the nemesis of anarchy. Without the Rule of Law, justice, peace and security would be mere chimeras. In light of that, it is clear that observance of the Rule of Law is the premier value of the East African Community. Disregard of it will torpedo the ship of regional integration. If laws are disregarded and court orders treated with contempt,*

44 Ibid., para. 29.
45 Ibid., para. 32.
46 Ibid., para. 53.
47 Ibid., para. 58.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

> *we will march back to the dark cold days of Thomas Hobbes' state of nature when life was solitary, poor, nasty, brutish and short."*[48]

The Appellate Division examined whether procuring of the contractor was "in contravention of the Internal Laws of Uganda". This being the case, and given that the government failed to produce the inter-governmental arrangement, the Appellate Division arrived at the conclusion that "the principles of the rule of law, transparency and accountability encapsulated in Articles 6(d) and 7(2) of the Treaty" have been offended.[49] Without explicitly rejecting the "obvious and blatant" standard advanced by the First Instance Division, the Appellate Division abandons it, claiming "that any conduct in breach of the rule of law is conduct which is likely to jeopardize the achievement of the objectives of the Treaty and, accordingly, offends Article 8(1)(c) thereof"[50].

With regard to the disobedience of the court orders, the Appellate Chamber was of the opinion, that:

> *"[…] if pertinent facts about the existence of National Court orders and a State's subsequent contrarian conduct are brought to the attention of this Court, the Court does not need, let alone require, the assistance of the National Court, in any form or shape, to determine whether the Treaty has been breached in those circumstances."*

Since the Kyarimpa judgment, EACJ jurisprudence has firmly established that violations of national legislation breach the rule of law principle and thus constitute violations of Article 6(d) of the EAC Treaty. For example, in the 2020 case of Attorney General of Rwanda v UTC Mall, the EACJ reiterated the principle of the Kyarimpa judgment and emphasized that:

> *"[…] where the complaint is that the action was inconsistent with internal law, and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the principle of the rule of law, it is the Court's inescapable duty to consider the internal laws of such Partner State in determining whether the conduct complaint of amounts to a violation or contravention of the Treaty."*[51]

It is, however, important to note that also the UTC Mall case concerned the violation of national legislation by the executive branch of government. The key issue in the UCT Mall case was whether a Rwandese government agency referred to as "District Commission's Committee in Charge of Unclaimed Property" and the Rwanda Revenue Authority auctioned a property (the UTC Mall) in violation of a piece of Rwandese legislation, Law

48 Henry Kyarimpa v Attorney General of Uganda [Kyarimpa Appeal], Appellate Division, Appeal no. 6 of 2014, para. 82.

49 Ibid., para. 72.

50 Ibid.

51 UTC Mall v. Attorney General of Rwanda (Reference No 10 of 2013, EACJ, 26 November 2020), para. 83.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

No. 28/2004 – that allowed a takeover of abandoned property, which the applicants alleged and the Attorney General of Rwanda denied. After the First Instance Division decided in favour of the applicants, and the judgment was confirmed on appeal.[52]

II. Extending Scrutiny to Judicial Decisions: Burundi Journalist Union, EACSOF and Martha Karua

In Kyarimpa and UCT Mall, the EACJ did not address whether the standards of scrutiny applied to executive actions extend to domestic judicial decisions. However, prior to Martha Karua, the Court had already engaged with this question in Burundi Journalist Union vs AG of Burundi,[53] and more comprehensively in EACSOF vs AG of Burundi. In short, the EACJ believes that there is no difference whatsoever.

The EACSOF case concerned a petition challenging the confirmation of presidential election results in Burundi by the country's Constitutional Court. The Appellate Division found that the Constitutional Court's decision violated the relevant EAC Treaty provisions, including the principle of the rule of law.[54] The applicants argued the Partner State (Burundi) violated the principle of the rule of law because the Constitutional Court violated Burundi's own laws.[55] Among those laws were provisions of the Constitution of Burundi relating to the elections of the President.[56] The Appellate Chamber relied on the international law rules on state responsibility and highlighted the principle of "undifferentiated attribution".[57] Accordingly, the EACJ Appellate Division argued, it "matters not if it is executive, legislative, or judicial act or omission which is complained of".[58] The Court further emphasised that any wrongful act engenders international responsibility. Such an act does not have to be "outrageous, done in bad faith, or with wilful neglect, or to be a blatant miscarriage of justice."[59] This crucial determination resulted in EACJ's comprehensive rejection of deference to national authorities, domestic courts included. It is also a reaction to a claim made by the EACJ First Instance Division in the same case. Citing a nearly 100 years old arbitral award between a US national and Mexico, the First Instance Division held that revaluation of issues decided by a national apex court is possible only

52 Attorney General of Rwanda v. Union Trade Centre LTD (Appeal no. 10 of 2020). The Appellate Division upheld the judgment of the First Instance Division.

53 Burundian Journalists Union v. Attorney General of the Republic of Burundi (East African Court of Justice, First Instance Division, 15 May 2015) Reference No 7 of 2013, paras. 40-41.

54 East African Civil Society Organizations' Forum v Attorney General of the Republic of Burundi and Others (EACJ Appellate Division, 24 May 2018) Appeal No 2 of 2018 (EACSOF), paras. 96-97.

55 Ibid., para. 20.

56 Ibid., paras. 21-22.

57 Ibid., para. 73.

58 Ibid.

59 Ibid., para. 74.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

when such decision reflect a "clear and notorious injustice, visible, to put it thus, at a mere glance".[60] Hence, the Appellate Division overruled an excessively loose standard of scrutiny advanced by the First Instance Division, and replaced is for an excessively strict standard. This strict standard allows the EACJ to apply the EAC Treaty's rule of law principle to comprehensively re-evaluate the national courts' case assessment and, more precisely, to determine whether a judgment of a domestic court is complies with the substantive domestic laws of the Partner State concerned, including its constitution. And this is exactly what the EACJ affirmed in the Martha Karua case. While disagreeing with Kenyan Judiciary's interpretation of Kenyan Constitution, the EACJ proposed a different interpretation, which in the EACJ's opinion was aimed at giving full effect to the right of access to justice.

Summarising its caselaw concerning scrutiny of domestic courts' judgments against the Treaty's rule of law principle in Martha Karua, the EACJ was keen on pointing out a difference between its case law based on the rule of law principle and an appellate jurisdiction. According to the Appellate Chamber, the EACJ does not exercise any appellate jurisdiction, because it has no powers to "revise, review or quash" the domestic judgments.[61] What the EACJ is doing is different: it merely determines the Partner States' international responsibility under international law.[62]

The argument of the EACJ is too formalistic and conceals the crucial problem, which arises if an international standard requires from a State compliance with its domestic laws, as the rule of law principle enshrined in the EAC Treaty does. In this case a determination to be made by an international court such as the EACJ about the international responsibility of a State requires from this court a very similar type of analysis as would be required from a domestic court of that State sitting on appeal. In both situations, the court would have to review a decision of the domestic trial court on whether it accurately applied the domestic laws to a given set of facts. The fundamental issue here is that the domestic court, by virtue of its composition, way of appointment and appointment requirements, may legitimately claim to be better equipped or even more competent to conduct this type of analysis than an international court, which on its part may claim superior expertise in international law. The issue is even more glaring, when the case has already been adjudicated not only by one domestic court, but by two; the trial court and a court of appeal, or even by three domestic courts, as was the case in the Martha Karua saga. By substituting its own legal analysis for that of Kenya's Supreme Court, the EACJ effectively positions itself as better suited to properly apply Kenyan law to the legal issues raised by the applicant. And such an assumption is highly problematic, given the vetting which the Kenyan Supreme Court judges, but also even the High Court Judges and Judges of the Court of Appeal had to

60 East African Civil Society Organizations' Forum v Attorney General of the Republic of Burundi & Others (EACJ First Instance Division, Reference No 2 of 2015), 29 September 2016, para. 44.

61 Martha Karua Appeal, paras 52& 54, citing EACSOF.

62 Ibid., paras. 54-55.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

undergo and the amount of experience in applying Kenyan law they have accumulated.[63] By leaving those very crucial issues unaddressed, the EACJ exposes itself to legitimate criticism from Kenyan judiciary. And the more politisised the practice of appointment of EACJ judges becomes, the more justified such criticism will be.

As previously emphasized, the judicial appointment procedure for EACJ judges represents a significant institutional vulnerability for the Court. A worrying recent example was the appointment of Dr. Zablon Mokua a former member of county assembly, to the EACJ by Kenya. Following the resignation of Justice Nyachae in January 2024, the executive unilaterally and arbitrarily nominated Dr. Mokua to take up the position. The Law Society of Kenya moved to court to challenge this decision, terming it unconstitutional and a mockery of the rule of law.[64] On the other hand, the Kenyan executive, through the cabinet secretary in charge of the EAC docket, argued that the nomination of a judge to the EACJ was a preserve of the Head of State and he enjoyed the discretion to nominate a candidate who would be appointed by the summit.[65] The High Court intervened and quashed the nomination of Dr. Mokua. In his decision, Justice Chacha Mwita stated that the Judicial Service Commission was the entity responsible for determining whether a person fulfilled qualifications for appointment to a high judicial position in Kenya. Furthermore, the Constitution required openness and transparency in appointments to public positions.[66]

While the High Court rightly stopped this appointment, this is the consequence of the unfortunate gap in the Treaty, which, as discussed above, fails to provide for any procedure of vetting for the EACJ judges. The establishment of an EAC-affiliated regional judicial service commission may cure it, but, as of now, there are no specific plans to establish such a body.

III. Deference vs. Intervention: The Missing Doctrine

A short look at history may shed some more light on the dilemma. The EACJ is not the first regional judicial organ in East Africa. Its predecessor, the Court of Appeals for Eastern Africa (CAEA) used to have what the critics say the EACJ is usurping: the appellate jurisdiction. The legacy of the CAEA is, however, somewhat mixed. On the one hand, the Court is credited for high level of independence in the increasingly authoritarian political environment and the last bastion of protection of individual freedom.[67] On the other hand, the Court had a colonial heritage having been established by British Order in Council in

63 Article 166(2) and (5) read together with Article 172(1)(a) of the Constitution of Kenya.

64 *Luke Anami*, Lawyers lobby fault nomination of Kenyan as judge to regional court, The East African, 29 April 2024, https://www.theeastafrican.co.ke/tea/news/east-africa/lawyers-lobby-fault-nomination-of-kenyan-as-judge-court--4605268 (last accessed on 13 January 2025.)

65 Ibid.

66 Law Society of Kenya v Attorney General & 2 others; East Africa Law Society & another (Interested Parties) [2025] KEHC 641 (KLR).

67 *Milej*, note 24, pp. 173-174.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

1902 to facilitate a cost-efficient administration of justice in the East African territories under the British rule. Later, the court exercised its jurisdiction based on the domestic codes of procedure of Kenya, Tanzania and Uganda. It was eventually abolished in 1977.[68] One may see the CAEA as a post-colonial relic, but one may also see is as a quite unique East African heritage of a regional appeal mechanism which as we see still tends to shape the imaginations about what functions a regional court can perform.

The discussion in this part may be summarised by stating that the EACJ fails to adopt what Kermit Roosevelt refers to as "doctrine".[69] Writing in the context of the US Constitutional law, Roosevelt observes that doctrine primarily reflects the Court's decision to defer, or not to defer, to another governmental actor.[70] Transposing this thought to a relationship between national and international judiciary, the doctrine would mean the decision of the international court to defer, or not to defer to the national court. In the context of the EAC, this decision would reflect the EACJ's judgment, whether the national actors, including the national judiciary, may be relied upon or trusted to identify and observe the limits which the principle of the rule of law places on the organs of the Partner States.[71] As pointed out by Roosevelt, governmental action carries with it at least the implicit judgment of the governmental actor that what has been done complies with the Constitution.[72] Hence, "the Court is in part reviewing the governmental action, but it is also in part reviewing the judgment of the governmental actor".[73] Similarly, the EACJ should recognize that the Partner States' organs under review have already assessed whether their actions comply with the rule of law principle, including adherence to national legislation. For example, the Rwanda Revenue Authority must have evaluated whether the auctioning of the UCT Mall was compliant with the Rwandese law on abandoned property. The same applies even more clearly to the evaluation of the Martha Karua petition by the Kenyan Supreme Court.

The problem is whether the EACJ can rely on these evaluations when the cases come up before it, or such evaluations conducted by the Rwanda Revenue Authority, the Kenyan Supreme Court or any other organ of the Partner State, to borrow from John Hart Ely, can be trusted. The answer will depend on a number of factors. One may argue, for example, that the judiciary of a Partner State can be more trusted than non-judicial organs, because the application of domestic law is their core business and the key element of their training. However, what if the independence of the Judiciary is in doubt? The situation in this regard may vary and indeed does vary from Partner State to Partner State. Can it be then said that the Judiciary of one Partner State can be more trusted than the Judiciary of another Partner

68 Ibid.

69 *Kermit Roosevelt*, The Myth of Judicial Activism, London 2006, p. 43.

70 Ibid.

71 Ibid., p. 53.

72 Ibid., p. 24.

73 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

State? What would be the consequences for the Court if it dismisses a particular judiciary as not trustworthy?

What makes such judgments even more difficult is the all-encompassing character of the rule of law principle. As we have seen, the principle may mean compliance with national procurement laws, but also compliance with constitutional guarantees of access to justice. Should the EACJ apply uniform standard of deference to Partner States' assessments of rule of law compliance? This question gains complexity given that even national courts usually calibrate their scrutiny, granting greater leeway in specialized areas like economic policy while exercising stricter review in fundamental rights cases, such as freedom of expression.[74] Answering all those questions will go well beyond the scope of the present analysis, but our point of critique is that the EACJ does not address these questions at all. Moreover, by replacing the analysis of the national organs by its own and rejecting any qualifiers for the wrongfulness of the state action complained of, it seems to apply by default the strictest standard of deference, leaving hardly any room for trusting or relying on the judgments of the national actors.

In the caselaw examples given, either the counsels for the Partner States or the First Instance Division of the EACJ proposed various doctrines which may be used to determine the level of scrutiny to be applied by the EACJ while reviewing judgments of domestic courts. They were mostly derived from dated classics of international arbitration and assumed a high level of deference to the domestic courts (or low level of scrutiny of the decisions of the same), allowing the EACJ to intervene e.g. in cases of "obvious and blatant" violations, no matter the circumstance. The 2024 Supreme Court Advisory Opinion develops this analysis further.

E. The Judicial Backlash: Position of the Supreme Court

The Supreme Court's reasoning may be divided into two parts. In the first part, the Court is keen on stressing the supremacy of the Constitution of Kenya, 2010 and its "final judicial authority" under the same.[75] In the second part, the Supreme Court calls the EACJ to exercise judicial restraint and elaborates on the doctrine of margin of appreciation developed by the European Court of Human Rights (ECtHR).

The argument in the first part proceeds in two steps. First, the Supreme Court invokes the principle of subsidiarity. While the Court derives this principle from ECtHR case law, the argument relies heavily on the outdated concept of reserved domain ("domaine reserve"). Accordingly, the Supreme Court claims that "a State's electoral laws and pro-

74 *Philomena Apiko / Bruce Byiers*, The East African Court of Justice: The hard road to independent institutions and human rights jurisdiction, ECDPM, https://ecdpm.org/application/files/3516/5546/8772/EACJ-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf (last accessed on 28 January 2025).

75 Reference No E001 of 2022; Hon Attorney General v Hon Martha Karua, SC [2024] KESC 31 (31 May 2024) (Advisory Opinion), paras. 57& 74.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

cedures fall squarely within the municipal competency of its courts",[76] suggesting that electoral laws are an area of state activity that is beyond any international judicial scrutiny.

In the second step, the Court argues that the EACJ is barred from interpreting national laws. This would be "outside the purview of the Treaty" and beyond the EACJ's jurisdiction.[77] While regional courts would be empowered to conduct "procedural reviews" of national court's decisions and "call attention to violations", the EAC Treaty would limit the EACJ's mandate to "interpretation and application of the EAC Treaty only".[78] In the same vein the Supreme Court claims that the national courts would not be vested with "jurisdiction to deal with the interpretation or application of the EAC Treaty".[79] These two claims taken together basically deny the existence of any interactions between Kenyan national law and the Treaty. The reasoning of the Supreme Court represents therefore a quite radical version of the dualist approach to the relationship between national and international law.

The Supreme Court seems to be equating interpretation of national laws by the EACJ with "appellate jurisdiction"[80] and "merit review jurisdiction"[81] which the EACJ would arrogate to itself. It goes on to suggest that in so doing, the EACJ would assume "judicial supra-nationality" which should be "categorically provided for in the Treaty".[82] The Supreme Court is apparently of the opinion that this is not the case.

It is worth noting that the dualistic approach to the relationship between the national and international law conceptualized by the German scholar Hans Tripel has been the foundation for Kenyan case law regarding international law for decades. It was only the Constitution of Kenya, 2010 that seemed to have brought about a paradigm change. While reaffirming the supremacy of the Constitution,[83] Article 2 of the Constitution of Kenya provides that general rules of the international shall form part of the laws of Kenya,[84] and that any treaty or convention ratified by Kenya form part of the laws of Kenya.[85] These provisions were regarded by some commentators,[86] as a shift from a dualistic approach to international law towards the monistic one. However, in a quite surprising turn of events, the Supreme Court stated in the Mitu-Bell case in 2021 that the cited provisions are of no

76 Ibid., para. 56.

77 Ibid., para. 64.

78 Ibid., para. 74.

79 Ibid., para. 64.

80 Ibid., paras. 56 & 74.

81 Ibid.

82 Ibid.

83 Article 2(1) of the Constitution of Kenya.

84 Article 2(5) of the Constitution of Kenya.

85 Article 2(6) of the Constitution of Kenya.

86 *Kabau Tom / Ambani John*, The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism? Africa Nazarene University Law Journal 1 (2013), pp. 36-55.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

consequence on the monism-dualism distinction and only mean that the Kenyan courts may apply international law, as long as the same is not in conflict with "the Constitution, local statutes, or final judicial pronouncement".[87] International law norms were thus reduced to filling gaps and a means of interpretation of national law and precedents.

While the first part of the Supreme Court's reasoning seems to incorrectly (as will be discussed below) deny the EACJ any authority to review domestic court decisions for compliance with national law, the second part makes a more nuanced point: it correctly identifies the absence of any established doctrine in EACJ case law that defines the boundary between domestic and international judicial competence. The Supreme Court calls out the EACJ for subverting the authority of national courts. As said, it proposes instead the doctrine of margin of appreciation, granting national courts the discretion to apply municipal law calibrating it to the circumstances of the case at hand.

F. The Position of the Supreme Court in a Comparative Perspective

The judicial resistance against the EACJ displayed by the Supreme Court is a new phenomenon in the EAC. Generally, there are not many instances in which the national courts would directly engage with the case law of the EACJ. A formal avenue for a judicial dialogue is provided through the preliminary reference procedure in Article 34 of the EAC Treaty, but it is rarely used as already stated. By asking the Supreme Court for an advisory opinion the Government of Kenya chose a rather unique way to challenge the EACJ caselaw, particularly the Martha Karua judgment. In the past, the governments used to defy the EACJ openly, as the Anyang' Nyong'o saga demonstrates. However, fifteen years later, with the EACJ having cemented its authority within the region, an open assault on the Court, would appear politically too costly. The nature of cases in the EACJ docket is also an important factor. Most of the cases concern human rights and rule of law.[88] They may be used by private individuals in the national courts as precedents, but given the large body of human rights case law, it actually rarely happens. The Tanzanian judiciary for example sometimes refers to the EACJ cases but cites them along case law from the entire Commonwealth to prove the existence of a certain common law principle, with no reference to a particular regional context.[89] However, as the EACJ's case law expands and its docket diversifies, national courts will likely need to engage with its rulings more often.

87 Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR, para. 133.

88 *Japhet Biegon,* State Implementation and Compliance with the Human Rights decisions of the East African Court of Justice, in: Prof. CA Maimela (ed.), Special Focus: Implementing Regional Human Rights Standards in East and West Africa Challenges and Remedies, Pretoria 2021, pp.411-412; *Mbori*, note 12, pp. 3, para. 7.

89 See for example Song Lei vs Republic (Criminal Application No. 102/06 of 2019) [2024] TZCA 597 (18 July 2024) or Deogratius Martin Kachangaa and 2 Others vs Director of Public Prosecutions (Criminal Application No. 1 of 2013) [2017] TZCA 1144 (13 December 2017).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

For example, with the growing intra-community trade, more cross-business transactions might come under the scrutiny of both the EACJ and national courts, necessitating a judicial dialogue.

Because of the political costs of an open attack on the EACJ, the Partner States' governments choose silent defiance. If very uncomfortable with a particular EACJ judgment, they would just ignore it, rather than asking a national court whether they should implement it, as the government of Kenya did regarding the Martha Karua decision. The worrying implementation record of the EACJ judgments confirms this point. An up-to-date comprehensive study is yet to be completed, but from the available data, it occurs that only half of the judgments are actually implemented.[90] Unfortunately, this figure reflects the broader practice of non-implementation of court orders, also those made by the domestic courts.[91] This shows that the national courts and the EACJ have a common cause to fight, rather than fighting each other.

On a positive note, the EACJ frequently incorporates domestic precedents into its own reasoning.[92] The domestic courts of the Partner States also show no hostility or reluctance toward substantive EAC laws. The comparative study by Emmanuel Sebijjo Ssemmanda, gives a number of examples from Uganda, Tanzania, Kenya and Rwanda demonstrating a positive reception of EAC law, even if the majority of cases cited concern the application of the East African Customs Management Act (EACMA) which is a rare example of a directly applicable piece of EAC legislation.[93] The courts in Kenya and Uganda only made clear that the EAC law must comply with the national Constitution. In the case *Uganda v Gurindwa & others*,[94] the petitioner argued that some penal provisions of the EACMA would violate Uganda's Constitution presumption of innocence. The High Court did not share this view, but indicated that should such a violation occur, the Constitution would have to take precedence.

90 *Biegon*, note 88, p. 425.

91 For Kenya see *Milej* / *Ogada*, note 39, for Tanzania see The Citizen, Valambhia family battles Tanzania government for Sh280bn payout, 5 September 2018, https://www.thecitizen.co.tz/tanzania/news/national/valambhia-family-battles-tanzania-government-for-sh280bn-payout-2654532 (last accessed on 14 July 2025). In Uganda, President Museveni came up with a theoretical framework to justify non-compliance with court orders, see *Kenneth Kazibwe*, Museveni Defends Security Agencies on Defying Court Orders, Nile Post, 22 September 2022, https://nilepost.co.ug/news/143463/museveni-defends-security-agencies-on-defying-court-orders (last accessed 14 July 2025).

92 See for example the Burundi Journalists Union case in which the EACJ extensively relies on the domestic case-laws of the Partner States, including Kenya.

93 *Emmnauel Ssemanda*, Push And Pull: Application Of Community Law In The Partner States Of The East

African Community, East Africa Community Law Journal 1 (2021), pp. 174-176, see also *Augustus Mutemi Mbila*, Implementation of East African Community Law by Partner States: A review of relevant Laws, Strathmore Law Review (2021), pp. 124-137.

94 Uganda v Gurindwa & others [2012] UGHC 166. Ssemanda, p. 177.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

To find a comparably skeptical approach to that of Kenya's Supreme Court, one must look outside the East African region. In 2016, the High Court of Ghana refused an application to enforce a judgment of the Economic Community of Western African States (ECOWAS) Court of Justice.[95] It this Judgment the ECOWAS Court of Justice awarded the applicant damages of 800,000 USD against the Republic of Ghana on account of human rights violations. It is important to note that, in contrast to the Supreme Court of Kenya, the High Court of Ghana did not suggest that the judgment of the ECOWAS Court of Justice would be in any form *ultra vires*. It rather relied on a formalistic approach to the Ghanaian domestic framework and went on to conclude that it does not provide for a procedure for enforce a judgment made by an international court. On a lighter note, one may observe that the Supreme Court of Kenya could not hide between formalistic reasoning and had to engage substantively with the limits of the EACJ's jurisdiction, because, as opposed to Ghana, the Kenyan legal framework is quite clear about the enforceability of regional court's judgments.[96] More specifically, the High Court of Ghana stated that the relevant treaty instrument obligating the ECOWAS Member States to give effect to the judgments of the ECOWAS Court of Justice has not been incorporated into the Ghanaian law by an Act of Parliament, and given the dualistic nature of Ghanaian legal order, the High Court of Ghana would not have a legal basis to grant an application for enforcement. While commenting on the decision, Richard Frimpong Oppong deplores a lost opportunity to develop the common law in a way that would facilitate the domestic enforcement of the regional court's judgments.[97] Oppong juxtaposes the position taken by the High Court of Ghana with the decision of the South African Constitutional Court in *Government of the Republic of Zimbabwe v. Fick and Others,*[98] concerning the enforcement of a costs order made by the South African Development Community (SADC) Tribunal with regard to its judgment in *Mike Campbell (Pvt) Ltd. and Others v. The Republic of Zimbabwe*.[99] In this highly controversial judgment, the SADC Tribunal found that Zimbabwe had violated the provisions of the SADC Treaty by expropriating white farmers without compensation. Zimbabwe failed to comply with the judgment which eventually led to the suspension of SADC Tribunal operations in 2010 following a political campaign against the Tribunal led by the Government of Zimbabwe. It is for this reason that the original applicants of the

95 In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS

against the Republic of Ghana and In the Matter of Chude Mba v. The Republic of Ghana, High Court of Ghana, Suit No. HRCM/376/15.

96 See in particular Article 2(6) of the Constitution of Kenya. For avoidance of doubt, Kenya unlike Ghana has an Act of Parliament domesticating the regional treaty framework, Treaty for the Establishment of the East African Community Act, Cap. 4C of the Laws of Kenya.

97 *Richard Frimpong Oppong*, The High Court of Ghana declines to enforce an ECOWAS Court Judgment, African Journal of International and Comparative Law 25 (2017), p. 131.

98 Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22.

99 Mike Campbell (Pvt) Ltd. and Others v. The Republic of Zimbabwe [2008] SADCT 2.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

SADC case sought enforcement in South Africa. The Constitutional Court of South Africa allowed for it despite the lack of an explicit provision in South Africa on enforcement of international tribunals' judgments. In a display of judicial solidarity, the South African court relied on a broad interpretation of the principles applicable to execution of foreign judgments, arguing that the right of access to courts and the concomitant right to an effective remedy are essential parts of the rule of law and there is a need to ensure lawful judgments are not evaded with impunity.

The formalistic stance of the High Court of Ghana should be seen in a broader context of the ECOWAS system. Like in the EAC, the ECOWAS Treaty framework provides for the procedure of preliminary references which a national court can submit to the ECOWAS Court of Justice. And like in the EAC, the procedure does not play any major role in the integration project. It has actually never been used.[100] Samuel Ebobrah explains that this is due to the elitist character of ECOWAS which was conceived by the governments without much public participation and without providing for individual access to the ECOWAS Court of Justice. The 2005 treaty amendments, which introduced individual human rights complaints to the Court, aimed to strengthen the ECOWAS Court of Justice's role in regional integration. Yet, as Ebobrah contends, two decades later, the "disconnect between ECOWAS community law and the daily realities of citizens and officials in Member States" remains.[101] Moreover, the national courts do not perceive themselves as actors in the regional integration project,[102] the lower courts are reluctant to refer cases to organs outside of their own constitutional frameworks, and the apex courts are determined to preserve their privileges.[103] As argued elsewhere,[104] the challenges in the EAC and other African Regional Economic Communities, in particular the inter-governmental and elitist character of the regional integration process, are quite similar. However, as said, this situation is likely to change as the regional integration progresses, and it is likely that at some point the national and regional judges will realise that promoting regional integration actually requires a judicial dialogue and that regional and national courts need each other as allies to curb executive excesses or call out executive inaction.

100 *Solomon Ebobrah,* The preliminary reference procedure of the ECOWAS Community Court of Justice: why would the courts not play?, African Journal of International and Comparative Law V32 (2024), p. 437.

101 Ibid, p. 450.

102 Ibid, p. 448.

103 Ibid, p. 450.

104 *Tomasz Milej*, East African Community (EAC) – Inspiring Constitutional Change by Promoting Constitutionalism?, International Organizations Law Review 20 (2023), p. 166.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

G. Discussion

I. The EACJ's Proactive Role

Any discussion of the EACJ caselaw must first acknowledge the positive role which the Court has been playing in radically broadening the access to justice in the East African region, otherwise severely limited by a number of constrains. These include high cost of access, lengthy proceedings, perception of corruption, challenges concerning judicial independence and the lack of social entrenchment of the judiciary or missing sense of social ownership.[105] Facing political pressures, East African judiciaries often struggle to develop assertiveness and to uphold rule of law standards. Against this backdrop, the robust stance of the EACJ and its proactive interpretation and application of the Treaty's fundamental principles is good news. It must be seen in the context of Court's efforts to improve access to justice and to position itself as a public interest court. As already mentioned,[106] this includes a very liberal approach to the question of locus standi, granting of access without the need to exhaust local remedies, a fee and costs regime that does not discourage public interest litigants, online filing, establishment of sub-registries across the community, holding of court sessions also outside of Arusha (in the capitals of the Partner States) and lately also awarding of monetary compensations for Treaty violations.[107] On the negative side one can mention the punitive 2-months' time limit for filing of references introduced by the Treaty amendment following the intimidation campaign against the Court in the wake of the Anyang' Nyong'o case discussed above.

Unsurprisingly, it is the Kenyan Judiciary that the EACJ clashes with. Since the 2010 Constitution of Kenya came into force, the Kenyan Judiciary has transformed. Despite ongoing challenges, it has built a reputation for enforcing constitutional standards against both executive and legislative branches, as evidenced by its extensive case law.[108] However, it is important to note that the Kenyan Judiciary's levels of assertiveness and its active role in promoting the rule of law standards are quite unique in the East African region. For East Africans in Partner States where local judiciaries lack the kind of independence seen

105 *Joe Oloka-Onyango*, Human Rights and Public Interest Litigation in East Africa: a Bird's Eye View, The George Washington International Law Review 781 (2015), p. 47; *Apiko / Byiers*, note 74; *Teddy Musiga / Hanningtone Amol / David Sigano* (eds.), Simplified Manual for the East Africa Court of Justice, 2020, p. 3.

106 *Milej*, note 4.

107 *Harrison Mbori*, EACJ First Instance Court Decides Martha Karua v Republic of Kenya: The litmus Test for EACJ Jurisdiction and Supremacy, Afronomics Law, 30 November 2020, https://www.afronomicslaw.org/2020/11/30/eacj-first-instance-court-decides-martha-karua-v-republic-of-kenya-the-litmus-test-for-eacj-jurisdiction-and-supremacy (last accessed on 24 January 2025).

108 Ibid., see also *Milej / Ogada*, note 39.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

in Kenya,[109] the EACJ may not only be the last, but also the only resort when it comes to protecting their rights against government's overreach.

J. EACJ Usurping Appellate Jurisdiction and Supra-Nationality?

The EACJ and the Supreme Court hardly engage in judicial dialogue. What is observable are two monologues. While the EACJ fails to adopt any doctrine of deference to the national authorities, the Supreme Court fails to recognize the EACJ's jurisdiction over the principle of the rule of law and its implications. This is because the EACJ, by refusing to exercise appellate jurisdiction, fails to recognize the similarities between appellate jurisdiction and its jurisdiction under Article 6. On the other hand, the Supreme Court does not distinguish between the EACJ's adjudication based on the Treaty's Article 6 principle of the rule of law and the concept of an appellate jurisdiction.

The Supreme's Court suggestion that the EACJ would usurp "appellate jurisdiction" and "judicial supra-nationality" is definitely not persuasive. Despite some suggestion in caselaw that the EACJ could nullify legal acts of national authorities,[110] this line of reasoning has not been pursued as of recently and nowhere did the EACJ suggest that is has a competence to set aside judgments of national courts which exercising appellate jurisdiction would require. The EACJ uses the missing competence to "revise, review or quash" to emphasize that its case-law does not constitute appellate jurisdiction. The problem is, however, that the similarity between the EACJ's case law and appellate jurisdiction may justify a higher level of deference to the national judiciaries than the one the EACJ actually applies, meaning no deference at all. Therefore, while the first part of the Supreme Court's argument may be misplaced, the second part does hold some merit.

The idea of the EACJ exercising appellate jurisdiction may be seen as an aspect of the more general concept of supranationalism. However, the EACJ has carefully avoided any references to this concept. It even took special care to ensure that its prescribed remedies are aligned with established (classic) international law principles of state responsibility. This is particularly true for the Martha Karua case, where the EACJ limited its remedies to declaration of incompatibility of the actions of the Respondent State acting "through its judicial organ" with the principles of the EAC guaranteed under the Treaty and the right to access to justice. In so doing, it did not go beyond what international organs are commonly mandated to do. Also, in ordering damages, the EACJ was keen on staying within the realm of classic international law anchoring the order in the law of state responsibility and the ILC Draft Articles, rather than for example referring to a special nature of the legal order of the EAC. This is in line with the EACJ's previous case law. Despite some allusions to the

109 Judges & Jurists Forum, Report on The State Of Judicial Independence In East Africa: Contemporary Threats And Mitigation Strategies Webinar, 1 February 2024**,** https://africajurists.org/report-on-the-state-of-judicial-independence-in-east-africa-contemporary-threats-and-mitigation-strategies-webinar/ (last accessed on 12 February 2025).

110 British American Tobacco (U) Ltd v Attorney General of Uganda [2018] UGSC 21, para. 33.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

EU cases, especially Van Gend en Loos, the EACJ has stopped short of declaring the East African Community law to be an autonomous legal order distinct from the classical public international law, as of now.[111] Also nowhere has the Court suggested that there has been a transfer of sovereign powers, and the EACJ has acquired some of the powers previously exercised by the domestic judiciaries. As much as the principle of the rule of law gives the EACJ a very broad standard of review against which the actions of the state organs of the EAC Partner States may be evaluated, the Court emphasizes its position as an international court, when it comes to ordering remedies, as far-reaching as they might be.

This does not, however, mean that the Treaty does not offer any potential to pursue the concept of supra-nationality as an integration path. This potential remains, however, largely unexplored. For instance, the preliminary reference procedure outlined in Article 34 of the Treaty has the potential to introduce supranational characteristics to the EAC's institutional framework. Yet, for the EACJ to achieve true supranational status, the preliminary reference procedure must be mandatory. Specifically, national courts should be required to refer cases involving EAC law to the EACJ for interpretation and application and then be bound by the EACJ's ruling. Only through such a mandatory referral system would national courts effectively transfer their interpretative powers over EAC law to the EACJ, thus establishing it as a supranational institution. We will discuss the mandatory character of preliminary references in the following section.

K. The role of Preliminary Rulings Procedure

The Treaty's regulation regarding the preliminary reference procedure in Article 34 sheds some light on the problems discussed here. Unfortunately, neither the case law of the EACJ concerning the rule of law principle nor the Advisory Opinion of the Supreme Court give much attention to this provision. Especially the silence of the EACJ is quite surprising, given that the EACJ has elaborated upon Article 34 of the Treaty in the 2015 preliminary ruling in the case of AG of Uganda vs Tom Kyahurwenda.[112]

The first and most evident consequence of the preliminary reference procedure is that the Treaty inherently presupposes a form of interaction between the domestic legal orders of the Partner States and the Treaty, including other instruments such as Protocols and Acts of the Community, an interaction which the Supreme Courts effectively denies. And as the EACJ correctly points out in Tom Kyahurwenda, the fact that decisions of the EACJ on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter as per Article 33(2) of the Treaty, presupposes some areas of concurrent jurisdiction between the EACJ and the domestic courts.[113]

111 *Milej*, note 24, p. 592.

112 The Attorney General of the Republic of Uganda v Tom Kyahurwenda [2011] UGSC 1.

113 *Harrison Mbori,* Hidden in plain sight: Kenyan Supreme Court Shooting its own Foot on Merits Review and Appellate Jurisdiction in Continuing Supremacy Battle with the East Africa Court of Justice (EACJ), Afronomics Law, 3 June 2024, https://www.afronomicslaw.org/category/an

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The consequences of the preliminary reference procedure for the division of powers between the EACJ and national courts require special attention, particularly because all domestic court applications of national law fall under the rule of law principle. Unlike in the European Union Law, save for some exceptions, the applicability of the Treaty does not require any cross-border elements.[114] Any case of application of domestic law to purely domestic scenarios; for example in the Kyarimpa and UTC Mall cases, may be scrutinized by the EACJ on the compatibility with the rule of law principle. And the gist of the scrutiny may be, as demonstrated above, the accuracy of the application of domestic law by a domestic court. Hence, going by the wording of Article 34, one can easily imagine a situation in which a domestic court seeks EACJ's guidance on the interpretation of domestic law in cases involving purely domestic scenarios. In other words, because every case of application of domestic law by domestic courts is a case of application of the rule of law principle of the Treaty, in every such case, EACJ's guidelines can be sought. For example, the Burundi Constitutional Court could have stayed the proceedings and asked the EACJ whether President Nkurunziza's bid for a third term was constitutionally permissible. Similarly, the High Court of Kenya could have stayed the proceedings in Marta Karua's electoral petition and asked the EACJ whether the right of access to justice under the Constitution of Kenya requires the High Court to proceed with the petition. Can it then be that the Treaty envisages an EACJ that acts as an advisor to the domestic courts on any case of application of domestic laws? If it does not, it would mean that EACJ's case law on the rule of law principle is misconstrued, as it grants to the EACJ powers which it should not have, if the consequences of the preliminary reference procedure are to be considered.

The idea of a domestic court being under obligation to seek EACJ's guidance each time it applies domestic law would be absurd, alone for practical reasons. The wording of article 34 of the Treaty is not conclusive, to what extent such obligation exists. On the one hand, the provision uses the word "shall" implying an obligation, but on the other hand, it gives the national court some leeway. The obligation arises only if the national court "considers that a ruling on the question is necessary to enable it to give judgment". Based on the wording alone, it would be for the national court to decide whether the guidance of the EACJ is necessary or not.

In the Tom Kyahurwenda decision, the EACJ distinguishes between application and interpretation of the EAC-law, and claims a monopoly for the latter.[115] The court also observes, that the preliminary references procedure "is the keystone of the arch that ensures that the Treaty retains its Community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all the

alysis/hidden-plain-sight-kenyan-supreme-court-shooting-its-own-foot-merits-review-and (last accessed on 20 January 2025.)

114 *Mbori*, note p. 6, para. 15

115 Kyahurwenda, para. 45.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Partner States of the East African Community."[116] As the questions of the interpretation of domestic law in purely domestic scenarios have hardly any impact on the uniform interpretation of the Treaty, there can be no obligation to consult the EACJ in the type of rule of law cases discussed here. As already mentioned, the hierarchy established by Article 33 of the Treaty between the EACJ decisions and the decisions of the domestic courts assumes some area of concurrent jurisdiction. The EACJ's exclusive jurisdiction and the resulting mandatory reference requirement would only apply when uniform interpretation of the Treaty is necessary. As an example, the EACJ points to cases involving the invalidation of Community Acts, which are the EAC's main form of secondary legislation (borrowing terminology from EU law), despite their limited practical use.[117] The fact that the case law of the EACJ is as of now rarely preoccupied with cross-border legal disputes, and most of the cases focus on internal rule of law and human rights issues, explains why the preliminary reference procedure is rarely used. This is why Tom Kyahurwenda is still the only case decided using the Article 34 procedure and has not (yet) become the foundation stone for the advancement of supra-nationality in the EAC.

Even if the use of the preliminary reference procedure would rarely be mandatory, and such obligation would not apply if a national court applies domestic law to domestic scenarios, the question remains if the national court may apply for EACJ for such guidance, even if under no obligation to do so. The idea may seem extravagant at first blush, given the superior expertise of the national court on domestic law, as opposed to an international court such as the EACJ. The mere existence of the preliminary reference procedure might be even advanced as an argument that the Treaty does not envisage the kind of jurisdiction which the EACJ has assumed based on Article 6(d) and 7(2) in purely domestic scenarios. This might sound true from the perspective of Kenyan judiciary which, as said, has managed to cement a relatively independent position within the system of the division of powers and maintain a remarkable degree of professionalism. In some of the other Partner States, the situation might be very different. The judicial systems suffer under shortage of qualified lawyers, underfunding, corruption and above all political interference.[118] And as said, also in Kenya, the executive has undertaken numerous attempts to erode judicial independence and repeatedly fails to respect court orders.[119] Accordingly, the position of the judge vis-à-vis the government might experience a not insignificant boost, if the judicial decision is supported by the authority of the EACJ. This may be particularly true for constitutional human rights guarantees corresponding to international human rights treaties. When confronted with politically sensitive scenarios, even of a purely domestic character, a judge may consider seeking EACJ's advice to be an attractive option. And finally, there is nothing in the Treaty that would prevent judges from making use of it.

116 Ibid., para. 48.

117 Ibid.

118 *Roosevelt*, note 47, p. 53, see also Advisory Opinion, note 75.

119 *Milej / Ogada*, note 39.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

In summary, the preliminary reference procedure is evidence that the Treaty contemplates a judicial dialogue between the domestic courts and the EACJ and sometimes even requires the same. There is also nothing in the Treaty that would preclude national courts from seeking EACJ's preliminary ruling in cases of compliance with the rule of law, and by extension, with domestic legislation. It is through mutual supportiveness, rather than through battles over superiority, that respect for judicial decisions can be secured in the face of widespread executive overreach, ultimately strengthening the rule of law in East Africa.

L. Reserved Domain?

By denying EACJ's jurisdiction concerning elections in the Martha Karua case, the Supreme Court seems to limit the applicability of the principle of the rule of law enshrined in the Treaty. By virtue of the ratification of the Treaty, the observance of the rule of law principle is Kenya's obligation under international law. It is also the provisions of the same Treaty that establish the jurisdiction of the EACJ over the interpretation and application of this principle. Why would then the "electoral laws and procedures" fall outside of the EACJ's jurisdiction, if it is alleged that the operation of those laws and procedures violates the principle of the rule of law?

As suggested above, one way to understand this claim would be through the concept of a reserved domain. Accordingly, electoral laws and procedures would be an area of State activity immune from international scrutiny and confined to the "competency" of the domestic courts by its very nature. Such an area, one could argue in support of Supreme Court's claim, is a reserved domain inherent in the state sovereignty to which international law does not apply. However, such an understanding of the reserved domain would be at odds with the current state of international law's development. As pointed out by von Rütte,[120] the content of the reserved domain is determined by international law and not by the states unilaterally. A matter would fall under the reserved domain, only if international law allows it to.[121] Accordingly, there can be no argument that the electoral proceedings are by their very nature immune from international scrutiny. This would be the case only if the Treaty would exclude them from the scope of applicability of Article 6. Yet, the Treaty does not contain any such provision.

Another way to understand the Supreme Court's reasoning would be to claim that that the principle of the rule of law is not precise enough, or to use the Supreme Court's vocabulary, not "categorical" enough to grant the EACJ jurisdiction concerning elections. It is, however, unclear how this "categorical provisions" should be framed, and what level of precision international norms must achieve to justify limiting the reserved domain, as suggested by the Supreme Court. International law as any legal system consists of different

120 *Barbara von Rütte*, Domaine Réservé? Statehood, Sovereignty and Nationality, in: Barbara von Rütte, The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law, Leiden 2022, chapter 3.

121 Ibid.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

types of norms, not only of rules, but also principles. Of course, if powers of state organs were to be transferred to the EAC, the law would need to clearly define which powers are being transferred, which organs would assume them, and the procedures for their implementation, including the scope and limitations of the transfer. But as already noted, no such transfer has taken place. The subject of Supreme Court's objections are norms of the Treaty falling under the *rationale materiae* jurisdiction of the EACJ, most notably those spelling out EAC's fundamental and operational principles. These norms do not transfer sovereign powers but instead establish Kenya's obligations under public international law. By their nature, legal principles provide direction and establish legally binding commitments to certain values, which does not, however, diminish their normative and justiciable character. The justiciability of the EAC principles was confirmed by the EACJ in its landmark ruling in the Katabazi case.[122] In the light of this case law, one may regard the robust set of justiciable principles as an original contribution of East Africa to the law of regional integration which pursues an agenda going well beyond the establishment of a common market.

In a nutshell, what the Supreme Court seems to suggest is that a particular state activity, namely holding of elections, should be removed from the scope of the applicability of the EAC Treaty's principle of the rule of law. But there is hardly any viable argument that would speak for it. The problem is not the EACJ interfering with Kenya's reserved domain. One cannot claim that the EACJ does not have jurisdiction to review even court judgments against the principle of the rule of law. This is because the EACJ has no power to set such judgments aside. Also, no Kenyan court is under the obligation to seek a preliminary ruling of the EACJ while ruling on purely domestic scenarios. The problem is only the way in which the EACJ exercises its jurisdiction, and most notably its failure to adopt an adequate standard of deference to national courts and authorities.

M. Conclusion

In the evolving dance of judicial governance within the EAC, it is high time the Supreme Court of Kenya abandons its radical dualism and the EACJ carves out a doctrine that respects the competence of national courts while championing regional integration. This is not a battle for dominance but a symphony in which both courts must find their unique notes to play. By recognizing their shared commitment to the rule of law, these institutions can transcend monologues and foster a judicial dialogue that secures justice and rule of law across the region and enables the national judiciaries and the EACJ to provide an effective

122 James Katabazi and Others v Secretary General of the East African Community and Another, EACJ Reference No 1 of 2007 (1 November 2007).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

check on judicial overreach and face the actual challenges to their position and to the rule of law.

© Tomasz Milej, Alvin Kubasu

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

BOOK REVIEWS / BUCHBESPRECHUGEN

Simon Butt, Judicial Dysfunction in Indonesia, Melbourne University Press, 2023, 372 pages, AUD $40, ISBN 978-0-5228-7991-9

The Path to Meaningful Judicial Reform

A. Introduction

The title of this book—*Judicial Dysfunction in Indonesia*—is provocative given its evaluative stance. It raises the questions: Why is the title so pointed and sharp, in particular on how severely does the author describe the condition until it is deemed dysfunctional? Beyond the title itself, this invites reflective questions, especially from an internal perspective, about how the judiciary should respond or raises other critical inquiries such as this one. In this context, this book is best understood as a critical perspective of a foreign scholar who is offering an evaluation of the judicial reform agenda in Indonesia, and the ongoing need for reform in the future.

Professor Butt has spent over two decades exploring the challenges and issues faced by the Indonesian judiciary. Understanding the book's content is much easier if we are already familiar with his previous work on judicial corruption and Indonesia's constitutional court.[1] It is not surprising that, especially in this work, he bases the foundation of his research on the Anti-Corruption Court, the Constitutional Court, and, of course, the Supreme Court itself.

Drawing from the complexity of the sources, the difficulty level in writing this book is quite high. The author must possess a comprehensive understanding of Indonesia's historical and current political and legal landscape and must clearly grasp the inherent legal culture of society, government, and especially the legal enforcers. At the same time, he must have a strong understanding of the intricate structure of the judiciary, its officials, and their primary duties, as well as the technical terminology commonly used not only in the criminal justice system but also in civil and constitutional law.

However, Professor Butt succeeds in meticulously depicting how the complexity of Indonesia's judicial system operates, not merely anchored in the law or existing legislation, but in practical realities that most people hardly understand. He also recognizes the authoritative sources required to explain and support his findings.

1 See among others, *Simon Butt*, The Constitutional Court and Democracy in Indonesia, Leiden 2015; *Simon Butt*, Corruption and Law in Indonesia, Oxfordshire 2012, and *Simon Butt*, Indonesia's Anti-Corruption Courts and the Persistence of Judicial Culture, in: Melissa Crouch (ed.), The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia, Cambridge 2019, pp. 151-173.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

B. Quality, Effectiveness, and Specialization

This book is organized around three key themes: quality and judicial performance, judicial effectiveness, and specialized courts.

Firstly, Professor Butt discusses the debate surrounding how to conduct judicial evaluation. He criticizes the Supreme Court for placing greater emphasis on performance aspects of the court rather than the quality of the decisions themselves in Chapter 2. To emphasize the contrast in this account, Chapter 3 examines three significant Supreme Court decisions on high-profile cases that were widely reported in the media in the Miscarriages of Justice sections.

Professor Butt places the debate on measuring judicial performance at the forefront of discussion to emphasize its paramount significance, asserting that the ultimate aspect of judicial success is the quality of decisions, rather than other factors.

As clearly depicted in Chapter 2, the Supreme Court implements the Main Performance Indicators (Indikator Kinerja Utama) in every annual report, as stipulated in Chief Justice Letter Number 192/KMA/SK/XI/2016. These indicators include disposition rates, case resolution times, productivity, and the reduction of case backlogs as measures of judicial success. He acknowledges that the figures in the annual report, neatly arranged in tables, are important. However, these figures cannot describe the quality of the courts in a more complete and fundamental way.

He examines three critical decisions made by the Supreme Court to elucidate his earlier claims and concludes that the performance report cannot justify the subpar quality of these rulings regarding the sexual harassment case involving a Canadian teacher at Jakarta International School in 2015, the Kopi Sianida murder case in 2016, and the blasphemy case of former Jakarta Governor Basuki Cahaya Purnama, known as Ahok, in 2017. He finds that these decisions disregard fundamental rules of Indonesian evidence law, rely on evidence lacking probative value, incorporate questionable expert testimonies, and overlook seemingly valid defence evidence and arguments.

Evaluating judicial performance is complex, as it encompasses the fundamental principle of how the judiciary functions, its role in the constitutional and political landscape, and the methods of assessment.

According to Colbran (2003), judicial performance evaluation encompasses three kinds of accountability. *First*, traditional forms of judicial accountability include public scrutiny, media surveillance, appellate review, parliamentary accountability, professional review, academic commentary, the chief justice, and collegiate judiciary. *Second*, judicial attributes consist of legal ability, impartiality, temperament, diligence, communication, management skills, and settlement skills. *Third*, court and administrative performance measurement includes productivity measures, benchmarking, and time and motion studies. While the first

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and second employ a qualitative approach, the third uses a quantitative one.[2]While the first involves outsider scrutiny, the second and third pertain to insider evaluations. Using this framework, Professor Butt pointed out that the Supreme Court to much focus on the court's administrative measures while almost neglecting the assessment of judicial attributes.

To address this challenge, he suggests reviving the *Eksaminasi* mechanism, a method for evaluating the quality of judicial decisions, to assess judges' competence and ability in the decision-making process.[3] However, he argues that several weaknesses of the existing rule of *eksaminasi* should be discussed further. Some crucial issues include the necessity for cases to be selected randomly, the priority of assessor quality, the fact that almost all cases in Indonesia are tried by three judges, complicating the identification of individual judges' quality, the limited amount of facts presented during hearings in written judgments of civil cases, and the need to ensure the accountability of the process, as it is not easily manipulated.

To elaborate this issue further, Professor Butt discusses the most intriguing aspect of this book concerning judicial corruption in handling cases in chapter 4. As noted, more than 22 judges have been arrested for bribery in the last 10 years (from 2010 to 2020). From these significant cases, he outlines patterns of judicial corruption involving the judges, detailing common methods of negotiating bribes, the process of delivering the bribe, and how it was transferred to the judges.

One aspect that is not discussed much by Professor Butt regarding judicial corruption is the involvement of non-judge officers or high-ranking administrative officials in the Supreme Court. While they may not preside over cases like a judge, these court officials influence how judges decide cases. This is an area in need of future research, and may explain another epicenter of the issue of judicial corruption. For instance, within the last five years, two secretaries of the Supreme Court were sentenced to prison for bribery cases. The Secretary of the Supreme Court occupies a highly strategic position, as this role includes authority over human resource management (including judges), which encompasses more than 32,000 personnel, as well as budget allocations and facilities and infrastructure across all courts. This authority provides unrestricted access to courts nationwide, spanning all judicial branches. Another high-ranking official, a former Head of the Judicial Training Center of the Supreme Court, was convicted of receiving a bribe for his role in connecting a defendant with the Supreme Court justices, so that the defendant could influence the decision of the judge in that case.

These high-ranking strategic positions in the Supreme Court are vulnerable to structured judicial corruption due to their significant influence and high accessibility to all

2 *Colbran Stephen*, The Limits of Judicial Accountability: the Role of Judicial Performance Evaluation, Legal Ethics 6 (2003), p. 56.

3 Circular Letter of the Supreme Court Number 1 of 1967 regarding Examination, Monthly Report, and Appeal Case List.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

human resources in the first instance courts, high courts, and the Supreme Court. Given this, Professor Butt's assertion that the cases discussed in this book represent only the tip of the iceberg appears to be accurate.

Secondly, the next part of this book discusses judicial effectiveness, focusing on the complexities of implementing judicial orders in civil and criminal law in chapters 5 and 6, while highlighting shortcomings in the government's response to the judicial decisions of the constitutional court in chapter 7. He argues that all entities should cease following or applying statutory provisions that the Constitutional Court has invalidated. However, in practice, regulations tend to remain on the books and continue to be enforced until expressly revoked by their creators. The Court has no recourse in this matter.

The enforcement of court decisions is one of the pressing challenges faced by the Indonesian judiciary today. In criminal cases, this study identifies both internal and external issues. Internal problems include unfinished written decisions that judges announce publicly and inadequate supervision of verdict implementation. External factors involve convicted defendants absconding or evading imprisonment, at least temporarily, after the trial, as well as inmates paying bribes to receive special treatment while incarcerated.

In civil cases, internal issues include unclear written orders in the judge's decisions regarding sanctions for the losing party, the absence of parties during the execution process, and the ability and capacity of court officials responsible for executing judicial orders. External issues encompass a disrespectful party and the challenges involved in the takeover and vacancy of the disputed object.

Unlike in criminal cases, the responsibility for implementing the verdict in civil cases lies with the court. The Supreme Court pays attention to this by issuing the *Pedoman Eksekusi pada Pengadilan Negeri* (A Guidance for the Implementation of Court Decisions in General Court) in 2019.[4]

The problem is even more complex in reality. The implementation of judicial decision is not only expensive but also takes a long time sometimes. When I was assigned as a serving judge at a regional court, we found that one case process took more than two years to execute, and for vacating a house in a non-performing loan dispute, the winning party had to spend more than thirty million for a security account to the police, far higher than the court fee, which was only around one million rupiah.

Another case involved a party coming to court for execution approval on an inheritance dispute that had been pending for over 20 years. As Professor Butt describes in this chapter, the main problem lies in the decision itself. The disputed objects, which consist of thousands of meters and dozens of buildings, were not clearly verified. When we inspected the location of the objects, the position, size, and ownership did not align with the verdict, making execution impossible.

4 Directorate General of the General Court of The Supreme Court (n.d.), Pedoman Eksekusi pada Pengadilan Negeri, https://badilum.mahkamahagung.go.id/86-publikasi/2820-pedoman-eksekusi-pada-pengadilan-negeri.html (last accessed on 20 September 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Thirdly, the final section of this book examines specialized courts, focusing on the Anti-Corruption Court and the Constitutional Court (chapters 8-11). During the Soeharto era, the independence of the courts was significantly influenced by the executive branch, and corruption became a prominent issue within the judicial process. The establishment of specialized courts after Reformasi 1998 occurred in this context.

Professor Butt poses several questions regarding this topic, such as why lawmakers decided to establish a specialized court for a certain jurisdiction rather than allowing existing courts to preside over it, why the specific model (which includes ad hoc judges) of the specialized court was chosen, and whether this strategy succeeds in reforming the judiciary as a whole.

According to this book, a quarter of the 22 judges arrested by the Corruption Eradication Commission in the last ten years are ad hoc judges (that is, non-career judges who work for a short period of time as a judge). For context, judicial recruitment in Indonesia is conducted with a closed recruitment system, which is the common type in civil law countries, where judges are recruited from fresh graduates of law school, following a bureaucratic structure with intricate administrative details. In contrast, open recruitment requires candidates from a broader field, commonly from senior lawyers, the private sector, and esteemed academics; this system is prevalent in common law systems. The significant involvement of ad hoc judges in bribery cases contradicts the initial expectation that the introduction of ad hoc judges would reduce corruption in the judicial system. Lawmakers have adopted the recruitment model commonly implemented in common law countries and combined it with the existing closed recruitment system to try to improve the quality of judicial appointments. However, according to Professor Butt, there is no evidence indicating that their expertise decreases or increases the quality of the verdicts provided by the court.

C. Conclusion

The Indonesian judicial system has experienced significant fluctuations throughout its history. After gaining a meaningful opportunity to reclaim its dignity following the 1998 reformasi, some improvements have been made, including better case administration, enhanced court infrastructure, and improved public services; however, some fundamental issues persist. Recent legal developments in Indonesia reinforce Professor Butt's depiction of judicial dysfunction. These issues range from the arrest of two Supreme Court justices and two former high-ranking officials to dozens of assistants and staff of the Supreme Court, as well as the pervasive political intervention in the Constitutional Court during last year's presidential election.

Completed in 2022, this book offers a diverse and comprehensive examination of the current Indonesian judiciary from a doctrinal and positivistic perspective, providing valuable information along with rigorous analysis. What is discussed in this review is only a small part of the diverse topics that this study offers. This book is a significant contribution to understanding the most vulnerable aspects of judicial corruption practices

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

and highlights crucial areas of the judicial system as a whole that still need improvement. It represents the latest important work alongside the seminal contributions of Daniel S. Lev, Sebastian Pompe, Tim Lindsay, Mark Chammack, Adrean Badner, Melissa Crouch, Stijn Cornelis van Huis, and Dian Rositawati, among others, on modern Indonesia's judiciary.

Professor Simon Butt raises significant concerns that demand serious attention from all stakeholders: Parliament, the government, the Supreme Court, academia, and Non-Governmental Organisations. . Amid the decline of democracy and some indicators of political interference over the judiciary, the coming years will be more challenging for the Indonesian judiciary. The decline of public trust due to deficient integrity will become a ticking bomb for our national commitment to the rule of law if not addressed.

Abdul Halim
Judge at the Islamic Court of Bekasi, Indonesia; PhD student at the School of Law and Justice, University of New South Wales, Australia, Email: abdul.halim@unsw.edu.au

Tom Daly and Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways**,** Oxford University Press, Oxford 2024, 400 pages, $117.99, ISBN 978-0-1928-9934-7

Making Room for Difference*

A. Introduction

In 2024, the New York Times published a list of hundred books which it considered the 'best' books of the twenty-first century.[1] The list sparked criticism, predictably, as the assumption of the 'best' centred primarily American stories told in English by mostly English speaking authors to the exclusion of all other vast human stories, cultures, and emotions.[2] The exercise, however, tells us two things: first, that the world is full of stories. And second, that, unfortunately, only certain kinds of stories often occupy our hearts and minds. Many stories remain untold because we simply do not bother about them. We see that the one living or telling the story is too *far* from us, is too *different* from us and we close our eyes and ears. But what would happen if we moved the centre and changed the

* I am thankful to Prof. Rosalind Dixon and Douglas McDonald-Norman for their comments. Mistakes are all mine.

1 New York Times, The 100 Best Books of the 21st Century, https://www.nytimes.com/interactive/2024/books/best-books-21st-century.html (last accessed on 5 September 2025).

2 The Bookshop Inc, Not the NYT List: 100 Fine Books from Around the World (and Not Just the USA) of the 21st Century, https://scroll.in/article/1070853/not-the-nyt-list-100-fine-books-from-around-the-world-and-not-just-the-usa-of-the-21st-century (last accessed on 5 September 2025).

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

map of the world a little bit to tell a different story? What if we shifted what we consider the mainstream a little bit?

That is the impulse that inspires the edited volume by Tom Daly and Dinesha Samararatne on democratic consolidation and constitutional endurance. It relies on the modified Mercator-Miller projection map of the world which places Africa and Asia at the centre of the map to 'radically reorient' the conversation of the comparative constitutional field (p. 3). It decenters the usual suspects and places the experiences of African and Asian democracies and their endurance at the heart of questions of democracy and its institutional-non-institutional challenges. In doing so, it builds on and revives earlier but somewhat sidestepped tradition of comparison between the two biggest and deeply diverse continents of the world.[3]

The edited volume includes case studies of Malaysia, Thailand, Myanmar, Sri Lanka, Maldives, Ethiopia, and Gambia - seven countries covering a vast region of East Asia, South Asia, and Africa. The comparative choices of the book are welcomed as most of these countries have remained understudied in the conversation on democracy, constitutions, and their endurance. The comparative choices, however, also pose a challenge. Any discussion of understudied jurisdictions first requires a detailed case study style account of the country before comparative conclusions can be drawn. The authors and editors respond to this challenge by dividing the volume in two parts: part one is thematic, and part two provides single country case studies. The two parts correspond to the two aims of the volume: first, to contribute to the growing scholarship on backsliding, constitutional endurance, and resilience through case studies, and second to provide bottom-up, contextualized chapters on understudied jurisdictions (p. 4). Although appearing as two separate parts, the two form a seamless intertwined web. Part two applies the themes to the case studies and, in turn, part one distils the overarching themes from the case studies. The volume thus engages in a constant and deeply self-reflective style of doing comparison.

B. The Wedding Party

In the introductory chapter, Daly and Samararatne imagine the global conversation on democracy and constitutions as a wedding party with hierarchical and regimented seating arrangement. The usual suspects occupy the tier one table or the high table. They are the referential framework through which all other constitutional contexts must be filtered. Their language is the language in which varied constitutional experiences have to be articulated. As the editors point out, the occupants of the high table decide, 'what constitutional democracy 'is', what is valuable about it, how it should function, and who counts as a

3 In 1987, leading scholars like Neelan Tiruchelvam, Radhika Coomaraswamy undertook comparative research on adjudication in divided societies through case study of three Asian (India, Sri Lanka, and the Philippines) and two African countries (Tanzania and Mozambique). See *Neelan Tiruchelvam / Radhika Coomaraswamy* (eds.), The Role of the Judiciary in Plural Societies, London 1987.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

democracy.' (p. 2) The experiences that do not fit in the framework of usual suspects or dwell too far away from it have to be adjusted, assimilated, or even worse discarded altogether. Overall, the editors point out that the relevance, and the value of a comparative work gets determined by its *'proximity to the central guests'* (p. 1). Some jurisdictions are considered naturally belonging in the wedding party; some have to justify why they are there; and then there are whole bunch that are not even invited. Through the wedding party analogy, the editors sharply bring out the limits of global north framing of experiences of backsliding and resilience.

A good example of the normative dominance of usual suspects is the over-occupation of the field with courts. Courts are the lead occupants of comparative constitutional scholar's mind.[4] This, in part, is a result of the influence of the US constitutional system in the scholarship where rights have been constitutionally entrenched, and the federal and state courts have been provided vast powers to declare any law unconstitutional and invalid. Other institutions like political parties,[5] military,[6] and fourth-branch institutions,[7] have only recently become part of the conversation. The edited volume joins these efforts and moves the conversation on democracy and resilience beyond courts. The thematic chapters of the book include an analysis of executive-legislative relationship (i.e. the impact of presidential, parliamentary, semi-presidential, republic-monarchy in constitutional endurance);[8] military institution and its impact on democracy,[9] political parties and democratization,[10] and even the role of non-institutional factors like constitutional cultures[11]. This makes the volume multi-institutional and multi-factorial.

The tier two table in the wedding party is occupied by what I term the *'new usual suspects'*. The dominant nations in the global south tend to repeat the patterns of the global north: seeking standardization, overshadowing varied experiences of other polities in a

4 Ginsburg terms it as 'core of comparative field'. See *Tom Ginsburg*, The State of the Field, in: David S. Law (ed), Constitutionalism in Context*,* Cambridge 2022, p. 11.

5 *Tom Ginsburg / Aziz Z. Huq / Tarun Khaitan* (eds.), The Entrenchment of Democracy: The Comparative Constitutional Design of Elections, Parties and Voting, Cambridge 2024.

6 *Melissa Crouch,* The Military Turn in Comparative Constitutional Law: Constitutions and the Military in Authoritarian Regimes, Annual Review of Law and Social Science 20 (2024), p. 53.

7 *Tarunabh Khaitan,* Guarantor Institutions, Asian Journal of Comparative Law 16 (2021), p. 40.

8 *Kimana Zulueta-Fülscher*, The Role of Governing Institutions in Attempted Reform Process, in: Tom Daly / Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa, Oxford 2024.

9 *Shanil Wijesinha* / *Daniel Alphonsus*, Civil-Military Relations, in: Tom Daly / Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa, Oxford 2024.

10 *Mouli Banerjee*, Here, there, Everywhere: Locating the Political Party in Democratic Transitions and Backsliding, in: Tom Daly / Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa, Oxford 2024.

11 *Cheryl Saunders*, Constitutional Cultures, in: Tom Daly / Dinesha Samararatne (eds.), Democratic Consolidation and Constitutional Endurance in Asia and Africa, Oxford 2024.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

region, and acting as normative framework on the basis of which all experiences have to be discussed. Countries like India or South Africa are often used as a rushed representative for the whole of South Asian and African continent. The dominance of India and South Africa in the comparative world shows that even the 'global south' is not a monolithic whole. Who gets a seat on the 'global south' table at the wedding party also gets determined by the history of colonization, and geopolitical and economic factors. Asia and Africa are geographically, socio-economically and culturally diverse continents. They do not and cannot tell a single story of democracy and resilience. As Samararatne's own previous work with Tarun Khaitan and Swati Jhaveri, shows that the experiences of resilience and democratic decay in South Asia both disturb and affirm the global patterns, making it hard to rely on any easy narratives.[12]

The book challenges the thematic dominance in the field. From the South Asian region, India is not included in the volume. It is Sri Lanka, Maldives, and Myanmar. In her another work Samararatne describes these jurisdictions as 'south of south' i.e. countries which even within the global south, remain understudied.[13] The edited volume thus undertakes 'double decentering', both inside and outside the global south. It disrupts what the editors' term as 'top-table epistemic centrality' (p. 5) not only in global north but also in global south. The double decentering asks us to imagine and articulate different stories and, in the process, learn more about the existing stories. The 'southern turn' of the comparative field will surely benefit from these new styles of comparisons.[14]

C. Immersive Comparison

The edited volume engages in an immersive comparative exercise through in-depth single-country case studies. As I and others have argued, the southern turn in the comparative field requires making more room for differences and, therefore, more in-depth, contextual case studies.[15] Contextual single-country case studies can unburden the case study from comparative frameworks, settled boundaries, and terms and allow us to study the case on its own terms. It can allow us the lens of 'difference' rather than being forced into finding sameness. For instance, the edited volume includes a chapter on Maldives and the role of political parties, coalitions, and personalized leadership in the Presidential system since the

12 *Surbhi Karwa*, Towards Grounding Differences: Review Essay on South Asian Comparative Constitutional Studies, Comparative Constitutional Studies 2 (2024), p. 370.

13 *Dinesha Samararatne*, Book Review: Philipp Dann, et al., The Global South and Comparative Constitutional Law (OUP 2020), International Journal of Constitutional Law 20 (2022), p. 536.

14 *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 1.

15 *Surbhi Karwa*, Towards Grounding Differences: Review Essay on South Asian Comparative Constitutional Studies, Comparative Constitutional Studies 2 (2024), p. 370. See also *Arun Thiruvengadam*, Foreword, in: Swati Jhaveri et al. (eds.), Constitutional Resilience in South Asia, Oxford 2023, pp. viii-ix.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

promulgation of the 2008 constitution in the country. Since 2008 no party has received the threshold of 50+1 votes, creating a unique situation of coalitions in a Presidential system. Maldives is seeing a small but determinative rise of comparative scholarship, and this chapter contributes towards better understanding of constitutional system in the country and also raises important questions about designing presidential systems, tackling corruption, and their impact on the process of strengthening democracy.[16] In the chapter, India does not appear as prime comparator and norm setter. Instead, Maldives is described in its own terms creating a database for further comparative exercises involving Maldives.

Notably, the volume and seven case studies are not disjointed, a challenge that edited volumes often face. For instance, the broader theme of legislative-executive relationship emerging out of the experience of Maldives and its impact on democracy and resilience, in turn, is discussed in thematic chapter by Kimana Zulueta-Fülscher. Each of the countries in the volume has gone through democratising in the past and is at various stages of democracy, backsliding, and their reverse, and back forth. They all have been impacted by colonial rule, directly or indirectly. They push us to think more deeply about what is in crisis in the current crisis of democracy, and how do we prevent or salvage it. These case studies warn us against exceptionalizing experiences of the global north. Instead, as the editors point out, it takes us towards recognition of 'cyclic' and 'recurrent' nature of democratization, consolidation, and decay and backsliding (p. 8). They point us towards a concerning reality where instead of operating as polar opposites of 'normal period' and 'exceptional period', the threat to democracies is perhaps more systemic and more entrenched.

D. Conclusion

The field of 'world literature' often follows a pattern. Literary theorists explain that there are 'well-known strategies' and 'formulae' for writing 'world literature': 'Keep the prose plain and readable, the imagery simply and translatable, the setting metropolitan and identifiable.'[17] We may run similar risks in comparative constitutional field. The edited volumes, like the current one, demonstrate that we require a more sincere acknowledgement what we choose to compare and how we compare is not entirely a neutral exercise. They are deeply intertwined with our own nationalistic locations and geo-political power structures.

Perhaps the analogy of wedding is troubled not only because of the underlying gendered and blood-based connotations of the idea but also because at the weddings only two people can be centre of attention, and only invited guests can join. We can aspire, instead, to be a university society or club which, in principle, is open to all irrespective

16 See, for instance, Ahmed Nazeer, The Maldives: A Parable of Judicial Crisis, Institutional Corrosion and Democratic Demise, in: Swati Jhaveri et al. (eds.), Constitutional Resilience in South Asia, Oxford 2023, p. 211. Shamsul Falaah, Towards a Maldivian Nation State: The Constitutions of 1932 and 1968, in: Kevin YL. Tan / Ridwanul Hoque (eds.), Constitutional Foundings in South Asia, London 2021.

17 *Vineet Gill*, Here and Hereafter: Nirmal Verma's Life in Literature, Gurgaon 2022, p. xvi.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of any ties; and where no one is centre of attention by design. The world of democracy, constitutionalism, and law is kaleidoscopic. It requires multiple reflections from multiple standpoints. Light needs to be allowed from various angles, and various centres for more patterns and, consequently, more vibrant imagery. Else, the conversation, as Daly and Samararatne put it, will be 'distorted'.

Surbhi Karwa
Ph.D. Candidate, UNSW Sydney

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Call for Papers

»VRÜ/World Comparative Law« analyses developments in constitutional and public law in states and regions outside Europe and North America (in what used be called the 'Third World') as well as their regional and international integration. Founded in 1968 and inspired by the ideals of 'decolonization' and fair cooperation, the Journal also has a special interest in the entanglements between 'Global South' and 'Global North', including the presence of the 'South in the North'. Looking beyond the surface of globalization, 'VRÜ/World Comparative Law' promotes scholarship that uncovers the particularities of legal configurations as well as their interdependencies in an interconnected world.

The journal seeks to publish theoretically and historically informed studies of law in context, but is equally open to contributions from social sciences and from practitioners. It has a particular interest in analyses that compare several legal orders but is equally attentive to studies in international law and its impact on Asia, Africa and Latin America as well as comparative international law.

»VRÜ/World Comparative Law« addresses authors and readers on all world regions and aims to serve as a forum of mutual exchange. It publishes research articles, shorter reports about current events or conferences as well as book reviews.

All manuscripts undergo a double-blind peer-review. The journal is published quarterly and welcomes contributions in English, and exceptionally in German, Spanish and French.

Manuscripts may be submitted as an e-mail attachment and under the condition that they have not been published elsewhere in any form. A short abstract and some details about the author (both in English) should be added. We regret that no remuneration can be offered for publication. Contributions must be saved in a simple editable format (no PDF files please), i.e. without automatic hyphenation, with a consistent font, and NO activated hyperlinks or other macros. The length of an article should not exceed 10,000 words using 12 pt Times New Roman, line space 1,5. Please refrain from using bold type or underlining in the text, italics only sparingly. Footnotes (font 10 pt Times New Roman, line space single) should use tab after standard auto number and keep to the following scheme, including typeface as indicated:

(a) books: author's full name, title, place, year of publication, page number;
(b) journals: author's full name, title, name of journal volume (year), page number; do not cite the publishing company;
(c) book reviews: should contain a head-line citing author(s)/editor(s), full title of book (in bold font), publishing company, place and year of publication, page numbers, price and ISBN-number.

Titles of works cited in languages using non-Latin script should be given in an established transliteration, and a translation of the title should follow in [ ]. For detailed submission guidelines see our website: www.vrue.nomos.de

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Impressum

Verfassung und Recht in Übersee (VRÜ)
World Comparative Law (WCL)
ISSN 0506-7286

Editor in Chief: Prof. Dr. Philipp Dann (V.i.S.d.P.)

Please send submissions to: Prof. Michael Riegner – Universität Erfurt – Juniorprofessur für internationales Verwaltungsrecht und Völkerrecht – Nordhäuser Str. 63 – 99089 Erfurt
Telefon: +49 (0) – 361 737-4761
E-Mail: vrue@nomos-journals.de | www.vrue.nomos.de

Manuscripts and other submissions: All submissions should be sent to the abovementioned address. There is no liability for unsolicited manuscripts that are submitted. They can only be returned if return postage is enclosed. Acceptance for publication must be made in text form. With the acceptance for publication, the author transfers the non-exclusive, spatially and temporally unlimited right to reproduce and distribute in physical form, the right of public reproduction and enabling access, the right of inclusion in databases, the right of storage on electronic data carriers and the right of their distribution and reproduction as well as the right of other exploitation in electronic form for the duration of the statutory copyright to Nomos Verlagsgesellschaft mbH & Co.KG. This also includes forms of use that are currently not yet known. This does not affect the author's mandatory right of secondary exploitation as laid down in Section 38 (4) UrhG (German Copyright Act) after 12 months have expired after publication. A possible Creative Commons license attached to the individual contribution, or the respective issue has priority in case of doubt. For copyright, see also the general notes at www.nomos.de/copyright. Unsolicited manuscripts – for which no liability is assumed – are considered a publication proposal on the publisher's terms. Only unpublished original work will be accepted. The authors declare that they agree to editing that does not distort the meaning.

Copyright and publishing rights: All articles published in this journal are protected by copyright. This also applies to the published court decisions and their guiding principles, insofar as they have been compiled or edited by the submitting person or the editorial staff. Copyright protection also applies with regard to databases and similar facilities. No part of this journal may be reproduced, disseminated or publicly reproduced or made available in any form, included in databases, stored on electronic data carriers or otherwise electronically reproduced, disseminated or exploited outside the narrow limits of copyright law or beyond the limits of any Creative Commons license applicable to any contribution without the written permission of the publisher. Articles identified by name do not necessarily reflect the opinion of the publisher/editors. The publisher observes the rules of the Börsenverein des Deutschen Buchhandels e.V. on the use of book reviews.

Advertisments: Verlag C.H.Beck GmbH & Co. KG – Media Sales – Dr. Jiri Pavelka – Wilhelmstraße 9 – 80801 München

Media-Sales: Tel: (089) 381 89-687 – mediasales@beck.de

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Publisher and overall responsibility for printing and production: Nomos Verlagsgesellschaft mbH & Co. KG – Waldseestr. 3-5 – D-76530 Baden-Baden. Telefon +49 – 7221 – 2104-0 / Fax 49 – 7221 – 2104-27 – www.nomos.de

Geschäftsführer/CEO: Thomas Gottlöber – HRA 200026, Mannheim
Stadtsparkasse Baden-Baden, IBAN DE05662500300005002266 (BIC SOLADES1BAD).

Frequency of publication: quarterly

Annual subscription prices for the print edition: Individual customers: € 118,- Institutions: subscription € 319,-. Single issue: € 34,- All prices include VAT and are subject to a distribution fee (domestic € 18,-/foreign € 33,-) or direct order fee € 3,50. Invoices will be issued after publication of the first issue of the year.

Orders: Orders can be placed at local bookstores or directly at Nomos Verlagsgesellschaft Baden-Baden

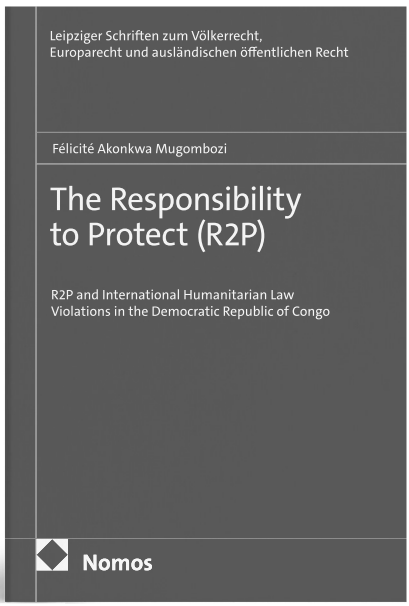
Customer Service: Phone: +49-7221-2104-280 – Telefax: +49-7221-2104-285 – E-Mail: zeitschriften@nomos.de

Cancellations: Cancellation of the subscription is possible with a notice period of six weeks to the end of the calendar year.

Change of Address: Please notify us of any changes in address as soon as possible. When doing so, please indicate the new and old address next to the title of the magazine. Note in accordance with Art. 21 (1) EU-GDPR: In the event of a change of address, Deutsche Post AG may notify the publisher of the new address even if no forwarding order has been placed. An objection to this can be lodged with Post AG at any time with effect for the future.

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

The Challenges of Applying IHL in the DRC



Félicité Akonkwa Mugombozi

The Responsibility to Protect (R2P)

R2P and International Humanitarian Law Violations in the Democratic Republic of Congo

2025, 256 pp., pb., € 84.00
ISBN 978-3-7560-3534-2
E-Book 978-3-7489-6597-8
(Leipziger Schriften zum Völkerrecht, Europarecht und ausländischen öffentlichen Recht, vol. 26)

This study analyzes the implementation of the Responsibility to Protect (R2P) and the challenges of applying IHL in the Democratic Republic of Congo. It examines the Force Intervention Brigade's role under R2P, the attribution of IHL violations among the UN, troop-contributing states, and the DRC, as well as available remedies for victims. A key contribution is the interpretation of UN Security Council Resolution 2098, which created the Brigade within MONUSCO and supports all three R2P pillars. The book also explores reparation mechanisms, proposing innovations such as a victim compensation fund that links reparation with prevention and post-conflict reconstruction as central to R2P.

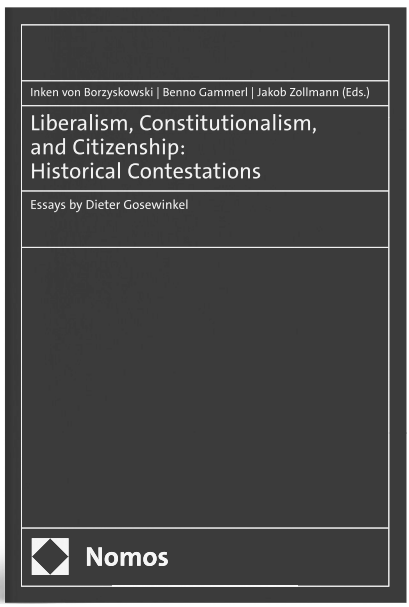
Available digitally on Inlibra.com

Available in bookstores or via nomos-shop.de | Customer Service +49 7221 2104-222 | service@nomos.de
Returns are at the risk and expense of the addressee.

Nomos

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Knowing History to Shape the Future



Inken von Borzyskowski | Benno Gammerl | Jakob Zollmann [Eds.]

Liberalism, Constitutionalism, and Citizenship: Historical Contestations

Essays by Dieter Gosewinkel

2025, 318 pp., pb., € 104.00
ISBN 978-3-7560-2445-2
E-Book 978-3-7489-5190-2

In his writing, Dieter Gosewinkel skillfully combines legal expertise with meticulous historical analysis. He examines liberal, conservative, and social-democratic schools of thought and then devises new conceptual frameworks that open up fresh perspectives on important actors, on debates about property, on intricate socio-legal phenomena like citizenship, as well as on constitutionalism between past failures and future opportunities. The broad social histories Gosewinkel writes about reach far beyond the narrow confines of the law. They echo various voices from the past and allow readers to understand how things could always have developed otherwise. The texts, assembled here for the first time in English, thus enable a much needed multi-perspective conversation between various liberal-democratic positions of the present.

Available digitally on Inlibra.com

Available in bookstores or via nomos-shop.de | Customer Service +49 7221 2104-222 | service@nomos.de
Returns are at the risk and expense of the addressee.

Nomos

https://doi.org/10.5771/0506-7286-2025-3 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY