

# Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights

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## I. INTRODUCTION

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

This Article analyzes the institutional structure and jurisprudence of Benin's Constitutional Court and argues that its unique mandate provides a model for addressing human rights violations through a state-sponsored institution, but that certain characteristics inherent to constitutional courts limit the Beninese Court's capacity to provide redress to victims of abuse. This Article seeks to understand the institutional and political factors that explain the Court's success, analyze the sources of its challenges, and offer recommendations to further consolidate its capacity to guarantee human rights. Part II of this Article will provide an historical overview of Benin's transition to democracy in 1990 and a brief summary of the Beninese Constitution. Part III will analyze the institutional features of Benin's Court, in-

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1. BENIN CONST. tit. V, art. 121, para. 2.

cluding the purpose underlying its establishment, its subject matter jurisdiction, rules of standing, requirements for membership, the nomination process, membership perks and institutional independence, the decision making process, judicial opinions and their effects, and remedies. In order to situate the Beninese Court along an institutional spectrum and put in relief its hybrid nature, this Part will draw comparisons to both state-sponsored human rights institutions and the French and German constitutional courts. With a focus on analyzing the legal rules and rationales underlying the Court's decisions, Part IV will examine the human rights jurisprudence of the Constitutional Court. Finally, Part V will study how the Court's structure has limited its remedial power and thus impeded its ability to protect those who have suffered human rights abuses and will make recommendations to mitigate this result.

## II. HISTORICAL OVERVIEW

### A. 1972–1989: Marxist-Leninist Regime

The story of Benin's Constitutional Court begins with the status of human rights before the country's 1990 transition to democracy. Benin, formerly Dahomey, gained its independence from France on August 1, 1960.<sup>2</sup> In the subsequent decade, Benin endured five coups d'état<sup>3</sup> and several constitutions.<sup>4</sup> General Mathieu Kérékou took power in October 1972 and declared a Marxist-Leninist state under the control of a single authoritarian party, the Party of the Popular Revolution of Benin (*le Parti de la Révolution Populaire du Bénin*—PRPB).<sup>5</sup>

Until its demise in March 1990, the regime actively abused the human rights of its citizens. Kérékou transformed Benin into a police state, sending the opposition underground.<sup>6</sup> A pamphlet published by the League for the Defense of Human Rights in Benin (*Ligue pour la Défense des Droits de l'Homme au Bénin*) details hundreds of cases of torture and other human rights abuses perpetrated from 1972 through 1991 by government officials.<sup>7</sup> Julien Y. Togbadja, now the president of the League, languished as a political prisoner under the Kérékou regime. In recalling the mood that prevailed at that time, Togbadja emphasized the strong repression suffered by the Beninese population.<sup>8</sup> The Honorable Harriet Isom, who arrived in Benin as the U.S. ambassador in late 1989, recalls the regime micro-managing her interaction

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

3. *Id.* at 13–14.

4. See Jessie L. Matthews, *Republic of Benin*, in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1993).

5. ADAMON, *supra* note 2, at 13, 21.

6. *Id.* at 13.

7. See *LIGUE POUR LA DÉFENSE DES DROITS DE L'HOMME AU BÉNIN, NOMENCLATURE DES TORTIONNAIRES DE LA RÉPUBLIQUE DU BÉNIN 1972–1991* (2d ed. 1995).

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

with the Beninese, forbidding anyone from coming to her receptions or having his picture taken with her without Kérékou's permission.<sup>9</sup> Summing up the reality of life under the regime, Luc-Omer Gandemey, a Beninese human rights activist, stated: "The word liberty did not exist."<sup>10</sup>

An analysis of the factors that contributed to sweeping changes in Benin in 1989 is outside the scope of this Article. The events unfolded as follows. In November 1989 teachers and civil servants threatened a general strike because of the bankrupt government's failure to pay salaries and scholarships.<sup>11</sup> Completely discredited, Kérékou renounced Marxism-Leninism on December 5. Nationwide demonstrations began on December 11.<sup>12</sup> Kérékou subsequently accepted the principle of multi-party government and issued a decree establishing a committee to organize an assembly of "all the living forces of the nation, whatever their political sensibilities."<sup>13</sup> On February 19, 1990, a "National Conference" commenced.<sup>14</sup>

### B. Benin's National Conference

Given the enormity of the problems facing Benin, the ultimate achievements of the nine-day National Conference were inconceivable when it began. A delicate process of consensus building resulted in the disbandment of the PRPB regime,<sup>15</sup> the release of political prisoners,<sup>16</sup> the nomination of conference delegate Nicéphore Soglo to a newly created Prime Minister position,<sup>17</sup> the establishment of a Constitutional Commission to author a new constitution,<sup>18</sup> the elaboration of a precise program to install new democratic institutions,<sup>19</sup> "a new economic policy based on liberalism and structural adjustment,"<sup>20</sup> and the establishment of the High Council of the Republic (*le Haut Conseil de la République*—"HCR")<sup>21</sup> to guide the country's transition to democracy.

It would be anachronistic to analyze Benin's triumphant National Conference as an explicit victory for human rights. The Conference was foremost an effort to extricate the country from the clutches of the outgoing regime. Nevertheless, among the tasks assigned the transitional HCR, whose mem-

9. Telephone interview with the Honorable Harriet Isom, former U.S. Ambassador to Benin (Mar. 5, 2003).

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

11. John R. Heilbrunn, *Social Origins of National Conferences in Benin and Togo*, 31 J. MOD. AFRICAN STUD., 277, 286 (1993).

12. *Id.*

13. *Id.*

14. ADAMON, *supra* note 2, at 44.

15. *Id.* at 89.

16. *Id.* at 150.

17. *Id.* at 96.

18. *Id.* at 103.

19. *Id.* at 146.

20. *Id.* at 70.

21. *Id.* at 94-95.

bers were installed by Kérékou on March 9, 1990,<sup>22</sup> was “the defense and the promotion of human rights, such as they are proclaimed and guaranteed by the African Charter on Human and Peoples’ Rights.”<sup>23</sup> The HCR remained true to its purpose by creating a constitution and institutions that elaborated the results of the National Conference.

### C. *Human Rights and the Constitution of 1990*

Under the Constitution of 1990, Benin’s Constitutional Court is the state’s highest jurisdiction on constitutional matters.<sup>24</sup> To understand the breadth of this mandate, particularly as it relates to human rights, a brief overview of the document is in order. Unlike its numerous predecessors, human rights and public liberties are the focus of Benin’s Constitution of December 11, 1990.<sup>25</sup> The Constitution directly incorporates the African Charter on Human and Peoples’ Rights<sup>26</sup> and the Charter has served as the source for rights invoked in numerous Constitutional Court decisions.<sup>27</sup> Title II of the Constitution dedicates thirty-four articles to human rights. The Constitution places a heavy burden on the state to guarantee these rights, culminating in article 40, which declares that the State has the duty to ensure the diffusion and teaching of the Constitution, the Universal Declaration of Human Rights of 1948, the African Charter on Human and Peoples’ Rights of 1981, as well as all properly ratified international human rights instruments.<sup>28</sup>

Thus the Constitution’s list of enumerated rights and corresponding state duties is lengthy. Far from a mimeograph of other states’ constitutions however, the document directly addresses the history from which Benin had emerged and the particularities it faced, beginning with the Preamble, which acknowledges the country’s “turbulent constitutional and political evolution since gaining independence”<sup>29</sup> and declares: “the successive changes of political regimes and governments did not erode the determination of the Beninese people to seek in their own spirit the cultural, philosophical, and spiritual values of civilization that drive the power of their

22. *Id.* at 94.

23. *Id.* at 112.

24. BENIN CONST. tit. V, art. 114.

25. As Johanès Toudonou and Césaire Kpenonhoun document, the constitutions of 1959 and 1960 do not address human rights. The 1964 constitution devotes eleven articles to human rights, while the 1968 constitution devotes seven articles. The fundamental law of 1977 addresses human rights in twenty-six articles. JOHANÈS ATHANASE TOUDONOU & CÉSIRE KPENONHOUN, CONSTITUTIONS ET TEXTES CONSTITUTIONNELS DE LA RÉPUBLIQUE DU BÉNIN DEPUIS LES ORIGINES DAHOMÉENNES 226 (1997).

26. BENIN CONST. tit. II, art. 7.

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

28. BENIN CONST. tit. II, art. 40, para. 1.

29. BENIN CONST. pmbi.

patriotism.”<sup>30</sup> In a dramatic rejection of the previous regime, the Preamble declares the Beninese people’s “fundamental opposition to any political regime founded on arbitrariness, dictatorship, injustice, corruption, misappropriation of public funds, regionalism, nepotism, confiscation of power, and personal power,”<sup>31</sup> and article 16 guarantees that “no citizens shall be forced into exile.”<sup>32</sup> The tactics of previous regimes were explicitly outlawed in article 19, which states: “Any individual and any state agent is freed from the duty of obedience when the order received constitutes a serious and manifest attack on the respect for human rights and public liberties.”<sup>33</sup> In recognition of the linguistic and cultural diversity of the population, article 11 states: “All the communities that make up the Beninese nation shall enjoy the freedom to use their spoken and written languages and to develop their own culture while respecting those of others”<sup>34</sup> and requires the State to “promote the development of national languages used to communicate within the country.”<sup>35</sup> More generally, the Preamble declares the Beninese peoples’ “firm will to defend and safeguard our dignity in the eyes of the world and to regain our former place and role as a pioneer of democracy and human rights.”<sup>36</sup> Thus, just as Benin’s National Conference blazed a trail in its distinctive transition to democracy, the resultant Constitution established a human rights regime that is unique to Benin.

### III. INSTITUTIONAL FEATURES OF BENIN’S CONSTITUTIONAL COURT

Tasked with implementing Benin’s transition to democracy, the HCR designed institutions that were familiar in name to those in other states but often different in function. This Part will seek to identify the similarities and delineate crucial differences. As will be discussed, Benin’s Constitutional Court can be considered a hybrid institution that encompasses the competencies typically associated with constitutional courts *and* a human rights mandate generally advanced by state sponsored human rights institutions. To provide context for such a view of Benin’s Court, this Part will reference the typical features of national human rights commissions. As Human Rights Watch has documented, state-sponsored human rights commissions have become a new vogue among governments, particularly in Africa, where their number multiplied significantly in the 1990s.<sup>37</sup> Human rights

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30. *Id.*

31. *Id.*

32. BENIN CONST. tit. II, art. 16, para. 2.

33. *Id.* at art. 19, para. 2.

34. *Id.* at art. 11, para. 1.

35. *Id.* at para. 2.

36. BENIN CONST. pmbi.

37. Human Rights Watch reports that in 1989 there was one human rights commission in Africa. By 2000 there were two dozen in operation or in the process of formation in Africa. HUMAN RIGHTS WATCH, PROTECTORS OR PRETENDERS? GOVERNMENT HUMAN RIGHTS COMMISSIONS IN AFRICA (2001), available at <http://www.hrw.org/reports/2001/africa/overview/summary.html>.

commissions are established as autonomous government bodies that work for the effective application of the state's laws and practices concerning human rights.<sup>38</sup> Their role is to push other state bodies to uphold their responsibilities in protecting human rights.<sup>39</sup> Institutional independence seems to be the greatest challenge faced by national human rights commissions, as they struggle to influence the practices of the very government that creates, staffs, and funds them.<sup>40</sup>

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

### A. *The Purpose of the Court*

During the National Conference, a constitutional court, together with an Economic and Social Council and the High Authority for Audiovisual Media and Communications, were suggested to offset the power of the President and the National Assembly.<sup>41</sup> Two-term (or "Former") Constitutional Court member Maurice Glèlè-Ahanhanzo, who chaired the Commission on Laws and Constitutional Affairs during the National Conference, reminds those examining the Court today that, having known arbitrary governance for so long, its framers designed a mechanism to guarantee stability.<sup>42</sup>

Envisioning the court as a balancing institution fits with traditional notions of the purpose of constitutional courts. Hans Kelsen, a leading jurist of his time and the drafter of the Austrian Constitution of 1920, which established Europe's first constitutional court, "recognized the need for an institution with power to control or regulate legislation."<sup>43</sup> Kelsen saw the institution as a "negative legislature" that supplemented the parliament, the "positive legislator,"<sup>44</sup> because its decisions had the power "to make a statute disappear from the legal order."<sup>45</sup> The breakdown of the pre-war democracies across Europe led jurists and politicians alike to reconsider the role of the

38. *Id.*

39. *Id.*, available at <http://www.hrw.org/reports/2001/africa/overview/factors.html>.

40. *Id.*, available at <http://www.hrw.org/reports/2001/africa/overview/summary.html>.

41. ADAMON, *supra* note 2, at 77.

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

43. John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 52 (2002-2003).

44. Bojan Bugarcic, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 256 (2001).

45. Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST. L. 977, 983 (2001).

judiciary within the balance of power arrangements characteristic of democracies. Instead of relegating the judiciary to secondary status behind the parliament, as had historically been the case, several European countries designed constitutional courts to play a mediating role between the state's institutions. For example, France's *Conseil Constitutionnel*, established in 1958, was intended as a mechanism to ensure a strong executive by keeping Parliament within its constitutional role.<sup>46</sup> As such, its essential function was to protect fundamental rights from encroachment by the legislature (not by the administration or the courts).<sup>47</sup> When Germany decided to create a specialized constitutional court after World War II, it was granted authority over all constitutional disputes including the validity of the laws.<sup>48</sup> The German court also was designated to serve as *the* guardian of the so-called "Basic Rights," fundamental rights guaranteed to all German people.<sup>49</sup>

Thus the National Conference Commission's conception of Benin's Constitutional Court as a balancing institution was similar to the broad purposes underlying the French and German models. In response to the oppression of the previous regime, however, Benin went beyond those models. Limited standing rules mean constitutionally guaranteed human rights are typically only reviewed by constitutional courts when a *legislative* act under review infringes on those rights or when all other legal remedies have been exhausted. In contrast, article 114 of Benin's Constitution granted the Court the role to "guarantee the fundamental rights of the individual and public liberties."<sup>50</sup> The Constitution also specified standing rules that grant individuals access to the court for alleged violations of human rights.<sup>51</sup> As Glèlè-Ahanhanzo describes, the fear of government that had permeated Benin needed to be replaced with the rule of law, and the rule of law implied that each citizen possess the right to access the Court tasked with guaranteeing their human rights.<sup>52</sup>

### B. Subject Matter Jurisdiction

The uniqueness of Benin's Constitutional Court stems from its subject matter jurisdiction. To ascertain where the "different-ness" begins, it is worthwhile to explore the jurisdictional boundaries traditionally associated with constitutional courts. According to Cappelletti and Cohen, Kelsen held

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

47. *Id.* at 46.

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

49. Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, in CONFERENCE REPORT: FIFTY YEARS OF GERMAN BASIC LAW: THE NEW DEPARTURE FOR GERMANY 4 (American Institute for Contemporary German Studies ed., 1999), available at <http://www.aicgs.org/publications/PDF/basiclaw.pdf>.

50. BENIN CONST. tit. V, art. 114.

51. BENIN CONST. tit. I, art. 3, para. 3, states: "Every citizen has the right to start legal proceedings in the Constitutional Court against the laws, texts, and acts presumed unconstitutional."

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

the view that individual rights (“norms of natural law”) were inappropriate for judicial review. Nonetheless, less than three decades later, the German Constitutional Court rejected a model which purposefully avoided review of matters dealing with human rights. Today, “roughly 95% of the [German] Court’s docketed caseload has been generated from constitutional complaints, which may be filed by any person who claims that government action has violated a right under the Basic Law if the person has exhausted other legal remedies.”<sup>53</sup>

The subject matter jurisdiction of the French *Conseil Constitutionnel* permits it to be heavily involved in electoral matters: it is tasked with ensuring the proper conduct of presidential elections and declaring their results,<sup>54</sup> ruling on disputed parliamentary elections,<sup>55</sup> and ensuring the proper conduct of referendum proceedings and declaring their results.<sup>56</sup> The *Conseil Constitutionnel* polices the boundaries of the legislative competences of Parliament and the executive.<sup>57</sup> In practice, the referral of enacted laws to the *Conseil Constitutionnel* has become a procedure for challenging them on substantive grounds, particularly for breaches of fundamental rights.<sup>58</sup> The *Conseil Constitutionnel* also examines the constitutionality of organic laws and Parliament’s internal code of procedures before they are promulgated<sup>59</sup> and rules on the constitutionality of international commitments.<sup>60</sup> Finally, the *Conseil Constitutionnel* advises the President on when to seek to use emergency powers and on the rules made thereunder.<sup>61</sup>

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

—Shall rule obligatorily on:

The Constitutionality of organic laws and of laws in general before their promulgation; . . .

The Constitutionality of laws and regulatory acts deemed to infringe on fundamental human rights and on public liberties, and in general on the violation of the rights of the individual;

53. JACKSON & TUSHNET, *supra* note 48, at 521.

54. CONST. tit. VII, art. 58.

55. *Id.* at art. 59.

56. *Id.* at art. 60.

57. *Id.* at arts. 61–62.

58. JACKSON & TUSHNET, *supra* note 48, at 507.

59. CONST. tit. VII, art. 61, para. 1.

60. *Id.* at tit. VI, art. 54.

61. Institutional Act on the Constitutional Council, Ordinance No. 58-1067 of Nov. 7, 1958, § 54, amended by Ordinance No. 59-223 of Feb. 4, 1959, Institutional Act No. 74-1101 of Dec. 26, 1974, and Institutional Act No. 95-63 of Jan. 19, 1995, available at <http://www.conseil-constitutionnel.fr/langues/anglais/texts.pdf> (last visited Mar. 1, 2004).



### Conflicts of attributions between the institutions of the State

—Safeguard the regularity of the election of the President of the Republic, examine the complaints, rule on the irregularities that [the Court] itself is able to raise and proclaim the results of the ballot, rule on the regularity of the referendum and proclaim its results;

—Rule in the event of disagreement, on the regularity of legislative elections; . . . .

Article 146 requires the Court to rule on the constitutionality of treaties and international agreements. In addition, the Constitution grants the Court a number of minor duties, which have seldom been exercised.<sup>62</sup>

While this Article intends to focus on the Beninese Court's human rights competence, a brief discussion of this list of jurisdictional heads will shed light on the uniqueness of the human rights role. While delicate systems of checks and balances characterize all democracies, an observer is struck by the extent to which the varied competencies of Benin's Court pull it towards a number of potential political landmines. As election arbiter, the Court must verify the elections of the very politicians who nominate its membership. As the highest jurisdiction on the constitutional matters, government administrators and parliamentarians must submit all law to the Court for review. As regulator of institutional attributions, the Court must mediate turf wars between the government institutions. As guarantor of human rights, the Court must consult all branches and levels of government to investigate allegations of abuse.

The broad influence the Court wields through its varied competencies may serve to explain its success in adjudicating human rights complaints. From a procedural standpoint, the Court itself investigates alleged human rights violations. A review of past Court decisions on human rights indicates that the alleged violator is almost always a government institution of some sort, be it the gendarmerie in a village or the President of the National Assembly. Although a few decisions note that the government authority failed to reply to the Court's investigative request for information regarding alleged abuses, the Court successfully obtains the necessary information in the vast majority of the cases. Recognizing that administrative cooperation is imperative to the Court's functioning, Clotilde Médégan, a current member of the Court, recounts that one of the first things the second Court did when it was assembled in 1998 was to write to President Mathieu Kérékou (who in 1996, declaring himself a "born again Christian," returned to Beninese politics and was subsequently elected president) asking him to pressure his

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

administration to be responsive to the Court.<sup>63</sup> Both Médégan and current Court President Conceptia Ouinsou submit that the government's responsiveness improved during their mandate that began in 1998.<sup>64</sup> According to Médégan, today administrators "run" when they get investigation inquiries from the Court. She acknowledges that the Court exercises a "strong influence" over the other branches of government because these branches want the Court to view them favorably in regulating the institutions.<sup>65</sup> Thus administrative responsiveness in dealing with allegations of human rights violations is likely linked to the not unsubstantial power the Court influences over these same institutions through its other competencies. Regardless of whether this was intended, the end result is welcome insofar as it has bolstered the Court's efficacy in investigating alleged human rights violations.

There is a dark side to this rosy analysis of the Court's jurisdictional mixing bowl. A plausible risk exists that a misstep by the Court in one of its competencies could severely undermine its authority and legitimacy in guaranteeing human rights. Election verification is the most likely area in which such a misstep could occur and it is fair to say that the Court stepped on a few political landmines during the two-round presidential elections of 2001, in which a record nineteen candidates faced off. One observer remarked that the Court's behavior during the election had "very little credibility."<sup>66</sup> Its troubles began when it proclaimed the results of the first round of voting without including the ballots cast in the entire Mono province.<sup>67</sup> When the additional 231,314 votes (some 9.69% of the total cast) were added to the tally, all the top candidates enjoyed some gains but the gap widened between the first place candidate, President Mathieu Kérékou, and second place candidate, former President Nicéphore Soglo.<sup>68</sup> Soglo denounced "the assassination of democracy" before pulling out of the race.<sup>69</sup> With the runoff scheduled in only four days, third place candidate Adrien Houngbédji also refused to compete against Kérékou. Bruno Amoussou, who had finished fourth in the first round and had already called on his supporters to vote for Kérékou, agreed to participate in the run off in order "to save the democracy," as he put it.<sup>70</sup> Explaining that he "[did] not want to participate in the disorganization of the country nor the ruin of its image overseas,"

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

64. Interview with Conceptia Ouinsou, President of the Beninese Constitutional Court (1998–present), in Cotonou, Benin (Jan. 16, 2003).

65. Interview with Clotilde Médégan, *supra* note 63.

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

67. Hippolyte Amouzouvi, *Le Chic, le Choc et le Chèque d'une Election Démocratique: Mots et Maux des Présidentielles de 2001 au Bénin*, 35 AFRIKA SPECTRUM 359, 366 (2000).

68. *Id.*

69. *Id.* at 367.

70. *Id.*

Amoussou appealed to voters to elect the best man.<sup>71</sup> Kérékou was ultimately re-elected with 83.64% of the votes, although 46.38% of eligible voters stayed home.<sup>72</sup> The role played by the Constitutional Court in the debacle called into question its independence and legitimacy. No one, however, has gone so far as to assert that the damage is permanent, or that the election controversy has affected the public's trust in the Court's role in adjudicating human rights violations. On the other hand, if the Court continues to find itself at the center of disputed results, its closely guarded independence could be severely damaged, and its repercussions could affect its legitimacy in areas beyond elections.

### C. Rules of Standing

More than any other factor, liberal rules of standing have facilitated the active role assumed by Benin's Constitutional Court in addressing human rights violations. A comparative perspective again assists in highlighting the uniqueness of the Beninese model. In Germany, an individual citizen can call on the Constitutional Court to review any act of a public authority as to its conformity with the human rights enumerated in the Basic Rights, provided that the petitioner has exhausted all other legal remedies.<sup>73</sup> Scholar Donald Kommers notes that in response to the flood of complaints received by the German Constitutional Court, which reached around 3,500 annually by the mid-1980s, each of the Court's two senates established three screening committees to filter out frivolous complaints.<sup>74</sup> In contrast, in France, citizens may only access the *Conseil Constitutionnel* in the event of an electoral dispute.<sup>75</sup> Citizens have no standing in any matter concerning the constitutionality of laws<sup>76</sup> or treaties.<sup>77</sup>

The fundamental role the Beninese Court plays in guaranteeing human rights in Benin is born of the fact that any individual or non-governmental human rights organization or association, as well as the President of the Republic, has standing before the Court for matters involving laws or regulatory acts that threaten the fundamental rights of the individual and public liberties, and in general, are deemed to violate human rights.<sup>78</sup> Unlike in Germany, citizens need not exhaust other legal remedies before calling on the Beninese Court, nor does Benin's Court employ a filtering process to

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71. *Benin: Electoral Commission Maintains 22 March Run-off Date*, Paris Agence France Presse (Foreign Broadcast Information Service, Doc. FBIS-AFR-2001-0320, Mar. 20, 2001).

72. Amouzouvi, *supra* note 67, at 367.

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

74. JACKSON & TUSHNET, *supra* note 48, at 633.

75. HENRY ROUSSILLON, *LE CONSEIL CONSTITUTIONNEL* 31 (4th ed. 2001); see also CONST. tit. VII, arts. 58-59.

76. ROUSSILLON, *supra* note 75, at 31; see also CONST. tit. VII, art. 61.

77. CONST. tit. VI, art. 54.

78. Loi Organique sur la Cour Constitutionnelle, Law No. 91-009 of May 31, 2001, art. 22.

prevent its full membership from considering the constitutional validity of an individual citizen's complaint. In addition, the Beninese Court can act on its own motion to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties.<sup>79</sup>

Benin's Court can address human rights violations only when citizens are willing to take the state to court without fearing negative repercussions.<sup>80</sup> Given the repressive tactics of the previous regime, this would seem to require a cultural shift in terms of how citizens perceived their government. The data show that the number of human rights decisions handed down has gradually increased since the Court's establishment. The first few years brought just a handful of human rights decisions: two in 1993, nine in 1996, and twelve in 1995. In 1996 that figure more than tripled to forty decisions. Although year-over-year increases only have been sustained since 2000, 2002 saw a record eighty-three decisions dealing with human rights. Unfortunately, there is little data to account for why, for example, 1997 only saw nineteen decisions on human rights after 1996 saw forty, or why in 1999 the Court only handed down fourteen human rights decisions, after adjudicating a then-record fifty-three cases in 1998. It has been suggested that most of the citizens who file are urban dwellers,<sup>81</sup> although there is no precise data to support this. The available data permit only a basic profile of who accesses the Court in human rights cases. Between 1991 (when the HCR began to hear the types of cases that would be heard by the Court once established in June 1993) and December 31, 2002, the Court handed down 350 decisions on human rights. Of these, 227 decisions had at least one male petitioner, just shy of six times more than the thirty-eight decisions that had at least one female petitioner. Seventeen petitioners were not-for-profit organizations, while twenty-three complaints were filed by individuals representing organizations. Twenty-two petitioners were represented by counsel. Seven complaints were filed by foreigners. Of the remaining decisions, three arose from a trial in the judicial system in which a determination of constitutionality was necessary for the disposition of the case, three were raised by the President of the Republic, one was raised by a deputy at the National Assembly, one was raised by the Minister of Commerce, and eleven found the Court acting on its own motion.

The dearth of available data likewise prevents conclusive analysis of why citizens chose to file complaints with the Court. A number of factors may serve as preliminary explanations for the steady increase in human rights complaints. Anecdotal evidence suggests that the Beninese were quick to

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79. BENIN CONST. tit. V, art. 121, para. 2.

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

81. Interview with Théodore Holo, *supra* note 66.

cast aside the old regime and embrace their new freedoms. U.S. Ambassador Isom describes a night and day change between the oppression of the previous regime and the openness of the post-National Conference era.<sup>82</sup> Given that almost three years passed between the National Conference and the inauguration of the Constitutional Court in mid-1993, one could argue that the public had already grown confident in its democratic institutions. Yet it may be naïve to accept that after decades of repression, both the perception and reality of the government had so changed that the Beninese would boldly bring their human rights complaints before a government institution. In fact, vigilantism has become prevalent over the past several years,<sup>83</sup> perhaps born of frustration with the sluggish criminal justice system. Human rights activists continue to speak of Benin's democracy in terms of its "fragility."<sup>84</sup> Thus the relationship between the entrenchment of Benin's democracy and the willingness of citizens to seek redress from the Court is unclear.

Increased human rights education may be an alternative or additional factor that has encouraged citizens to take advantage of the Court's liberal standing rules. The past thirteen years have seen the proliferation of human rights NGOs.<sup>85</sup> While only a selection of these organizations focus exclusively on human rights education, their work would seem to have reached a large segment of the population. Two-term Constitutional Court member Glèlè-Ahanhanzo, who also serves as President of the Institute for Human Rights and the Promotion of Democracy, has undertaken a unique education effort by hosting a weekly radio program to teach the public about human rights and discuss decisions of the Constitutional Court.<sup>86</sup> The Association of Women Jurists of Benin, a NGO led by current Court member Clotilde Médégan, has as its mission to educate the public on the rights accorded to them by the Beninese Constitution and the international conventions and charters to which Benin adheres.<sup>87</sup> The Beninese Section of Amnesty International has conducted educational seminars for school teachers in the capital-city area to teach them how to instruct students on human rights.<sup>88</sup> Finally, the Court itself threw its hat into the civic education ring when it published a pamphlet in February 2001 entitled: "The Constitutional Court

82. Telephone interview with Harriet Isom, *supra* note 9.

83. U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BENIN, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8252.htm> (Mar. 4, 2002).

84. Interview with Luc-Omer Gandemey, *supra* note 10; see also Interview with Julien Togbadja, *supra* note 8.

85. At a symposium held in May 2002, entitled "Benin and International Human Rights Conventions," no fewer than forty-one domestic and international NGOs were identified by name as actively involved on the ground in the defense and promotion of human rights. Huguette Bokpe Gnacadja, *Les ONG béninoises et l'application des conventions internationales relatives aux droits de l'homme*, in ACTES DU SÉMINAIRE: LE BÉNIN ET LES CONVENTIONS INTERNATIONALES RELATIVES AUX DROITS DE L'HOMME 82, 86–88 (2002).

86. Interview with Maurice Glèlè-Ahanhanzo, *supra* note 42.

87. Interview with Clotilde Médégan, *supra* note 63.

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

of the Republic of Benin: At the Citizens' Service," in which it explained its subject matter jurisdiction and standing rules. Médégan recalls this book was published because the Court felt it needed to make itself better known to the public at large.<sup>89</sup> Nevertheless, it is impossible to empirically substantiate a connection between increased human rights education and the increase in citizens petitioning the Court. Indeed, Médégan asserts that citizen awareness of the Court is the result of the Court's mandate to verify national election results, not its adjudication of human rights violations.<sup>90</sup> If Médégan's hypothesis is correct, it would serve to confirm the thesis that the Court's varied competencies—in this case its electoral mandate—bolsters its institutional standing and thus its capacity to fulfill its human rights mandate.

The simplicity of the Beninese Court's filing procedure may serve as a final insight into increasing numbers of human rights complaints. A complaint filed by a private person only requires the individual to submit a letter with his or her name, surname, address, and signature or fingerprint.<sup>91</sup> No lawyer is required. Besides the price of a stamp for those outside of Cotonou, filing is free. Once the letter is submitted, nothing more is required of the citizen.

Citizen access to Benin's Constitutional Court is *the* key feature that permits the Court to fulfill its mandate of guarantor of human rights. It marks a radical departure from the French model and an evolution of the German model. Indeed, constitutional courts, as an institution, have seldom viewed their role as a resource or a recourse for citizens threatened by their own government. Thus their credibility is not a function of their capacity to respond directly to the general population. In contrast, the framers of Benin's Court wished to create this link between the institution and the people.

The unique role played by Benin's Court in protecting human rights leaves one to consider where similar institutional models exist. Given its competencies and standing rules, one can conceive of Benin's Court as a traditional constitutional court with the added functionality of a state-sponsored human rights commission. While national human rights commissions are typically designed to complement, rather than replace the judiciary's adjudication of human rights abuses, their accessibility allows them to offer institutional protections otherwise unavailable. Like Benin's Court, human rights commissions are typically mandated with the responsibility to protect human rights by investigating allegations of human rights abuses.<sup>92</sup> Like Benin's Court, human rights commissions typically allow complaints to be brought on behalf of an interested party and only require that they be in

89. Interview with Clotilde Médégan, *supra* note 63.

90. *Id.*

91. Règlement intérieur de la Cour constitutionnelle du Bénin of July 5, 1993, art. 29, para. 2 (amended 1997).

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

writing and not be anonymous.<sup>93</sup> Finally, like Benin's Court, human rights commissions allow direct citizen access.<sup>94</sup>

The analogy between Benin's Constitutional Court's human rights mandate and that of national human rights commissions is not perfect. For example, the work of human rights commissions often includes human rights education and publicity,<sup>95</sup> which does not fall within the explicit mandate of Benin's Court, although the Court's 2001 civic education effort reflects its recognition that its human rights mandate brings with it educational responsibilities not typically associated with a constitutional court. Also, unlike Benin's Court, which can hear complaints brought against officials at any level of government, the competence of national human rights commissions is usually limited to national authorities.<sup>96</sup> In the African context, the mandate of virtually every state-sponsored human rights institution is limited in some way.<sup>97</sup> For example, in most countries, the human rights commission cannot review court decisions<sup>98</sup> and some may not investigate abuses involving the police and security forces.<sup>99</sup> These limitations within which national human rights commissions must operate put in relief the potential power of the Beninese model. By combining a mandate to protect constitutionally guaranteed human rights with the institutional prestige and legitimacy of constitutional court, Benin's institution is optimally situated to address human rights violations. Moreover, the Court's competence in regulating the competencies of other government institutions may reinforce the willingness of those institutions to cooperate in the Court's human rights investigations. This leveraging power is impossible within the framework of a national human rights commission, whose only interaction with other government bodies occurs when inquiring about alleged abuses.

#### D. Membership

According to Hans Kelsen's conception of judicial review, constitutional courts should be populated by law professors rather than by ordinary judges.<sup>100</sup> Benin's Constitutional Court has seven members, called Councilors,<sup>101</sup> who serve five-year terms that may be renewed once.<sup>102</sup> Membership

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93. Leonard F.M. Besselink, *Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD*, *supra* note 92, at 157, 161.

94. *Id.*

95. *Id.* at 159.

96. *Id.* at 160.

97. Carver & Hunt, *supra* note 92, at 738.

98. *Id.*

99. *Id.*

100. Ferejohn, *supra* note 43, at 50–51.

101. Aubin R. Towanou, *Kérékou installe la Cour constitutionnelle sous le signe du respect du serment*, LE MATIN, June 10, 2003, at 14.

102. BENIN CONST., tit. V, art. 115. There was some question as to whether Idrissou Boukari was eligible to be nominated in 2003. While he has only served three years, Hubert Maga, the Court member

is divided among three magistrates with at least fifteen years experience, two high-level jurists, professors, or legal practitioners with at least fifteen years experience, and two “personalities” of great professional reputation.<sup>103</sup> Thus while Benin’s Court does require a high level of legal competence from the majority of its members, it also incorporates the participation of individuals with no legal training or political experience. These “personalities” are lauded for the new perspective they bring to the issues. Indeed, current Court President Ouinsou, herself a jurist, characterized the participation of personalities as a “good thing,”<sup>104</sup> and Councilor Médégan, a magistrate, emphasized that their non-legally trained colleagues quickly become “neo-jurists” while introducing a new dimension into the decision-making process.<sup>105</sup>

With Benin Court’s second term only having ended in June 2003 and with just fourteen individuals having served since its establishment, it is too soon to analyze the general professional profile of Court members. One can note that all of the members have dedicated most, if not all, of their careers to public service and most have studied, worked, or received training outside of Benin, usually in France. Both of the Court’s two presidents have been women who were born abroad and became Beninese through marriage.

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

The nomination process to Benin’s Court seeks to maintain balance between and independence from the executive and the parliament. Of the three magistrates, two are named by the Bureau of the National Assembly and one is named by the President of the Republic.<sup>106</sup> The Bureau and the President also name one jurist and one personality each.<sup>107</sup> The goal underlying Benin’s nomination design was to balance the political persuasions of the Court’s members to allow it to reach its decisions without undue political influence. This goal is best achieved when the politics of the Bureau are different from those of the President. Such was the case at the time the Court was first assembled in 1993. That political division was no longer present in 1998 and 2003 when the second and third mandates were assembled. In both cases, Kérékou controlled the presidency and his political party controlled the National Assembly. At the time of the 2003 nominations, the national press focused on the fact that five of the seven members were re-

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he replaced, would have been ineligible for renomination because no member of the Court can serve for more than ten years. Ultimately, he was nominated and confirmed for a second term. Telephone interview with Coffi Amoussou, Jurist, Documentation and Publication Service of the Beninese Constitutional Court, (Mar. 27, 2003).

103. BENIN CONST., tit. V, art. 115.

104. Interview with Conceptia Ouinsou, *supra* note 64.

105. Interview with Clotilde Médégan, *supra* note 63.

106. BENIN CONST. tit. V, art. 115.

107. *Id.*



nominated; only those members whose terms had expired departed.<sup>108</sup> Adding to the din is the fact that the two new members nominated to the Court in 2003 both appear to have ties to Kérékou and his political supporters.

Nevertheless, the prevalent view over the past decade is that the Court's human rights decisions reflect no discernable political allegiance. Given the similarities between the human rights mandate of these state sponsored institutions and Benin's Constitutional Court, one should inquire into the factors that aid the Beninese Court in guarding its independence, even while most national human rights commissions are plagued by conflict of interest concerns.<sup>109</sup> To begin, Court members are forbidden from simultaneously serving in the government, holding any elected position, holding any public, civil or military job, participating in any other professional activity, or representing the nation at a function.<sup>110</sup> The spirit of these provisions is adhered to more than the text. Conceptia Ouinsou, the current president of the Court, teaches constitutional law at the National University of Benin. Alexis Hountondji, who finished his second term on the Court in June 2003, continued to serve at the department of internal medicine at the University's Faculty of Health Sciences and publish in the field of medicine throughout his tenure.<sup>111</sup> Current member Médégan and former member Glèlè-Ahanhanzo are presidents of their own non-governmental organizations. The Constitution does grant members of the Court special protections and privileges, perhaps to make members less susceptible to outside influences. It prohibits the removal of members of the Court during the duration of their mandate and forbids bringing charges or arresting them without the joint authorization of the Court and the Bureau of the Supreme Court, except in the case of a flagrant offence.<sup>112</sup>

Besides the professional constraints and membership perks, there are a number of procedural factors that bolster the Court's political independence. First, the naming of the Court's president (an important position because the president generally controls procedure and designates the reporter for each decision) is the prerogative of the Court's members, their only constraint being that the president must be either a magistrate or jurist.<sup>113</sup> This process stands in sharp contrast to the French *Conseil Constitutionnel*, whose Presi-

108. See, e.g., Maurice K. Tossou, *Prix du Mérite ou Récompense pour Services Rendus?* LA NOUVELLE TRIBUNE, May 20, 2003, at 9. Euloge R. Gandaho, *Les Raisons de la Reconduction des Conseillers*, LE MATIN, May 20, 2003, at 3.

109. Harley Johnson, *Ombudsman—Essential Elements*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD, *supra* note 92, at 785–86.

110. BENIN CONST. tit. V, art. 115.

111. Under article 11, paragraph 2 of the Constitutional Court's Organic Law 91-009 of May 31, 1991, which establishes the framework of the Court, publications of a scientific character are permitted provided that "the conclusions of these publications are in the spirit and the sense of the decisions of the Constitutional Court . . . ."

112. BENIN CONST. tit. V, art. 115.

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

dent is appointed by the President of the Republic,<sup>114</sup> an issue that has historically been treated as a matter of high politics,<sup>115</sup> and the German Constitutional Court, where the Bundestag and Bundesrat alternately elect the President and Vice-President of the Court.<sup>116</sup> Second, depending on the matter under consideration, the Constitution specifies the maximum time allowed for the Court to hand down its decision after a complaint is filed. For example, article 120 requires the Court to hand down a decision within fifteen days of being called upon with a complaint of human rights violations.<sup>117</sup> Former HCR member Holo, who was partially responsible for the Court's institutional framework, commented that quick decisions are vitally important because slowness can be equated with doubt.<sup>118</sup> The rapidity with which the Court hands down its decisions has enhanced its credibility,<sup>119</sup> particularly in light of the fact that the Beninese judicial system is widely criticized for its delays and inefficiency.<sup>120</sup> However, a review of the scores of cases filed annually with the Court reveals that the precise constitutionally mandated timelines between filing and decision are seldom respected. The Court's documentarian, Coffi Amoussou, attributes the divergence to a lack of the resources required to adhere to such strict deadlines.<sup>121</sup> This resource deficit will likely worsen with time.<sup>122</sup> The institution could increasingly struggle to respond to the sheer volume of complaints, let alone meet the strict deadlines imposed by the Constitution. It remains to be seen whether this will diminish its credibility.

A third procedural mechanism that boosts the Court's independence is Article 121 of the Constitution, which permits the Court to act on its own motion (*l'auto-saisine*) to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties. The Court has exercised this mechanism when a procedural technicality

114. CONST. tit. III, art. 56.

115. JACKSON & TUSHNET, *supra* note 48, at 512.

116. Gesetz über das Bundesverfassungsgericht [Law over the Federal Constitutional Court], §9 Nr. 1 BVerfGG (1951), available at <http://bundesrecht.juris.de/bundesrecht/bverfgg/htmltree.html> (last visited Mar. 1, 2004).

117. BENIN CONST. tit. V, art. 120.

118. Interview with Théodore Holo, *supra* note 66.

119. Interview with Clotilde Médégan, *supra* note 63.

120. The Constitutional Court has handed down several decisions in response to citizens' complaints that the delays in the judicial system violated their right under article 7 of the Constitution to be judged within a reasonable delay. For example, Decision DCC 97-006 found a delay of fourteen months and ten days by the trial court in Cotonou in violation of the Constitution; Decision DCC 98-059 found an eleven year delay before the trial court in Abomey transmitted the dossier to the Appeals Court in Cotonou in violation of article 7. Benin Const. Ct. Decision DCC 97-006; Benin Const. Ct. Decision DCC 98-059. Substantial judicial reform is currently underway to modernize the current trial and appeals court system, which was established following independence in 1960. Telephone Interview with Coffi Amoussou, *supra* note 102.

121. *Id.*

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

would otherwise require the Court to reject the case. A typical scenario is illustrated by Decision DCC 96-031, in which the Court noted that the complaint was not admissible because it was not signed by the petitioners (as required by Article 29 of the Interior Regulation of the Court), but went on to act on its own motion, citing that it had been made aware that the petitioners had been arbitrarily detained in violation of their constitutional right to come and go.<sup>123</sup> *L'auto-saisine* is a prime example of the Court leveraging a mechanism typically associated with a constitutional court to respond to the human rights abuses suffered by individual citizens.

Notwithstanding the aforementioned procedural and constitutional mechanisms, the question remains whether the political independence and legitimacy achieved by the Constitutional Court are largely attributable to the respect that is commanded by the individuals who have served thus far. Two-term member Glèlè-Ahanhanzo is considered the father of the 1990 Constitution; former president Elisabeth Pognon was heralded in the international press as the "iron lady";<sup>124</sup> two-term member Hubert Maga (who died in 2000) was a respected statesman. Although the Constitution specifies few requirements for Court members, current members and observers have identified a litany of qualities exhibited by its membership ranging from "objectivity,"<sup>125</sup> "complete neutrality,"<sup>126</sup> and "honor,"<sup>127</sup> to "general culture,"<sup>128</sup> "a democratic spirit,"<sup>129</sup> and a "sense of solidarity" among the members.<sup>130</sup>

This focus on the members as individuals raises the broad questions as to whether, as one observer suggested, the current value of the institution is a function of those working on the Court<sup>131</sup> or whether the institution itself is sufficiently entrenched to fulfill its mandate were the members of the Court less respected as individuals. Court observers raise fears that as members' terms expire, the Court could become increasingly politicized and its credibility will erode. Interestingly, this fear functions in the opposite direction with regard to the parliament and presidency where, despite the dramatic events of the 1990s, the same politicians and personalities continue to dominate. Here, observers wish for change. In any event, the next test of the Constitutional Court's independence and legitimacy is underway as the Court adjusts to the June 2003 departure of two-term members Maurice Glèlè-Ahanhanzo and Alexis Hountondji and integrates two new members into its ranks.

123. Benin Const. Ct. Decision DCC 96-031.

124. Jean-Luc Aplogan, *Bénin: une Démocratie Apaisée*, LE MONDE DIPLOMATIQUE, Nov. 1997, available at <http://www.monde-diplomatique.fr/1997/11/APLOGAN/9489>.

125. Telephone Interview with Cyrille Oguin, *supra* note 80.

126. Interview with Clotilde Médégan, *supra* note 63.

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

128. Interview with Jules Zounho, *supra* note 88.

129. Interview with Théodore Holo, *supra* note 66.

130. Interview with Clotilde Médégan, *supra* note 63.

131. Telephone interview with Cyrille Oguin, *supra* note 80.

### F. Decision Making in the Court

The Court's investigation and decision making process encourages those who have suffered human rights abuses to call upon the Court. Because the Court bears the burden of investigating, even those with extremely limited resources can access the Court with any human rights complaint. The President assigns individual Councilors, called *rapporteurs*, to conduct an investigation of the abuse alleged in a complaint.<sup>132</sup> The investigation may encompass any individual hearings that seem appropriate or written solicitation of information that the *rapporteur* deem necessary.<sup>133</sup> Several decisions indicate the Court's investigation included a visit to the location of the alleged violation.<sup>134</sup> This process is similar to that undertaken by national human rights commissions, where quasi-judicial powers may be exercised to subpoena witnesses or papers and conduct on-site visits.<sup>135</sup>

The *rapporteur* drafts a report on the alleged violations, which is reviewed by all members before deliberations.<sup>136</sup> Deliberations are held in secret and no one can ask to be heard by the Court at these meetings.<sup>137</sup> The Court's Regulatory Text specifies that decisions are taken by a simple majority of the participants and that abstention is not permitted.<sup>138</sup> However, current President Ouinsou commented that in her five-year tenure the Court has never voted on a case.<sup>139</sup> If consensus cannot be reached, the *rapporteur* is tasked with additional investigation.<sup>140</sup>

### G. Judicial Opinions and Their Effects

The influence of the French civil law tradition on the judicial opinion writing of Benin's Constitutional Court is unmistakable. The Internal Regulation of Benin's Court requires that the opinion specify the motives on which it is based.<sup>141</sup> However, as in French judicial discourse,<sup>142</sup> the Court's opinions on human rights violations rarely offer any analysis of the *content* of the human rights guaranteed by the Constitution. The constitutional provi-

132. Interview with Clotilde Médégan, *supra* note 63.

133. Règlement intérieur de la Cour constitutionnelle du Bénin of July 5, 1993, art. 27 (amended 1997).

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

135. Carver & Hunt, *supra* note 92, at 742.

136. Règlement intérieur de la Cour constitutionnelle du Bénin of July 5, 1993, art. 27 (amended 1997).

137. *Id.* at art. 28.

138. *Id.* at art. 19.

139. Interview with Conceptia Ouinsou, *supra* note 64.

140. Interview with Clotilde Médégan, *supra* note 63.

141. Règlement intérieur de la Cour constitutionnelle du Bénin of July 5, 1993, art. 20 (amended 1997).

142. See Vivian Grosswald Curran, *Romantic Common Law: Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 88 (2001) (arguing that French judicial decisions offer little in the way of factual and legal analysis).

sion invoked is seldom recited, let alone discussed or analyzed. For example, in DCC 02-113, a citizen complained that specified recruitment guidelines for the National Police were unconstitutional insofar as they excluded candidates holding a diploma superior to a BEPC, the rough equivalent of finishing tenth grade in the United States. The citizen argued that "obtaining a superior diploma must not constitute a handicap to accessing a lower-level [recruiting] competition." The Court considered articles 8, 26, and 30 of the Constitution—which address the citizen's right to equal access to work, the equality of all before the law regardless of social position, and the right to work. The Court's holding, however, simply stated that in setting the BEPC ceiling, "the Minister [. . .] has taken account of the functions that the National Police are called on to assume; [and] that this choice does not contain any discrimination." There is no analysis of the substance of the Constitutional provisions in question. No policy argument is set forth on whom the provision is meant to protect. In short, the Court's only explanation is that the Ministry can set its own guidelines.

It is noteworthy that the Court does not publish dissents. While dissenting opinions are closely tracked in the United States as a glimpse into battles waged behind closed doors and a window on future rulings, their absence in Benin's Court accords with its consensus method of decision making. Théodore Holo warned that dissenting opinions could weaken the relevance of the Court's opinion.<sup>143</sup> President Ouinsou explained that the Court must make a correct decision because there is no appeal.<sup>144</sup> Such a view accords with the civil law conception that the correct answer exists and is in principle deducible from the applicable legal authority.<sup>145</sup> Moreover, divided decisions on human rights may be unpalatable in a country that has known repression.

On the other hand, the absence of dissents may partially explain why the Court's opinions fail to analyze the complexity of the issues under consideration. Publishing dissents could force the majority opinion to state explicitly the reasons, rationales, and legal interpretations underlying its decision. The Court must recognize that what it is called on to adjudicate is the *content* of the human rights guaranteed by the Constitution. This task is undoubtedly difficult. But as the highest jurisdiction of constitutional matters including human rights, it seems not only appropriate but also important that Benin's Constitutional Court strive to enter into a jurisprudence focused on defining the substance and limits of the litany of rights ensured in the Constitution.

The decisions of Benin's Court are notified to the concerned parties and take effect as soon as they are announced.<sup>146</sup> The Constitution provides that

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143. Interview with Théodore Holo, *supra* note 66.

144. Interview with Conceptia Ouinsou, *supra* note 64.

145. Curran, *supra* note 142, at 93.

146. Règlement intérieur de la Cour constitutionnelle du Bénin of July 5, 1993, art. 21 (amended 1997).

the Court's decisions are binding "on public authorities and on all civil, military, and jurisdictional authorities."<sup>147</sup> Court decisions can be rectified in the case of material error<sup>148</sup> but they may not be appealed.<sup>149</sup> This implies that once the Court has declared a law to "conform with the Constitution" its constitutionality may no longer be questioned.<sup>150</sup>

#### H. Remedies

While the judgments of Benin's Constitutional Courts are legally binding, the institution is a jurisdiction of attribution, which means the Court's authority is limited to a determination of when the Constitution is violated. This power is identical to that exercised by other constitutional courts and typically results in immediate changes to legislation. The difference, however, is that other constitutional courts do not typically grant immediate and direct access to citizens alleging violations of human rights. In cases involving human rights abuses, the violation has usually already been endured, so absent concrete remedies, the decision only amounts to a moral victory for the citizen.<sup>151</sup>

The remedies issue raises a fundamental question: is Benin's Constitutional Court ill-equipped to provide redress for human rights abuses, despite its constitutional mandate to guarantee the fundamental rights of the individual and public liberties? Presently, to "guarantee" fundamental rights means to observe publicly that rights have been violated. From this perspec-

147. BENIN CONST. tit. V, art. 124, para. 2.

148. Règlement intérieur de la Cour constitutionnelle du Bénin of July 5, 1993, arts. 22–23 (amended 1997). An example of a "material error" is illustrated by a 2000 decision in which the petitioner alerted the Court to the fact that his claim, disposed of in a previous decision, was registered by the Secretary of the Court on December 29, 1998 and not on December 29, 1999, as had been recorded in the decision itself. The Court noted that rectifying this material error did not affect the authority of the issue judged in the decision and thus was not contrary to article 124 which prevents appeals of Court decisions. Benin Const. Ct. Decision DCC 00-068.

149. BENIN CONST. tit V, art. 124, para. 2.

150. The jurisprudence indicates that this prohibition on appeals makes inoperative the standing rule of article 24 of the Court's Organic Law that permits a citizen to request the Court to determine the constitutionality of laws when the determination is necessary for the disposition of a case that concerns him, whenever the Court has already declared constitutional that law in question. The issue arose in DCC 99-054, in which the Court joined three complaints, two filed by citizens and one filed by the Court of Assizes before which the citizens were on trial. Benin Const. Ct. Decision DCC 99-054. Having achieved standing through article 24, the citizens asked the Court to declare the Penal Code provision that prescribed the death penalty in cases of armed robbery contrary to the Constitution's guarantee of the individual's right to life, liberty, security, and integrity. The Court cited to DCC 99-051, where it had declared that the provision in question conformed to the Constitution and held that the provision had the authority of "something judged" and thus could not be ruled on.

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

rive, opinions serve to uphold the integrity of the right by publicizing its violation, awarding a moral victory to the victim, and shaming the perpetrators. By identifying the individual perpetrator by name, the Court aims to confer the public shame and stigmatization associated with a criminal. However, the Court is realistic about the deterrence effect of its decisions. Glèlè-Ahanhanzo submits that behavior changes in response to a Court decision and then abuse begins again.<sup>152</sup> According to one observer, the political authorities have changed their behavior in response to Court decisions, but administrative and police authorities have not changed as much.<sup>153</sup> This outcome is unsurprising when one recalls that Benin's political authorities are subjected to balance of power mechanisms that the Court controls, whereas local administrators and police are far removed from the Court's reach.

The struggle for adequate remedies served as the impetus behind the most significant evolution in the Court's jurisprudence since its inception. In Decision 02-052, handed down in June 2002, the Court examined what appeared to be a standard complaint of provisional detention and inhumane treatment. The Court relied on medical certificates delivered by the petitioner to establish that the petitioner had endured cruel, inhumane, and degrading treatment.<sup>154</sup> It also found that the petitioner had been held in detention beyond the constitutional limit. The Court then stated:

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

Considering that it emerges as much from a combined and cross-reading of these provisions as from international doctrine and custom that from the harms endured by any person opens the right to

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152. Interview with Maurice Glèlè-Ahanhanzo, *supra* note 42.

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

154. Benin Const. Ct. Decision DCC 02-052.

reparations; that in the instant case, [the petitioner] has the right to reparations for the harm that he endured.<sup>155</sup>

With that, the Court redefined its responsibility to guarantee fundamental individual rights to include providing the victim the opportunity to collect reparations. In the human rights decisions that immediately followed, the Court explicitly cited to DCC 02-052.<sup>156</sup> This reliance on precedent is almost unheard of in prior court decisions. The immediate impetus behind this change in strategy is unclear. In Decision DCC 02-037, which was published in the weeks preceding the first reparations decision, the Court confronted relatively similar facts in a provisional detention case. In response to the citizen's claim for 10,000,000 CFA (about \$15,625) from the State in reparations for the harm suffered, the Court cited the fact that articles 114 and 117 of the Constitution do not grant the Court the competence to allocate damages and reparations interests for harm suffered.<sup>157</sup> Perhaps this explicit demand for monetary damages spurred a discussion within the Court on how to address the persistent question of remedies. The result was the unusual language of DCC 02-052 in which the Court "opens" up the right to reparations for petitioners whose rights have been violated.

The breadth and reach of this reparations jurisprudence, however, has yet to be seen. For one thing, the Court did not explicitly "open up the right" to reparations in all of the human rights cases that followed. After DCC 02-052 (published in June 2002) through the end of 2002, the right to reparations was recognized in provisional detention cases,<sup>158</sup> inhumane and degrading treatment cases,<sup>159</sup> and a right to the environment case.<sup>160</sup> The right to reparations was not specified in any subsequent case where the Court found that violations had occurred in the area of the right to equal treatment by the State.<sup>161</sup> In a subsequent case on provisional detention the Court mentioned the right to reparations in its discussion of the case, but failed to specify the right in the section of its opinion that specifies its orders.<sup>162</sup> Shortly thereafter, almost identical facts were presented, and this time the Court did specify the right to reparations in its orders.<sup>163</sup> In addition, although the Court has found a way to indicate in its decisions that the right to reparations is "open" to an individual petitioner, the Court itself does not specify or allocate the sum. Moreover, the Court's decisions provide no guidance to the victim as to the process of claiming the reparations, which must

155. Benin Const. Ct. Decision DCC 02-052.

156. *See, e.g.*, Benin Const. Ct. Decision DCC 02-058; Benin Const. Ct. Decision DCC 02-065.

157. Benin Const. Ct. Decision DCC 02-037.

158. *See, e.g.*, Benin Const. Ct. Decision DCC 02-093 and Benin Const. Ct. Decision DCC 02-121.

159. *See, e.g.*, Benin Const. Ct. Decision DCC 02-058; Benin Const. Ct. Decision DCC 02-114, Benin Const. Ct. Decision DCC 02-131; Benin Const. Ct. Decision DCC 02-136.

160. Benin Const. Ct. Decision DCC 02-065.

161. *See, e.g.*, Benin Const. Ct. Decision DCC 02-081; Benin Const. Ct. Decision DCC 02-082.

162. Benin Const. Ct. Decision DCC 02-089.

163. Benin Const. Ct. Decision DCC 02-114.



be achieved through the traditional justice system. Notoriously slow, requiring the petitioner to negotiate the judicial system is asking him to incur time and expenses that are likely not at his disposable. As of yet, there is no instance in which petitioners have pursued this right to reparations granted to them by the Constitutional Court.

#### V. THE SUBSTANTIVE HUMAN RIGHTS JURISPRUDENCE OF BENIN'S CONSTITUTIONAL COURT

Between 1991 and 2002, Benin's Constitutional Court handed down 350 decisions on human rights and public liberties. The fact that almost one third of the Court's human rights decisions deal with provisional detention serves as an appropriate starting point for analysis of the human rights jurisprudence of the Court. The Constitutional provision at issue is article 18, paragraph 4, which establishes, "[N]o one shall be detained for longer than 48 hours without the decision of a magistrate before whom he must be brought. That delay shall not be prolonged except in exceptional cases provided by the law and shall not exceed an eight day period."<sup>164</sup> Thus the Court's analysis focuses on whether in fact the petitioner was held longer than forty-eight hours. Whenever the deadline is exceeded, the Court finds that the provisional detention violated the Constitution.<sup>165</sup> Excuses offered by the offending party, ranging from the magistrate's absence,<sup>166</sup> to custody stretching through the weekend,<sup>167</sup> have never dissuaded the Court.

The detention decisions are striking for several reasons. First, the petitioner almost always has already been released from detention. The fact that citizens nonetheless file with the Court, even when the detention limitation was exceeded by a few hours, seems to validate the moral value accorded by citizens to the Court's decisions. Second, the number of cases deliberated has *increased* steadily since 2000, with a record twenty-eight provisional detention decisions handed down in 2002. This increase undermines the argument that shaming abusers deters abuse. On the other hand, the increase indicates expanded awareness among the population of the Court's human rights mandate. Third, and perhaps most striking, is that Benin's highest Court on constitutional matters is devoting a significant amount of time to these incidents. The Court has shown itself willing to seriously consider any Constitutional violation, no matter how minor. In fact, Councilor Médégar commented that when the second court began its mandate in 1998, members considered taking surprise trips to the villages where the gendarmerie

164. BENIN CONST. tit. II, art. 18, ¶ 4.

165. Sometimes the deadline is exceeded by a number of hours, as in DCC 98-098, where the Court visited the place where the petitioner had been detained and concluded that he effectively had been held for what amounted to fifty hours and thirty minutes. Benin Const. Ct. Decision DCC 98-098. More often, the detention lasts a number of days, as in DCC 98-007, where seven days passed before the petitioner was brought before the magistrate. Benin Const. Ct. Decision DCC 98-007.

166. Benin Const. Ct. Decision DCC 02-027.

167. Benin Const. Ct. Decision DCC 02-116.

had been found to hold citizens in custody illegally because they thought surprising them would change the behavior. "Negligence on our part" was Médégan's explanation for why the trips never happened.<sup>168</sup> Still, the anecdote illustrates that the Court believes its mandate encompasses reducing violations. In fact, it could be considered a point of pride for Benin that the Court principally confronts violations of "everyday human rights," to use Glèlè-Ahanhanzo's term.

The key to understanding the Court's decisions is to recognize that its human rights jurisprudence involves the same fact/law analysis that is required in a traditional judicial body as opposed to a traditional constitutional court. For example, a number of decisions addressing the right to a defense make clear that the Court's analysis centers on whether the petitioner had an opportunity to be heard before action was taken.<sup>169</sup> Regarding the right to be judged within a reasonable delay, the Court has engaged in case by case review, deeming as unconstitutional delays ranging from fourteen months to fourteen years.<sup>170</sup> In determining what constitutes inhuman, cruel, or degrading treatment, the Court explicitly set out a multifactor test that considers not only the effect on the physical or mental health of the individual but also the length of the treatment, its deliberate character, and the circumstances in which it was inflicted.<sup>171</sup>

Unfortunately, more often than not, the Court fails to formulate tests, articulate the factors it considered in determining a right, or justify its decisions based on policy arguments. For example, while some fifty-five decisions involve article 26's guarantee of equality before the law without distinction based on origin, race, sex, religion, political opinion or social position, on only one occasion did the Court provide its interpretation of the article, which was limited to stating: "The notion of the equality of all before the law . . . must be analyzed as a general principle by which the law shall be the same for all in its adoption and in its application, and shall not contain any unjustifiable discrimination."<sup>172</sup> No explanation of "unjustifiable discrimination" is presented.

Because detailed analysis of the content of rights is rare, seemingly contradictory outcomes occur. For example, in DCC 02-049 a citizen contended that the state treated her unequally from her colleagues by failing to pay her a pension upon her retirement in July 1999. The Court's investigation uncovered a bureaucratic error that had prevented her retirement from being processed.<sup>173</sup> Contrast DCC 01-058 in which a citizen complained that he was not permitted to participate in a state entrance exam while a colleague

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168. Interview with Clotilde Médégan, *supra* note 63.

169. *See, e.g.*, Benin Const. Ct. Decision DCC 96-045; Benin Const. Ct. Decision DCC 99-024; Benin Const. Ct. Decision DCC 00-056.

170. *See, e.g.*, Benin Const. Ct. Decision DCC 97-006; Benin Const. Ct. Decision DCC 97-011.

171. Benin Const. Ct. Decision DCC 99-011.

172. Benin Const. Ct. Decision DCC 96-067.

173. Benin Const. Ct. Decision DCC 02-049.

with equal qualifications was. The ministry under investigation admitted that it had inadvertently authorized the petitioner's colleague to compete in the exam and underlined that action was taken to cancel that authorization as quickly as possible.<sup>174</sup> Although both scenarios present clerical mistakes, the Court concluded that "there was no unequal treatment" in the former,<sup>175</sup> but in the latter decided the ministry had violated the Constitution in allowing only one of two equally qualified candidates to compete.<sup>176</sup>

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

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

## VI. LIMITATIONS AND RECOMMENDATIONS

### A. *Limitations*

Benin's Constitutional Court could be characterized as both a constitutional court and a quasi-human rights commission. Two institutional features that hit at the very core of what it means to be a *constitutional* court impede the Court's effectiveness in its human rights mandate. First, the Court does not dispose of the remedial powers of a traditional court. Although its reparations jurisprudence is a significant attempt to offer a remedy to petitioners whose rights have been violated, the impossibility of direct reparations underlines that the Court is ill-equipped to offer traditional forms of redress. Second, Benin's Court can only address questions arising under its constitution. Although the 1990 Constitution grants citizens a litany of rights, there are certain rights and liberties guaranteed by international conventions that Benin has ratified that do not have their equivalence

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174. Benin Const. Ct. Decision DCC 01-058.

175. *Id.*

176. Benin Const. Ct. Decision DCC 02-049.

in the Constitution.<sup>177</sup> Because the Beninese Constitution does not include these rights, the Court lacks the competence to address their violation. Presuming Benin continues to ratify international human rights conventions, this gap between rights enumerated in the constitution and those guaranteed in international documents could only continue to grow.

Before further exploring how the Court could adopt creative enforcement mechanisms to mitigate the impact of its jurisdictional and structural constraints, two caveats are in order. First, it is important to acknowledge what the Court has already achieved. Andreas Schedler has proposed that political accountability includes an “answerability” element, defined as “the power given to an institution to ask ‘accountable actors’ to give information on their decisions and to explain the facts and the reasons upon which these decisions are based.”<sup>178</sup> While the Court’s move towards broader remedial powers should be applauded and must continue, it is important to recognize that the power of Benin’s Court to exact “answerability” from the state marks a leap forward from the repression of the previous regime. Second, it is useful to remember that the Court’s human rights mandate is about guaranteeing human rights and not promoting a damages culture. Thus the primary result the Court should seek is the reinforcement of a positive human rights culture.

## *B. Recommendations*

### *1. Remedies and Punishment*

With the previous caveats in mind, recommendations to improve the effectiveness of the Court must continue to focus on the question of remedies and punishment. Nothing in Benin’s Constitution or the Court’s regulations would seem to prevent it from incorporating into its decisions detailed suggestions, or even instructions, on how the instance of abuse could be remedied through legislative or perhaps even executive action. The public interest litigation carried out by India’s Supreme Court could serve as an example. Over a ten-year period, that Court’s jurisprudence developed from gradually granting compensation for severe violations of human rights to laying down a principle of law that the state is liable to pay compensation for such violations. The Court based this principle on its evolving analysis of article 32 of the Indian Constitution, which confers power on the Supreme Court to issue directives, orders, or writs for the enforcement of any human rights

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177. Examples range from the prohibition on imprisonment on the ground of inability to fulfill a contractual obligation to the right of every child to acquire a nationality. See International Covenant on Civil and Political Rights, arts. 11, 24, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 1976), *reprinted in* Supplement of Basic Documents to International Law and World Order 377 (Burns H. Weston et al. eds., 3d ed. 1997).

178. Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J., 1, 28 (2000).

conferred by the Constitution.<sup>179</sup> While Benin's Constitution offers less direct authorization for enforcement than the Indian document, article 122's vague provision that the Constitutional Court "must rule more generally on violations of the rights of the individual" could be broadly interpreted to permit the Court to rule on the required state response to grievous human rights violations. For example, the Court could instruct the legislature to adopt laws that require the return of property seized without compensation, or an automatic reduction in sentence when a defendant's right to be released from provisional detention after forty-eight hours was violated, or a declaration of immediate eligibility for parole when a defendant's due process rights were violated.<sup>180</sup> When the Court finds that a claimant's right under article 4(d) of the African Charter to be tried within a reasonable time has been violated, it could instruct the judiciary to shorten the trial as an emergency measure.<sup>181</sup> The Court could even move beyond its ambiguous language of "opening the right to reparations" and explicitly suggest to the state that it pay reparations for the violation.

It is difficult to say whether this change of tone from adjudication to suggestion would undermine the legitimacy of the Court. It has been argued that the Court's influence over the government through balancing the powers of institutions has bolstered its capacity to investigate human rights abuses. It is possible that the government would comply with the Court's suggestions because of its interest in working with the Court in other matters. However, non-binding language could mean that reparations would not be consistently paid out but rather depend on political considerations, such as the perpetrator's background or the pity provoked by the victim.

A further step along the path of punishing violators of human rights in the line of procedural innovations devised by the Indian Supreme Court<sup>182</sup>

179. The jurisprudence began in *Rudal Sah v. State of Bihar*, decided in 1983, when the India Supreme Court considered a case in which a prisoner was detained for fourteen years beyond his sentence due to negligence by state authorities. The Court invoked article 32 of India's Constitution. While acknowledging that the article "cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary process of courts," the Court decided to directly grant him damages, in part because in light of the facts of the case the Court "[had] no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed . . ." *Rudal Shah v. State of Bihar* [1983], AIR 1983 SC 1086, 1089 (Ind.). The jurisprudence of reparations solidified in 1993 in *Nilabati Behera v. State of Orissa*, when the India Supreme Court examined a case in which a young man was murdered by the police who had taken him from his home for questioning about a robbery. Relying again on article 32, the Court held that the state was liable to pay compensation for the violations and that the principle of sovereign immunity did not apply. *Nilabati Behera v. State of Orissa* [1993], AIR 1993 SC 1960, 1967 (Ind.).

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

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

182. See, e.g., *Mukesh Advani v. Union of India* AIR 1985 SC 1363 (Ind.); *Sheela Barse v. Union of*

would be for the Court to appoint commissions to investigate persistent violations of human rights. A Court-appointed commission would investigate why the right is violated with such frequency and recommend action by the state to end the abuse.

The remedies administered by national human rights commissions could also be incorporated into the Court's arsenal. For example, upon finding a violation of the constitution, the Court's decision could explicitly require that criminal charges be brought by the ordinary judiciary against the perpetrators. Again, there is nothing that would seem to limit the Court's capacity to mete out such a response, although the effectiveness of this remedy will depend on the judicial system to which the criminal is referred. At a minimum, the state must ensure that its penal code incorporates violations of the rights guaranteed in the Constitution and provides for punishments commensurate to the violation.

## 2. *Jurisprudential Development*

Each of the aforementioned recommendations would require the Constitutional Court to rely on other state institutions to implement its decisions. It bears repeating once more, however, that it is well within the Court's current competence to hand down decisions that analyze the content of the norms under review. A decisive move in that direction would serve to provide a deeper understanding of the litany of human rights guaranteed in the Constitution—an understanding that is vital to the efforts of the scores of NGOs that are involved in educational efforts throughout the country. The importance of analytical as opposed to conclusory decisions would become only more important were other institutions to get involved in remedying the violations identified by the Court. Before other bodies are made responsible for handing down punishments or distributing reparations, the Court must provide them with thorough analysis to justify their actions.

## C. *Judicial Reform*

Beyond the realm of the Constitutional Court, Benin must continue with all speed down the path of structurally reforming its judiciary. The ordinary judge must be well equipped to adjudicate human rights violations, and particularly those rights that are not enumerated in the Constitution. Unfortunately, judges in Benin seldom refer to international conventions in their decisions.<sup>183</sup> This may partially be explained by the fact that the lawyers themselves rarely invoke these covenants.<sup>184</sup> Regardless, the fact remains

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India 2 SCC 96 (Ind. 1983); Mohan Lal Sharma v. State of U.P. 2 SCC 600 (Ind. 1989); Delhi Judicial Services Ass'n v. State of Gujarat 4 SCC 406 (Ind. 1981).

183. Bernadette Codjovi, *La Place des Conventions Internationales dans le Droit Béninois: Le Juge Béninois devant les Conventions Internationales*, in ACTES DU SÉMINAIRE: LE BÉNIN ET LES CONVENTIONS INTERNATIONALES RELATIVES AUX DROITS DE L'HOMME, 56, 64 (2002).

184. *Id.* at 64–65.

that the judicial system is singularly equipped to address such violations and must be encouraged to do so.

## VII. CONCLUSION

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

First is the fundamental question of whether respect for human rights is part of the fabric of Benin. While Court member Glèlè-Ahanhanzo speaks in terms of "everyday human rights," and the Constitutional Court's docket is filled with relatively innocuous provisional detention violations, the President of the League for the Defense of Human Rights, Julien Togbadja, whose work involves representing individual victims of human rights abuses before the Beninese judicial system, was sharply critical of the idea that human rights are by and large respected in Benin. Togbadja was quick to provide League press releases detailing examples of violations ranging from the deprivation of the property of poor citizens through a complex system of land taxes, to repressive tactics designed to prevent the moto-taxi (*zémidjan*) drivers from forming a union, to the mounting clashes between vigilante militias and alleged thieves. A tangential query is whether the types of human rights abuses that are invoked before the Constitutional Court are an accurate reflection of those suffered by the population. Théodule Nouatchi, the Vice President of the Benin's National Consultative Council of Human Rights—a group representing some forty-five NGOs in their relations with the State—provided a run down of the human rights abuses that local NGOs frequently confront, including female genitalia mutilation, "levirat" (a social rite whereby a woman whose husband has died must marry his younger brother to keep her children because marrying outside the family means the new husband is not expected to accept the woman's children into his home), and the system of convents (part of the religious system of Animism, practiced by up to fifty percent of the population, whereby some parents send their very young children to live in religious convents instead of participating in primary or secondary education).<sup>185</sup> Despite the focus of the local NGO community on these violations, *none* has been addressed in any of the Court's

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

350 decisions. Equally mysterious is why several of the fundamental rights guaranteed in the Constitution have not made their way into the Court's decisions. For example, while in 2002 Benin was ranked twenty-first in a worldwide ranking of press freedoms, conducted by the international NGO "Reporters Without Borders,"<sup>186</sup> no decision has ever been handed down on the subject. Nor has the Court ever explored the individual's right "to development" guaranteed in article 9 or the meaning of the individual's "right to life" guaranteed in article 15. These gaps in the jurisprudence are raised to emphasize the complexity of assessing the importance of the Court in Benin's human rights landscape.

A second unanswered question is just where the protection of human rights ranks among the hierarchy of important issues confronting the Beninese and their government. Talking with human rights activists may lead one to believe that protecting rights is a top priority. But there appears to be tacit recognition that government stability is more important. While many lamented the fact that the Court's decisions do not provide recourse in the form of specified compensation, no one suggested that amending the 1990 Constitution was the right path to follow. Luc-Omer Gandemey at the Institute for Human Rights cautioned that amending the Constitution would open a Pandora's Box of political agendas that could dismantle the achievements of the past thirteen years.<sup>187</sup> Chief among the fears is that Soglo or Kérékou would try to amend the constitutional age limit of seventy years for serving as President, which should prevent both from running in 2007.<sup>188</sup> A similar scenario would see Kérékou attempt to overturn the constitutional two-term presidential term limit.<sup>189</sup> One unexplored aspect of this question is how the importance assigned to human rights in Benin has evolved since the National Conference. Certainly the civil and political violations of the previous regime made human rights a top item on the post-Conference agenda. But if Benin has moved into an era of relatively infrequent *gross* human rights violations, one could argue that in a country as poor as Benin, economic and social rights should top the agenda rather than "smalltime" civil and political rights abuses. If more research were done on where particular human rights rank on the agenda of the Beninese population, pundits, and politicians, the Constitutional Court could better assess the specific issues on which it should spend its own political capital when confronting human rights abuses.

A third issue that clouds the analysis of the Court's human rights mandate is the importance of this competence relative to the other roles played by the Court. In the Court's view, are human rights cases inconsequential

186. *Reporters Sans Frontières Publie le Premier Classement Mondial de la Liberté de la Presse*, REPORTERS SANS FRONTIÈRES, Oct. 2002, available at [http://www.rsf.org/article.php3?id\\_article=4097](http://www.rsf.org/article.php3?id_article=4097) (Oct. 24, 2002).

187. Interview with Luc-Omer Gandemey, *supra* note 10.

188. BENIN CONST. tit III, art. 44, para. 5.

189. BENIN CONST. tit. III, art. 42, para. 2.



compared to reviewing the constitutionality of legislation or verifying elections? Even Glèlè-Ahanhanzo, whose life's work has been dedicated to the promotion and protection of human rights, glibly quipped "too much, already" in response to a question as to whether citizens call on the Court with their human rights complaints.<sup>190</sup> If the number of human rights claims continues to rise, will the Court become weary of the task of investigating the abuse of a rural gendarme when important matters of institutional balancing also deserve its attention? These questions are nothing but conjecture, designed to illustrate another dimension that could influence whether the Court ultimately plays a significant role in guaranteeing human rights.

A fourth question that remains unexplored is the role, if any, the ordinary judiciary plays in confronting human rights abuses in Benin. As has been highlighted, no one disagrees that the judicial system is in need of serious reform. Thus the author was somewhat surprised when the President of the League for the Defense of Human Rights suggested they meet at the Appeals Chamber in Cotonou where he was litigating a case, as opposed to the Constitutional Court. The traditional justice system would seem to offer some recourse to victims of human rights abuses. On the other hand, a recent report by Bernadette Codjivo, a Beninese magistrate, indicates that Benin's lawyers and judges lack experience and training in arguing and litigating human rights cases.<sup>191</sup> These considerations highlight why a nuanced understanding of the current division of labor of human rights cases between the Constitutional Court and the judicial system would contribute to an analysis of why the Court is significant among Benin's institutions.

A final question that adds to the complexity of assessing the importance of the Court is ascertaining whether the Court is ahead of its time or behind the times. Dean Akpovo at the University of Benin's Faculty of Law suggests that the population knows the Court from an anecdotal point of view stemming from its occasional election monitoring. For him, the fact the Court was *not* widely known for its human rights competence demonstrates that it is ahead of its time.<sup>192</sup> Théodore Holo, one of those responsible for the Court's institutional framework, acknowledges that while the Court was designed to respond to particular needs (namely, the repression and political instability of the past), its human rights jurisprudence may be beyond the concerns of most citizens. Holo is quick to point out, however, that the Court should be viewed as educating the people on what *should* be. On the other hand, the fact that a paltry number of Court decisions involve complaints lodged by human rights NGOs leaves the impression that the Court is not considered an adequate forum to address the on-the-ground human rights violations these organizations confront. Perhaps this is because of the lack of reparations; perhaps this is due to a general distrust by NGOs of state sponsored

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190. Interview Maurice Glèlè-Ahanhanzo, *supra* note 42.

191. Codjivo, *supra* note 183, at 64–65.

192. Interview with Akpovo, *supra* note 153.

human rights institutions; perhaps this is simply due to the educational mandate (as opposed to litigious mandate) of most of the NGOs. The fact remains that there appears to be some disconnect between the Court and those involved in human rights protection on the ground.

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