

An assessment of the possibilities for impact litigation in Francophone African countries

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Summary

The advent of democratisation in Francophone Africa did not provide an enabling environment for the protection of human rights through impact litigation. Also referred to as strategic litigation or public interest litigation, impact litigation can be defined as 'a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected'. The article examines whether Francophone Africa's political and legal contexts are conducive to impact litigation. It concludes that, in general, the political context characterised by a weak separation of powers due to presidentialism, the timidity of constitutional judges, as well as the variance and complexity of electoral jurisdictions, hinder the possibilities for impact litigation. The article concludes that the legal context characterised by the lack of human rights mandates for constitutional jurisdictions (except Benin), the control of standing in constitutional matters by institutions and authorities, the limited standing afforded to NGOs and members of the public (except in Benin and Côte d'Ivoire) and the complete exclusion of amici curiae, have also hindered the prospects for impact litigation. In the same vein, the subscription to a monism doctrine does not lead to the application of international law in domestic courts and the situation is aggravated by the lack of a culture of litigation.

Key words: *impact litigation; Francophone countries in Africa; constitutionalism; access to court*

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1 Introduction

After independence African countries, generally, were more concerned with nation building and national unity than with issues such as democratisation and respect for human rights.¹ As a result, in spite of the adoption of constitutions enshrining human rights and fundamental freedoms, very little was done to guarantee human rights. The legal and political arrangements were not conducive to the protection of these rights. In this context, Francophone African countries chose a system of adjudication characterised by the prominence of the Supreme Courts, the highest jurisdiction of the countries or the courts of last resort in all matters.² However, in the 1990s, Francophone Africa experienced a wind of democratisation marked by 'a new juridical and political order',³ and characterised by the creation of constitutional jurisdictions to ensure better protection of human rights. However, the question is whether the advent of constitutional jurisdictions has led to impact or strategic litigation which aims at establishing a human rights framework characterised by the pre-eminence of the rule of law and a transparent and accountable government.

The aim of this article is to examine whether impact litigation is possible in Francophone Africa; in other words, firstly, is Francophone Africa's constitutionalism conducive to impact litigation? Constitutionalism should be understood as⁴

a system of government characterised by a separation of powers between the executive, the legislature, and the judiciary. It is a system where democratic elections, accountability, good governance, and respect for human rights characterise the government's activities.

Secondly, are judicial mechanisms, such as access to courts or standing, conducive to impact litigation? Put differently, the two questions investigate whether political and legal environments are conducive to impact litigation in Francophone African countries.

For the purpose of the article, I cannot provide an exhaustive investigation of possibilities for impact litigation in Francophone Africa. Nevertheless, broadening the investigation by moving from pure access to courts/*locus standi* and impact litigation to looking at the relationship between constitutionalism and impact litigation

1 CM Fombad 'The new Cameroonian Constitutional Council in comparative perspective: Progress or retrogression?' (1998) 42 *Journal of African Law* 172; IM Fall 'Constitutional courts and the protection of fundamental rights: A new method of protecting public interests in Francophone Africa' (2009) *Journal of the West Africa Public Interest Litigation Centre (WAPILC Quarterly)* 27.

2 B Kante 'Model of constitutional jurisdiction in Francophone West Africa' (2008) 3 *Journal of Comparative Law* 158.

3 Kante (n 2 above) 59.

4 S Kamga & S Heleba 'Can economic growth translate into access to rights? Challenges faced by institutions in South Africa in ensuring that growth lead better living standards' (2012) *SUR International Journal on Human Rights* 85.

would contribute to the existing literature on impact litigation. Furthermore, the other contribution to the debate will be the examination of the prospect of impact litigation in Senegal under the new draft Constitution. Similarly, adding to the debate, the article will additionally focus on the role of electoral judges in enhancing prospects for impact litigation in Francophone Africa.

The article is divided into five sections, including this introduction. The second section defines impact litigation; the third section looks at the political and legal contexts in Francophone Africa. This will inform the analysis of the possibilities of impact litigation, which is the fourth section of the article. The fifth section summarises the article and offers recommendations to enhance the prospects for impact litigation.

2 What is impact litigation?

According to *Black's law dictionary*, impact litigation, also known as strategic litigation or public interest litigation (PIL), is⁵

a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.

For Judge Bhagwati, impact litigation entails⁶

a co-operative and collaborative effort on the part of the petitioner, the state or public authority and the court to secure observance of the constitutional or legal rights benefits and privileges conferred upon the vulnerable sections of the community and to bring social justice to them.

In fact, a good strategic litigation is measured by its lasting impact. In this respect, Geary is of the view that strategic litigation⁷

involves selecting and bringing cases to court with a goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand. This means that strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

5 *Black's law dictionary* (1990) 1229; V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR International Journal on Human Rights* 127; F Falana 'The role of public interest litigation law in advancing goals of the constitution: Key gains, challenges and limitations of Nigerian democracy (1999-2007)' (2009) 1 *Journal of the West Africa Public Interest Litigation Centre (WAPILC Quarterly)* 14.

6 *Peoples Union for Democratic Rights v Minister of Home Affairs* [1986] LRC (cont) 547.

7 Child Rights Information Network 'Children's rights: A guide to strategic litigation' http://www.crin.org/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf (accessed 22 October 2013).

Therefore, the end result of a particular case is not the benchmark to measure the success of strategic litigation, but the impact that the case will have in transforming the law for the good of populations in the long term. In this respect, litigating aims to change things and promote the public good as opposed to that of interest groups and political parties⁸ who care only for their members. In short, among others, impact litigation entails the existence of a conducive political environment revolving around the separation of powers in which checks and balances are ensured as well as legal arrangements in which courts are accessible to all.⁹

Indeed, for impact litigation to flourish, there is a need to have a positive environment characterised by an existing constitution containing a bill of rights, a strong separation of powers, an open approach to *locus standi* or standing¹⁰ to take legal action and the liberal treatment of *amici curiae* or 'friends of the court' who use their expertise to elucidate issues before the court.¹¹ In addition, the litigant must know 'the rules of the game',¹² which entails understanding the political context, checking the timing in understanding whether the matter is ripe or not moot¹³ for litigation. Furthermore, the litigant should consider the appropriateness of other avenues, such as law reform, advocacy, legal education or the threat of litigation and the costs of the court orders. He or she should also

8 Falana (n 5 above) 21.

9 GS Nijar 'Public interest litigation: A matter of justice – An Asian perspective' <http://www.aseanlawassociation.org/9GAdocs/Malaysia.pdf3> (accessed 22 October 2013).

10 An example of a liberal approach to standing could be found in sec 38 of the Constitution of the Republic of South Africa, 1996, according to which '[p]ersons who may approach the court are (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) acting in their own interest; anyone acting as a member of, or in the interest of, a group, or class persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members'. For more on standing, see A Skelton 'Constitutional protection of children's rights' in T Boezaart (ed) *Child law in South Africa* (2009) 267; P Cane *Administrative law* (2004) 63; also the Nigerian case of *Femi Falana v Attorney-General & 36 Others* (unreported) Suit FHC/ABJ/CS 82/2006), where the plaintiff had sought leave of the Federal High Court to compel the federal and state governments to comply with sec 15(1) of the Nigerian Child's Rights Act, which provides that '[e]very child has the right to free and compulsory and universal basic education and it shall be the duty of the government in Nigeria to provide such education'. In this case, the Court upheld the preliminary objection, arguing that the plaintiff lacked *locus standi* in the case; see also *Gani Fawehinmi v Inspector-General of Police* ((2002) 23 WRN 1; (2002) 1 NWLR (PT 767) 606, where it was held that the plaintiff had *locus standi* to prosecute a sitting governor. For more on these Nigerian cases, see Falana (n 5 above) 15; *The Centre for Child Law v Minister of Justice and Constitutional Development & Others (National Institution for Crime Prevention and Reintegration of Offenders as amicus curiae)* 2009 (2) SACR 477 (CC).

11 Jaichand (n 5 above) 130.

12 A Skelton 'Strategic children's rights litigation: An overview' seminar organised by Save the Children and the Centre for Child Law, held at the University of Pretoria, 31 October 2011 (on file with author).

13 For more on ripeness and mootness, see art 34 of the South African Constitution; also Skelton (n 10 above) 269.

assess the possibility of using international and regional instruments in the domestic courts¹⁴ and identify the appropriate remedies¹⁵ which should in principle have a long-lasting impact on society.

3 Political and legal context in Francophone Africa

3.1 Political context

As alluded to earlier, the 1990s were the beginning of democratisation in Africa. This era was marked by the separation of powers between the executive, legislative and judiciary. The peculiarity of this context was the creation or the replacement of Supreme Courts by Constitutional Courts in Mali, Benin, Mauritania, Togo, Niger, and Constitutional Councils in Cameroon,¹⁶ Senegal and Burkina Faso. Only Guinea kept its Supreme Court.

However, in countries such as Benin, Mali, Burkina Faso, Côte d'Ivoire and Mauritania, the creation of constitutional jurisdictions did not lead to the abolition of the Supreme Court, but to some sort of cohabitation of the two institutions. Nonetheless, in Cameroon,¹⁷ pending the establishment of the Constitutional Council, the Supreme Court remains the highest court of the land, whereas in Togo and Niger, the Supreme Court remained operational, although not very active and dealing with only a handful of cases. Unlike in France, where the creation of the *Conseil Constitutionnel* or Constitutional Council is aimed at protecting the executive from the legislative known for being too powerful under the Third and Fourth Republics¹⁸ in Francophone Africa, the setting up of constitutional jurisdictions aimed not only to shield 'the legislative and judiciary, but also the ordinary citizens from the steadily-increasing and overbearing powers of the executive'.¹⁹ This was done through the judicial review processes as affirmed by the US Supreme Court in 1803 in the case of *Marbury v Madison*.²⁰ Accordingly, the Supreme Court was

14 For more, see RLK Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010); A Skelton 'The development of a fledging child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 482.

15 For more on remedies, see Cane (n 10 above) 82; Skelton (n 10 above) 274.

16 It is important to note that Cameroon is a bilingual country (French and English) with eight French-speaking and two Anglophone regions. Therefore, the analysis on Cameroon will be mostly based on the French-speaking context.

17 Even though French and British colonial rule left Cameroon with a dual legal system, with common law and civil law, when referring to Cameroon, the article will focus on civil law which is within its scope.

18 The constitutional periods of 1875-1946 and 1946-1958 respectively in France.

19 Fombad (n 1 above) 73.

20 *Marbury v Madison*, case decided in 1803 by the US Supreme Court; for more on this case, see <http://www.infoplease.com/ce6/history/A0831715.html#ixzz1gQK3uFaE> (accessed 20 October 2013).

empowered to take control of judicial review, which is the principal device used by the Court to oversee public decision making.²¹ In other words, the highest court in the country is empowered to ensure 'accountability for the performance of public function',²² which entails 'checking', 'controlling' and 'regulating'²³ decision-making processes.

Nevertheless, this attempt to shield other branches of government from the might of the executive is hindered by presidentialism which is endemic in Africa.²⁴ Presidentialism, also known as 'imperial presidency', is the dominance of the President of the Republic whose hand reaches the legislative and the judiciary and restricts their independence.²⁵ In this context, the power of the President to appoint members of the judiciary, to stand in the highest court of the land in constitutional and other matters and to legislate through decrees, are instrumental in deleting the frontiers of separation powers. This will be explored in detail while looking at how the separation of powers affects PIL in Francophone Africa.

3.2 Legal context

An examination of the legal context will focus on the nature of constitutions, access to court or *locus standi*, as well as the application of international law by domestic courts. For a legal environment to be conducive to impact litigation, there is a need to have a constitution which enshrines human rights; a constitution with a bill of rights in which protected rights are justiciable. Is it currently the case? In addition, the court, and especially constitutional jurisdictions, should be accessible to all citizens in all matters, especially in constitutional review-related matters and not only in electoral disputes as is currently the case generally.

Related to this is the question of access to the court for non-governmental organisations (NGOs) and associations. In general, access to courts is hindered by the principle of 'no interest, no action' of the French procedural law, which is a reality in Francophone Africa. However, there are a few opportunities that enable interested NGOs and associations to bring cases to court, through class action, for instance.

As far as adherence to international law is concerned, French-speaking African countries are parties to the main international and

21 Cane (n 10 above) 8.

22 Cane (n 10 above) 7.

23 As above.

24 K Prempeh 'Progress and retreat in Africa: Presidents untamed' (2008) *Journal of Democracy* 110.

25 As above; HS Adjolohoun 'Between presidentialism and a human rights approach to constitutionalism: Twenty years of practice and the dilemma of revising the 1990 Constitution of Benin' in MK Mbondenyi & T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from sub-Saharan Africa* (2013) 245.

regional human rights treaties and subscribe to the monist approach through which an international agreement automatically becomes part of domestic law upon its ratification and publication in the national gazette. The challenge is that Francophone African countries often do not give effect to international and regional agreements in their court rooms. Given these political and legal contexts, the next section of the article will examine whether these environments are conducive to impact litigation.

4 Prospects for impact litigation in Francophone Africa

Focusing on the assessment of avenues for impact litigation in Francophone Africa, this section examines the extent to which the environment is conducive to this litigation. In this respect, it assesses the extent to which the separation of powers is conducive to impact litigation. It also examines the legal architecture by assessing whether Francophone African countries have constitutions containing justiciable bills of rights, liberal standing requirements, and whether international and regional instruments are applied by domestic courts.

4.1 Separation of powers

Notwithstanding their official subscription to the separation of powers, Francophone African countries *de facto* apply 'imperial presidency'. In an analysis of the situation in Benin, Adjolohoun aptly demonstrates how the boundaries between the executive and other branches of governments are blurred to benefit the former.²⁶ In this regard, the President of the Republic is at the same time the head of state,²⁷ head of the executive²⁸ and the supreme head of the army.²⁹ He appoints cabinet members, and determines their duties and who they report to.

Furthermore, out of seven members of the Constitutional Court, the President appoints three. Empowered by article 54 of the Constitution, he also appoints the President of the Supreme Court and members of this Court, even though these appointees are chosen from the list prepared by the *Conseil Supérieur de la Magistrature* (Judicial Service Commission). The President also appoints the president of the broadcasting body in the country as well as the ombudsman.³⁰

26 Adjolohoun (n 25 above) 256-269.

27 Art 44 Constitution.

28 Art 54(1).

29 Art 54(2).

30 Adjolohoun (n 25 above) 256.

Moreover, the President is empowered to make law through 'projects' of law or 'executive bills'.³¹ In this way, he shares the 'initiative of laws' with parliament. From this perspective, the President also approves legislation adopted by parliament and is mandated to initiate a referendum.³² Although the National Assembly remains the main law-making body in the country, the vast powers of the President in law making cannot be ignored. In his analysis of presidentialism in Africa, Prempeh correctly argues that '[c]onstitutional design has helped to ensure presidential dominance over the legislature, typically by doing little to rebalance power between the two political branches'.³³ Indeed, it could be claimed that the might of the President in all spheres of power turns him into the alpha and omega or the beginning and end of the Beninese constitutionalism. Adjolohoun explains as follows:³⁴

[The] segregation of powers under the law is eroded by strong prerogatives afforded to the President of the Republic to both make the law and exercise important political influence-related powers over public administration, armed forces, the judiciary and other checks and balances institutions, including the media, social and economic councils, and the ombudsman institution.

The presidentialism observed above is not unique to Benin, but is the trend in Africa, and Francophone Africa in particular. For instance, in the Democratic Republic of Congo (DRC), the Constitutional Court is made up of nine members appointed by the President of the Republic who chooses three of them on his own initiative, three are recommended by parliament in session and three recommended by the High Council of Magistracy. In Cameroon, the President appoints members to the bench and the legal department.³⁵ In addition to this, the President 'shall be assisted in this task by the Higher Judicial Council which shall give him its [non-binding] opinion on all nominations for the bench and on disciplinary action against judicial and legal officers'.³⁶ This provision turns judges into mere civil servants who aspire to nominations and promotions and will therefore not contradict the executive that takes decisions in terms of their careers. These judges will not stand for public interest when their personal interest is at stake. This cannot enhance the prospects of impact litigation.

Furthermore, the specificity of the Cameroonian Constitutional Council is that 'it is not a court of law and operates outside the judicial system'.³⁷ This is so because the 'judicial power' is located in Part 5 of the Constitution, whereas the Constitutional Council is located in

31 Art 57 Constitution.

32 Art 58.

33 Prempeh (n 24 above) 115.

34 Adjolohoun (n 25 above).

35 Art 37(3) Constitution.

36 As above.

37 Fombad (n 1 above) 176.

Part 7. The executive interferes with and dominates the Constitutional Council where the President of the Republic appoints 11 members for a non-renewable term of office of nine years 'from among personalities of established professional renown' and 'of high moral integrity and proven competence'.³⁸ In addition to this, all 'former Presidents of the Republic shall be *ex officio* members of the Constitutional Council for life',³⁹ even if they lack expertise in terms of law and human rights issues. According to Nguélé, a term of office of nine years ensures the independence of the Constitutional Council.⁴⁰ However, it is worth noting that an appointed judge of nine years' service could serve his or her employer's interests to the detriment of fundamental freedoms. An elected judge (by a commission made of his or her peers) would be more prone to serve the interests of justice through which strategic litigation could become a reality.

Moreover, the review of the constitutionality of laws has been conferred by article 47 of the Constitution to the Constitutional Council. Nevertheless, since the latter has never been established, section 67(4) of the Constitution, dealing with transitional and final provisions, states that the Supreme Court shall perform the duties of the Constitutional Council until the latter is set up. The Supreme Court can therefore exercise such powers as have been conferred on the Constitutional Council.⁴¹ These powers are extremely restricted in two ways: Firstly, under article 47, the Supreme Court can only entertain disputes on a set number of issues. With respect to the most important issue concerning unconstitutional laws, its jurisdiction is limited to an abstract pre-promulgation review of laws. Hence, there is an urgent need to establish a strong separation of powers with an independent Constitutional Council.

In Senegal, the independence of the Constitutional Court is also questionable because all its members are appointed by the President of the Republic. Overall, Francophone African countries are characterised by the supremacy of the executive over other branches of government, by a 'quasi-subordination' of the judiciary to the executive, and this constitutes a hindrance to the flourishing of impact litigation. In fact, the pre-eminence of the executive in all spheres of the state led Pempeh to note:⁴²

[C]onstitutionalism (in the form of credible constitutional limits on executive power), Africa's post-1990 transitions have at best injected a few (but non-retrieval) democratising reforms into an old order that remains in key respects unreconstructed.

38 Art 51(1) Constitution.

39 Art 51(2).

40 MN Abada 'L'indépendance des juridictions constitutionnelles dans le constitutionalisme des Etats Francophones post guerre froide: L'exemple du conseil constitutionnel Camerounais' <http://www.droitconstitutionnel.org/congresmtp/textes5/ABADA.pdf> (accessed 22 October 2013).

41 CM Fombad *International encyclopedia of laws: Cameroon* (2003) 125.

42 Pempeh (n 24 above) 113.

However, in 2013, the government of Senegal established a National Commission for the reform of institutions. This Commission is mandated to reform national institutions to ensure democracy, good governance and respect for the rule of law in the country. After a nationwide consultation, the Commission produced an *avant projet de Constitution* or a draft Constitution, characterised by a balanced separation of powers between the executive, legislature and the judiciary.⁴³ To address the pre-eminence of the executive on the legislature, some of the new checks and balances proposed are that, although the President signs ordinances and decrees, most of his or her actions are countersigned by the Prime Minister, except in cases such as the attribution of distinctions to citizens who deserve them;⁴⁴ the exercise of presidential pardon happens after consultation with the *Conseil Supérieur de la Magistrature*,⁴⁵ and the negotiation of international agreements can only be ratified by the President after the approval of the National Assembly,⁴⁶ to list some of them.

Similarly, to ensure the independence of the judiciary, judges are subject only to the authority of the law,⁴⁷ and as such cannot receive injunctions from the executive which cannot as well hinder the implementation of the courts' decisions.⁴⁸ In addition to this, the presidency of the Superior Council of Magistracy is headed by the president of the Constitutional Court. The Superior Council of Magistracy comprises the president of the Constitutional Court, appointed by the President of the Republic, two high-ranking personalities appointed by the president of the National Assembly, the president of other branches of the judiciary, such as *Conseil d'Etat*, the first presidents of the Court de Cassation, the public prosecutor at the same Court, and many other elected members.⁴⁹ Moreover, the Superior Council of Magistracy also acts as a discipline council for judges⁵⁰ who are as such protected from the might of the executive.

Furthermore, the Constitutional Court comprises three magistrates with at least 25 years' experience, appointed by the President of the Republic who elects them from a list of six proposed magistrates by the Superior Council of Magistracy. It also includes a law professor with at least 25 years' experience, chosen by the president of the of National Assembly, a lawyer with at least 25 years' experience chosen by the national bar, and another high-ranking personality with 25 years' experience chosen by the Prime Minister from a list of three nominations recommended by associations of human rights

43 Art 5 Draft Constitution of 1993.

44 Art 71.

45 Art 72.

46 Art 145.

47 Art 105.

48 Art 129.

49 Art 106.

50 As above.

organisations.⁵¹ The tenure of the members of the Constitutional Court is six years and is non-renewable.

The diversity in membership of the Constitutional Court aims to ensure its independence from other branches of government. If adopted, the new Constitution of Senegal could become the model to be emulated in Africa as it addresses the various aspects of presidentialism which hinder access to justice and standing in court that are vital for impact litigation in Francophone Africa.

While waiting for the adoption of the new Constitution that can be used as a model in Francophone Africa, the other avenue to explore is the possibility of impact litigation in electoral disputes. In general, electoral judges are tasked with ensuring the rule of law and to guarantee free and fair elections. In this context, prior to elections, judges co-ordinate the registration of voters and monitor the candidates and electoral campaigns as well as their funding. After elections, judges are also tasked with announcing the election results and to handle elections disputes.⁵² These disputes question the validity of the elections. In various African French-speaking countries, including Cameroon, Benin, Burkina Faso, Gabon, Guinée-Bissau, Madagascar, Mauritania, Niger, Rwanda, Senegal, Tchad, Togo, Mali and Senegal, the Constitutional Court handles electoral disputes as a court of the first and last resort.

In Mali, for example, the Constitutional Court is tasked with addressing disputes related to presidential and parliamentary elections, whereas local and municipal elections are the domain of the Administrative Chamber at the Supreme Court.⁵³ Similarly, in Senegal, the Constitutional Council not only receives electoral lists for presidential elections, but is also tasked with handling disputes related to presidential and parliamentary elections and releasing the results of these elections.⁵⁴ As far as local or municipal electoral disputes are concerned, in Mali⁵⁵ and Senegal⁵⁶ the Administrative Chamber of the Supreme Court is in charge.

Furthermore, through election disputes, electoral judges are also mandated to protect human rights and fundamental freedoms. For instance, in Mali the right to equality of all Malians to run for presidential office was protected by declaring that a provision of the electoral law prohibiting independent candidacy was unconstitutional.⁵⁷ In a similar decision, a constitutional judge ordered the National Committee for Equal Access to State Media to

51 Art 108.

52 AA Sow 'La contribution du juge des elections dans la construction de l'etat de droit au Senegal' in H Hamann *et al* (eds) *African law study library* (2012) 2.

53 Law of 12 February 2002 relating to elections.

54 See arts 29, 30, 32, 33, 34, 35, 37 & 41 of the Senegalese Constitution. Also, Decree 92-916 of 17 June 1992, art 2.

55 Malian Law of 12 February 2002.

56 *Loi 92-15 du 7 février 1992 portant code électoral au Sénégal.*

57 Arrêt CC 96-003 du 25 octobre 1996.

ensure that Mr Mohamed Kimbiri, a candidate for presidential election, was given equal access with other candidates to state media.⁵⁸

In Senegal, during the 1993 presidential elections, the Constitutional Council protected the right to equality between the candidates by rejecting the candidacy of Landing Savané which was submitted after the deadline for submission.⁵⁹ The other illustration of the freedom of the Constitutional Council was demonstrated when it rejected a request from President Diouf because it was submitted late.⁶⁰ Still in Senegal, the Constitutional Council has recorded similar bold decisions related to legislative elections. For instance, in distancing itself from the position of the executive, the Constitutional Council held that rules related to the ineligibility of candidates for election should be interpreted narrowly and could not be broadened to include cases non-explicitly provided for by the law.⁶¹ Similarly, the Constitutional Council forbade the use of the name and picture of former President Abdoulaye Wade by 'the Wade Coalition' on ballots during legislative elections.⁶² This decision was aimed at protecting equality between political parties and various coalitions during legislative elections.

The separation of powers characterised by the independence of the electoral judges opens more space for impact litigation and the protection of human rights to flourish. However, the boldness of the electoral judges in constitutional jurisdictions is more theoretical than a reality. Generally, the weakness of the electoral judges is visible after the elections.⁶³ These judges often find excuses not to take action to address fraudulent elections. For instance, in Senegal in Decision 10/93 – Case 20 to 23/E/C/93, the judge was of the view that the irregularities noted during elections benefited all political parties and could not be relied on to declare the elections void.

Furthermore, instead of using his or her discretionary power, the constitutional judge defers the matter to another court. Such an approach was used by the Constitutional Court of Senegal in Decision 10/93 – Case 20 to 23/E/C/93. In this decision, some issues were qualified as criminal offences and were deferred to the competent judge by its electoral counterpart.⁶⁴ Moreover, as correctly observed by Sow, in that judgment, the judge spent more time expressing

58 Arrêt CCEL-044 du 11 avril 1997.

59 Décision 1/93-Affaire 1/E/93 (Publication of the list of candidates for presidential elections of 21 February 1993).

60 Constitutional Council decision 3/93 Case 4/E/93,

61 Constitutional Council decision 33/98 Case 1/E/98 et 2/E/98; for more on this decision, see Sow (n 52 above) 8; *Les décisions et avis du Conseil constitutionnel du Sénégal, Rassemblées et commentés sous la direction de Ismaila Madior Fall*, CREDILA (2008) 206.

62 Décision 81 - Affaires 2/E/2001-3/E/2001- 4-/E/2001. For more on this decision, see Sow (n 52 above) 8 9.

63 Sow (n 52 above) 9.

64 For more on this decision, see Sow (n 52 above) 10.

regret over the wrongdoings during elections than taking action to remedy these wrongs.⁶⁵ This attitude was illustrated by Decision 6/93 – Case 7 to 12/E/93, where the judge simply ‘regretted’ that a television channel aired a political campaign after the closure of the electoral campaign period.

It is important to note that the timidity of the constitutional jurisdictions is not unique to Senegal, but is the trend in Francophone Africa. For instance, in Mali the Administrative Chamber of the Supreme Court in charge of local elections disputes is often weak and cannot easily compel the administration to follow or not to follow the law.⁶⁶ The timidity and incapacity of constitutional jurisdictions to declare elections void could be linked to the fact that, in the first place, these jurisdictions are generally mandated to run the election processes and ensure their fairness. Therefore, declaring the elections void at the end will amount to an acknowledgment of incapacity and a vote of non-confidence in themselves.⁶⁷ It could be argued that, to some extent, constitutional jurisdictions are both the judges and the parties in election disputes and this can only hinder the prospects for significant impact litigation.

Besides the timidity of the constitutional judges, the variance or multiplicity of electoral jurisdictions tasked to handle different types of electoral disputes can be confusing and lead to incomprehension and interferences between these jurisdictions. Furthermore, in countries where many people are still illiterate, the complexity related to diversity of jurisdiction cannot encourage the populations in need of justice.⁶⁸ Consequently, there is a need to centralise electoral disputes to one well-equipped and capacitated specialised jurisdiction. Subsequently, populations should be educated and empowered to use the specialised jurisdiction as this will enable them to effectively take cases to the jurisdiction.

In general, notwithstanding some positive attempts by constitutional jurisdictions, it could be argued that much more needs to be done by these jurisdictions to make a significant impact. Indeed, after almost every election in Francophone Africa, the constitutional jurisdiction is called upon to address a crisis.⁶⁹ This situation is likely to weaken the jurisdiction and discourages citizens and groups who in

65 As above.

66 ‘Le juge suprême et la gestion du contentieux des élections locales’ *Les actes du colloque de Cotonou* 14-16 May (2002) 45.

67 D Sy ‘La condition du Juge en Afrique: l’exemple du Sénégal’ (2003) 19 <http://afrilex.u-bordeaux4.fr/la-condition-du-juge-en-afrique-l.html> (accessed 19 September 2014).

68 J de Gaudusson ‘Les élections à l’épreuve de l’Afrique’ *Les cahiers du Conseil constitutionnel* 13, ‘Etudes et doctrine. La sincérité du scrutin’ (2002) 103.

69 AH Diompy ‘Les dynamiques récentes de la justice constitutionnelle en Afrique Francophone’ http://afrilex.u-bordeaux4.fr/sites/afrilex/IMG/pdf/JOURNEE_DE_LA_JEUNE_RECHERCHE_EN_DROIT_CONSTITUTIONNEL.pdf25 (accessed 20 September 2014).

principle should litigate. This situation will, therefore, hinder the prospect for impact litigation.

4.2 Constitutions/bills of rights

In general, Francophone African countries' constitutions contain preambles that list fundamental rights. Although some scholars have questioned the legal value of the Preamble, arguing that it provides mere contextual guidance and is therefore non-justiciable,⁷⁰ the legal value of the Preamble has been expressly recognised in many Francophone African countries' constitutions. For instance, in Cameroon, the Constitution itself is unequivocal on the legal status of the Preamble. The Constitution, in article 65, clearly states that the Preamble 'is part and parcel of the Constitution' and is as such justiciable. This, however, remains controversial because the Cameroonian Supreme Court's emphasises that the Preamble only provides contextual guidance and contains mere principles, and is therefore not justiciable.⁷¹ In fact, the Cameroonian Constitution does not contain 'constitutional provisions which enable private individuals to petition the court in case of an alleged violation'⁷² of human rights. This was noted by the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee). During the examination of the 1998 Cameroon report, the ESCR Committee raised its concern 'about the legal status of the Covenant in the Cameroonian legal system'.⁷³ The Committee⁷⁴

regrets that the delegation [of Cameroon] has not been able to clarify the position of the Covenant in Cameroonian law, nor provide any specific references to cases in which the Covenant has been invoked in national courts of law.

This remark led Che to argue that 'Cameroon should clearly and unequivocally integrate socio-economic and political rights in its Constitution, as well as adopt definite measures for their enforcement by state organs'.⁷⁵ In other words, the enumeration of fundamental rights in the preambular paragraph of the Cameroonian Constitution cannot be an appropriate substitute for a bill of rights. Therefore, the country should revise its Constitution with specific attention to the

70 V Bhagwan & V Bhushan *Comparing constitutions* (1987) 12.

71 *Rapport de la Cour Suprême du Cameroun* (2000), as quoted by GZ Sebenzile 'The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa and Cameroon' unpublished LLM dissertation, University of Pretoria, 2005 41.

72 MD Afuba 'The constitutional protection of civil and political rights in Cameroon' (2006) 3 *University of Botswana Law Journal* 68-69.

73 Concluding Observations of the ESCR Committee: Cameroon 8 December 1999 E/C12/1/Add.40 para 11.

74 As above.

75 CAC Che 'Challenges of incorporating and enforcing a bill of rights in the Cameroonian Constitution' (2008) 2 *Cameroon Journal of Democracy and Human Rights* 1 <http://www.cjdh.org/2008-06/Christian-Che.pdf> (accessed 22 October 2013).

incorporation of a bill of rights, and the provision of remedies in cases of human rights violations. In this vein, Cameroon should act to institutionalise the justiciability of all fundamental rights because, as correctly observed by Arbour, 'it is through action at the national level that international human rights obligations can be translated into reality'.⁷⁶

In Senegal, the Preamble is part and parcel of the Constitution and is as such justiciable as a bill of rights provision. The Preamble subscribes to international human rights instruments which have contributed to the elaboration of global standards of human rights,⁷⁷ and this strengthens its legal value and renders it justiciable. This was confirmed by the Constitutional Council in its decision of 23 July 1993.⁷⁸ In this decision, the Constitutional Council extended the block of constitutionality to the Preamble, integrated the Bill of Rights of man and the citizen of 1789, the Universal Declaration of Human Rights (Universal Declaration) and the African Charter on Human and Peoples' Rights (African Charter) in the Constitution. This action underlines the justiciability of the Preamble that can be used for constitutionality control. In fact, the position of the Senegalese Constitutional Council has become the recent trend in Francophone Africa. Nevertheless, this does not lead to impact litigation because besides Benin, constitutional jurisdictions in Francophone Africa do not have a human rights mandate.⁷⁹ Furthermore, even in Benin, litigation on socio-economic rights that could be a basis for impact litigation is still scarce.

4.3 Standing in constitutional matters

Linked to access to justice, standing can be defined as an applicant's right to make a legal claim or seek judicial enforcement of a duty or right.⁸⁰ In principle, Francophone African countries' constitutionalism allows constitutional challenges. However, constitutional jurisdictions are not easily accessible to all, except in cases of electoral disputes. In Cameroon, only the President of the Republic, the president of the National Assembly, the president of the Senate, one-third of the members of the National Assembly or one-third of the senators, can bring a case to the Constitutional Council,⁸¹ except in cases concerning election disputes. In other words, individual Cameroonians do not have the standing to challenge the

76 L Arbour *The Plan of Action of the Office of the United Nations High Commissioner for Human Rights in Protection and Empowerment* (2005); Rights and Democracy Annual Report 2005/2006 1.

77 HS Adjolohoun 'Visiting the Senegalese legal system and legal research: A human rights perspective' (2009) <http://www.nyulawglobal.org/globalex/SENEGAL.htm> (accessed 20 September 2014).

78 RIDA-EDJA 23, 72 E.

79 Fall (n 1 above) 30.

80 *Black's Law Dictionary* (n 5 above) 1999; C Tobias 'Standing to intervene' (1991) *Wisconsin Law Review* 420.

81 Para 47(2) Constitution.

constitutionality of laws. The same trend is followed in the DRC, where only the President of the Republic, the Prime Minister, the president of the Senate and one-tenth of senators or members of parliament can bring constitutional matters to the Constitutional Court that is given 30 days to render its decision and eight days when there is an urgent matter or by request from the government.

Similarly, in Senegal, the President of the Republic is empowered to seize the Constitutional Council to declare a law unconstitutional, and this should be done within six days after he has received the law passed by at least one-tenth of the members of the National Assembly. Additionally, a tenth of the members of the National Assembly can seize the Constitutional Council for unconstitutionality.⁸² However, as will be discussed further below, in relation to Francophone Africa in general, individuals may invoke the exception of unconstitutionality of law during proceedings before the Court of Cassation or State Council.⁸³ Subsequently, these courts will refer the matter to the Constitutional Council for the final say. In addition to this, registered political parties and a coalition of parties have standing before the Constitutional Council.

In Côte d'Ivoire, only the President of the Republic has standing to challenge the constitutionality of bills at the Constitutional Court. Nevertheless, when human rights are encroached upon, associations and NGOs also have standing. In Mali, only the President of the Republic, the Prime Minister, the speaker of the National Assembly, one-tenth of the members of the National Assembly, the Chairperson of the Supreme Council of the Local Authorities or a tenth of the national councillors, and the Chief Justice can challenge the constitutionality of laws.⁸⁴ Fall observes that in Francophone Africa, only authorities and institutions have the right to access constitutional jurisdictions.⁸⁵ The exclusion of citizens from the sphere of constitutional justice is also characteristic of Guinea, Burkina Faso and Togo.

Although in Mali and Benin, the president of the High Council of Local Authorities and president of the High Broadcasting Authority and Communication are also allowed to bring matters to the Constitutional Court and Constitutional Council respectively, in general, French-speaking African citizens are still not empowered to reach the constitutional courts' doors. This effectively renders the process meaningless because the very people who usually initiate laws are the only people competent to challenge the constitutionality of these laws. This is implausible.⁸⁶ In general, in many Francophone

82 Art 74 Constitution of 2001.

83 Art 96.

84 Constitution of Mali; Fall (n 1 above) 29.

85 Fall (n 1 above) 30.

86 SA Djoyou Kamga 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 190.

African countries, constitutional courts exercise a sort of quasi-judicial control of the constitutionality of bills or non-promulgated legislation and a monitoring of state institutions. In other words, it is almost impossible to scrap a Bill after it has become law.⁸⁷ Apple and Deyling are of the view that⁸⁸

[j]udges in the civil law systems view themselves less as being in the business of creating law than mere appliers of the law, ie [having] a more technical and less active role in the development of the law than their common law counterparts.

This cannot enhance the prospects for impact litigation. However, Benin is the only African French-speaking country that opens the doors of its Constitutional Court to all. According to article 22 of the Benin Constitution, anyone can directly approach the Constitutional Court to challenge the constitutionality of laws *in abstracto*. This is called '*le control de constitutionnalité des lois par voie d'action*' or the ability to challenge the constitutionality of laws directly to the highest court in the land. According to Fall, it is 'the direct method that allows citizens to challenge directly before a constitutional judge, a legislative or jurisdictional act that is violating fundamental rights'.⁸⁹

Besides the possibility of going directly to the Constitutional Court for a constitutional matter, French-speaking civil law jurisdictions such as Benin, DRC, Burkina Faso, Mali, Niger, Senegal, Chad, Côte d'Ivoire, Cameroon and Togo also afford their citizens the possibility to raise constitutional matters incidentally or *in concreto*. It is called '*control de constitutionnalité des lois par voie d'exception*', in other words, during the hearing of a particular case, the plaintiff can raise the unconstitutionality of a law that he or she believes violates the Constitution. Nevertheless, unlike in American courts, where the judge before whom the plea of unconstitutionality is made can resolve the issue, in French-speaking African countries, the administrative or judicial judge in charge of the case postpones the verdict and submits 'the issue of constitutionality to the constitutional court which is the sole authority [competent] to deal with constitutional disputes of any nature'.⁹⁰ It is, however, important to note that the institution of judicial review *in concreto* is a departure from the classical French system which until 2008 did not allow such a review.⁹¹

Nevertheless, in Francophone African countries, the provision for a plea of unconstitutionality is mere words on paper. This is so because of the lack of a culture of litigation and the limited understanding of the justiciability of fundamental rights compared to regular laws, focusing on the protection of individual rights and public liberty and

87 Fombad (n 1 above) 180.

88 J Apple & R Deyling *A primer on the civil law system* (1997) 37.

89 Fall (n 1 above) 31.

90 Fall 30.

91 Kante (n 2 above) 161; F Delperee *Le recours des particuliers devant le juge constitutionnel* (1991) 221.

administrative acts (by the administrative judge), but not on constitutional issues.⁹² According to Fall, this is⁹³

a restricted human right protection as it is only directed towards the jurisdictional supervision of administrative acts (and not legislative acts or jurisdictional acts that violate fundamental human rights) and by a judge who is not always independent of the public service.

Sharing this view, Kante argues that constitutional law 'is still more institutional than substantive'.⁹⁴ Benin, however, is the exception, not only with a liberal standing approach in the Constitutional Court, but also with the ability of its Court to deal directly as a court of first instance with all issues of human rights violations. According to the Constitution of Benin, the Constitutional Court is competent to rule on '[t]he 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'.⁹⁵ In other words, besides its competency on electoral matters mentioned earlier, the highest court in the land is competent to address issues related to the violation of fundamental rights. Nevertheless, in this approach, the Court is overburdened by re-examining the facts of the case without proper investigations,⁹⁶ and remedies are provided for the violation of all fundamental rights caused by a law or administrative acts or whenever it occurs.⁹⁷ However, fundamental rights are paramount, hence the Constitutional Court works towards their realisation. For instance, in protecting the right not to be detained for a duration greater than 48 hours except by a decision of the magistrate before whom he must have been presented, the Court ruled that difficult working conditions could not constitute an excuse to detain a suspect beyond the deadline.⁹⁸

From the same perspective, while ruling on the right to equality provided for by article 26 of the Constitution, the Court held that 'equality is to be analysed as a rule according to which individuals of the same category can be subjected to the same treatment without discrimination'.⁹⁹ This was also the position of the Court in its Decision DCC 96-067 of 21 October 1996.¹⁰⁰ The right to equality was actually protected through an interesting case of impact litigation where the Court, in examining the law related to the Individual and Family Code, noted that 'there is unequal treatment between men

92 Fall (n 1 above) 31.

93 As above.

94 Kante (n 2 above) 170.

95 Art 117 Constitution of Benin.

96 Konrad Adenauer Foundation *Commentaire de la constitution Beninoise du 11 Decembre 1990* (2009) 223.

97 Konrad Adenauer Foundation (n 96 above) 224.

98 High Court Ruling DCC96-006 of 19 January 1996; for more on this judgment, see Fall (79 above) 33.

99 High Court DCC 96-025 of 2 May 1996.

100 For more on this decision, see Fall (n 79 above) 33.

and women where the option provided for in paragraph 2 of article 143 allows the man to be polygamous whereas the woman can only have one husband'. This provision was unconstitutional for conflicting with article 26(2) of the Constitution that provides for equality between men and women. As a result of this ruling, polygamy was abolished in the country.¹⁰¹ This is a positive example of strategic litigation.

The Constitutional Court goes as far as protecting third generation human rights. This was the case when the Court protected the right to a healthy environment¹⁰² by ruling against the setting up of a chicken farm which polluted the neighbourhood through the spreading of chicken feathers and stench which caused lung disease.¹⁰³ Overall, the liberal approach to standing and the openness of the Court to all human rights violations at the Beninese Constitutional Court enhance the prospects for impact litigation development and should be emulated by other Francophone African countries.

As far as standing for NGOs and associations is concerned, Francophone African countries apply the French procedural law principle that 'a plaintiff must demonstrate a personal interest in order to have standing to institute a suit in a court of law'.¹⁰⁴ According to the French New Code of Civil Procedure:¹⁰⁵

Anyone who has an interest in a claim being successful or rejected, may institute proceedings, except for those cases where the law grants a right of action to those persons qualified to support or contest a claim, or to defend a given interest.

This provision highlights the need to have an individual and direct interest in a case to have standing. This requirement keeps NGOs and associations away from courts. Nevertheless, NGOs, trade unions and professional associations are allowed to sue in the collective interests of their members¹⁰⁶ in the form of class or group action. However, under article 120 of the Constitution of Benin, NGOs, associations and even national human rights institutions have standing at the Constitutional Court on matters of human rights. Similarly, as alluded to earlier, NGOs and associations also have standing in matters of human rights in Côte d'Ivoire.

In spite of the positive examples from Benin and Côte d'Ivoire, generally in Francophone Africa, when the doors of the courts are

101 Decision DCC02-144 23 December 2004.

102 Art 27 Constitution.

103 Constitutional Court Ruling DCC02-065 of 5 January 2002.

104 YM Badwaza 'Public interest litigation as practised by South African human rights NGOs: Any lessons for Ethiopia?' unpublished LLM dissertation, University of Pretoria, 2005 22; C Dadomo & S Farren *The French legal system* (1993) 158.

105 Art 31.

106 Arts L 411-11, *Code du travail* cited in Dadomo & Farren (n 104 above) 158; Badwaza (n 104 above) 22.

open to NGOs or associations, this is subject to several conditions. In Cameroon, for instance, the NGO must be approved by public authority. As well, to be approved, the NGO must prove to have made an effective contribution of at least three years in one of the following domains: legal, economic, social, cultural, health, sports, education, humanitarian, environmental protection or the promotion of human rights.¹⁰⁷ These conditions are sufficient to discourage NGOs that are poor.

Nevertheless, Law 99/014 of 24 December 1999 regulating NGOs in Cameroon allows for the creation of an organisation/association, called *association unipersonnelle*, which is given special treatment in that it can be given approval without the mandatory three-year waiting period that applies to other NGOs. This practice, which to some extent allows NGOs to have standing, should be emulated by other Francophone African countries. In general, the French principle of 'no interest, no action in the court of law' not only hinders access to justice through NGOs, but also excludes *amici curiae* which can play a vital role in strategic litigations.

In spite of challenges to standing in constitutional jurisdictions, the electoral disputes discussed earlier provide an avenue for other citizens to have standing in these jurisdictions. In this regard, in Senegal, while any candidate for presidential and parliamentary elections can approach the Constitutional Council within 72 hours from the proclamation of results to contest these results,¹⁰⁸ every voter can approach the Appeal Court to request the annulment of regional elections¹⁰⁹ or municipal and rural elections within five days after the proclamation of the election results.¹¹⁰ From the same perspective, according to the Malian Law of 12 February 2002 relating to elections,¹¹¹ any individual, political party or groups of political parties as well as a representative of an independent candidate can approach the Constitutional Court or the Supreme Court for presidential or parliamentary as well as local or municipal election disputes respectively. Indeed, generally, in Francophone Africa, the constitutional courts and councils are open to all in matters of electoral disputes. This led Kante to argue that 'constitutional jurisdiction in former French colonies nations are all considered ... as jurisdictions of electoral disputes'.¹¹² Nevertheless, as discussed earlier, the timidity of the electoral judges in the constitutional jurisdictions hinders the opportunity afforded to citizens through electoral disputes and as such constrains the prospects for impact litigation.

107 Law 99/014 of 24 December 1999 regulating NGOs in Cameroon.

108 Art 29 Constitution; art LO 135 & LO 185 Electoral Code.

109 Electoral Code L220.

110 Electoral Code L254.

111 Art 175(1).

112 Kante (n 2 above) 160.

However, in the Senegalese context, the new draft Constitution increases access to constitutional courts for *controle par voie d'action* to individuals and groups. In this regard, groups of at least 10 000 people registered on electoral lists and living in more than half of the regions can now approach the Constitutional Court for a *controle par voie d'action*, six days after the adoption of a law which they find unconstitutional.¹¹³ In addition to this, every individual or moral person can approach the Constitutional Court whenever a legislative measure violates human rights.¹¹⁴ Put differently, the Constitutional Court is now mandated to receive complaints related to human rights violations from individuals and NGOs. Indeed, if adopted, the new Constitution will enhance the prospect of impact litigation in Senegal. Overall, besides some possibilities to access constitutional jurisdictions through electoral disputes and cases of violations of human rights in some Francophone African countries, in general, access to these jurisdictions is open to very few individuals and institutions.

4.4 International law in domestic courts

In general, Francophone African countries subscribe to the monist approach to international law. Accordingly, international agreements automatically become part of domestic law as soon as they are entered into. It follows that national courts are obliged to apply international law without further parliamentary processes.¹¹⁵ Article 45 of the Cameroonian Constitution provides as follows:

Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.

From a monist perspective, in Cameroon, any treaty provision is self-executing¹¹⁶ if it is directly applicable and does not require 'further implementing action for it to be legally binding at national level'.¹¹⁷ The provision should be given effect immediately at the local level. Therefore, human rights provided for by international and regional treaties are justiciable and directly applicable and self-executing in Cameroonian domestic law. Consequently, these rights could be the subject of impact litigation. Just like Cameroon, Benin adopts a monist approach, with international law overriding national law.¹¹⁸ This approach is also followed by Burkina Faso,¹¹⁹ Niger,¹²⁰ Central

113 Art 121 Draft Constitution.

114 Art 109.

115 J Dugard *International law: A South African perspective* (2005) 47.

116 For more on self-executing treaties, see T Buergenthal 'Self-executing and non-self-executing treaties' (1992) IV *Recueil des Cours* 343.

117 E Denza 'The relationship between international and national law' in MD Evans (ed) *International law* (2006) 437; M Dixon *Textbook on international law* (2007) 88.

118 Art 147 Beninese Constitution.

119 Art 151 Constitution of Burkina Faso, 1992.

120 Art 132 Constitution of Niger, 1999.

African Republic¹²¹ and Chad.¹²² Inspired by the 1958 French Constitution, the implementation of these clauses is, however, subjected to reciprocity. In other words, international agreements are implemented only when the other parties fulfil their obligations by implementing them as well. Nevertheless, while it is relatively easy to monitor the implementation of a treaty by a party in a bilateral agreement, it is rather difficult to do so for a multilateral agreement.¹²³ Nonetheless, as correctly observed by the Konrad Adenauer Foundation, the condition of reciprocal implementation does not apply to international agreements related to the protection of human rights. This would be a violation of the Vienna Convention on the Law of Treaties, according to which '[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.¹²⁴ This does not 'apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.¹²⁵ Consequently, monist Francophone African countries are bound to apply international human rights treaties upon ratification and this provides an entry point for impact litigation.

However, as correctly demonstrated by Killander and Adjolohoun,¹²⁶ in practice, monist African French-speaking countries are reluctant to automatically implement international treaties. Therefore, these treaties do not play a significant role in litigation in national courts.¹²⁷ For example, according to the Senegalese Constitution,¹²⁸ after ratification and publication in the official gazette, international treaties are superior to national law in Senegal. They become law in the national legal architecture as they are directly incorporated into national law.

Nevertheless, as demonstrated through the *Habre*¹²⁹ and *Fall*¹³⁰ cases, 'direct incorporation' does not automatically lead to 'direct application'.¹³¹ Indeed, direct incorporation would lead to direct application in court only if the treaty is 'self-executing' or 'lends itself to judicial or administrative application without further legislative

121 Art 69 Constitution Central African Republic, 1995.

122 Art 122 Constitution of Chad.

123 Konrad Adenauer Foundation (n 96 above) 298.

124 Art 60(1) Vienna Convention on the Law of Treaties, 1969.

125 Art 60(5).

126 M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in Killander (n 14 above) 3-4.

127 M Killander 'How international human rights law influences domestic law in Africa' *Law, Democracy and Development* (forthcoming).

128 Art 98.

129 *The Issene Habré* case of 20 March 2001, decided by the Court of Cassation.

130 *Sega Seck Fall* case of 29 January 1975, decided by the then Supreme Court of Senegal.

131 Adjolohoun (n 77 above).

implementation'.¹³² In the *Habre* case,¹³³ the Court of Appeal of Dakar and the Senegalese Court of Cassation were of the view that Convention Against Torture (CAT) was non-self-executive. They argued that, although the Senegalese Criminal Code recognises torture as a crime in accordance with article 4 of CAT, universal competence was not granted to the municipal judge because the country did not enact legislative measures for the implementation of article 5(2) of CAT. So, the fact that there was a need to mandate municipal judges to adjudicate cases related to CAT rendered the treaty non-self-executive, hence the Court refused to apply international law.

Similarly, the *Sega Seck Fall* case¹³⁴ also demonstrates the reluctance of the courts to apply international law in domestic courts. Senegal is party to the World Trade Organisation (WTO) Convention 87, in which article 4 prohibits the dissolution of workers' associations by an administrative act. However, based on the WTO Convention referred to above, Fall, a trade union leader, approached the Supreme Court for the annulment of a presidential decree which outlawed the Senegalese Teachers' trade union. The Supreme Court rejected the application on the basis that there was no evidence that WTO Convention 87 had been published and that, even if it had been published, the 'present conditions' would not dictate the application of the Convention in the local court. This was simply a refusal to apply international law in the local jurisdiction because, as correctly argued by Adjolohoun,¹³⁵ the specificity of the circumstances or conditions was not clarified by the Court.

The *Habre* and *Fall* cases clearly show that applicability may be hampered by the lack of judicial activism, which enables purposive and progressive interpretation of international law. In these conditions, the prospects for impact litigation are limited. Overall, in spite of their official subscription to the monist approach to international law, African French-speaking countries refuse the automatic application of international agreements in domestic courts on the grounds that it is yet to be inserted in the national gazette, or cast doubt on the self-executive character of the treaty or silently refuse to give effect to the treaty at the national level.¹³⁶ Indeed, this refusal to apply treaties in domestic courts does not enhance the prospect for impact litigation.

132 V Leary *International labour conventions and national law* (1982); MCR Craven 'The domestic application of the International Covenant on Economic, Social and Cultural Rights' (1993) 40 *Netherlands International Law Review* 367.

133 *Habré* (n 129 above).

134 *Sega Seck Fall* (n 130 above).

135 Adjolohoun (n 77 above).

136 Killander & Adjolohoun (n 126 above) 6-7.

4.5 Regional instruments in domestic courts

As far as the place of regional instruments in domestic law is concerned, most Francophone African countries merely 'affirm [their] attachment to fundamental freedoms'¹³⁷ contained the international instruments, including the African Charter, in the preambles of their constitutions. Nevertheless, Benin goes further in the following provision:¹³⁸

The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on January 20, 1986 shall be an integral part of the present Constitution and of Beninese law.

This provides a platform to use the African Charter in impact litigation. This was done in Benin when a plaintiff alluded to the violation of article 7 of the African Charter to claim his right to be tried within a reasonable period of time. In this case, the Constitutional Court ruled that the timeframe of 14 months and 10 days set by the Cotonou Magistrate's Court in pronouncing its ruling on a case of *flagrante delicto*, was a violation of the Constitution.¹³⁹

Similarly, while protecting the right to freedom of movement provided for by article 25 of the Beninese Constitution and article 12(1) of the African Charter, the Constitutional Court ruled that, given that no one can be detained for more than 48 hours without the ruling of a magistrate before whom he is to appear,¹⁴⁰ difficult working conditions cannot be an excuse to detain a suspect for a period longer than the deadline provided by the Constitution.¹⁴¹

Overall, besides some positive examples from Benin, the prospects of impact litigation in Francophone African countries are hindered by several factors, including the lack of constitutions containing bills of rights, a weak separation of powers, the lack of universal standing in constitutional jurisdictions, the lack of a popular culture of litigation, limited access to courts afforded to NGOs and associations, as well as the lack of standing for *amici curiae*.

5 Concluding remarks

This article assessed the avenues for impact litigation in Francophone African countries. After showing that impact litigation entails bringing cases to court to use the law to leave a lasting mark, the article examined various political and legal contexts to assess the extent to

137 1996 Cameroonian Constitution, Preamble, para 5; also Preamble to the Constitutions of Senegal and DRC.

138 Art 7.

139 DCC 97-006 of 18 February 1997. For more on this see, Fall (n 37 above) 34.

140 Art 18(4) of the Constitution.

141 DCC 96-006 of 19 January 1996.

which these countries' legal frameworks are conducive to impact litigation.

The article demonstrated that the political context is not conducive to impact litigation. In reaching this conclusion, the article showed that the separation of powers is hindered by presidentialism. Although electoral disputes provide avenues for judges to distance themselves from other branches of government, electoral judges are weakened by their timidity. Additionally, the variances and complexity of electoral jurisdictions hinder the possibility of impact litigation.

The article also found that the legal context is not conducive to impact litigation. In reaching this conclusion, the article shows that, although Francophone African countries' constitutions have binding preambles, this does not lead to impact litigation because, aside from Benin, constitutional jurisdictions do not have a human rights mandate. In addition, the monopoly of standing in constitutional matters by institutions and authorities, the limited standing afforded to NGOs and members of the public (except in Benin and Côte d'Ivoire), and the complete exclusion of *amici curiae* have hindered the prospects for impact litigation. In spite of following the monist doctrine in international law, Francophone African countries are reluctant to give effect to international treaties in domestic courts. From this perspective, they often claim that the treaty is yet to be inserted in the national gazette, or cast doubt on the self-executive character of the treaty, or silently refuse to give effect to the treaty at national level. The situation is worsened by the lack of a popular culture of litigation and, more importantly, of impact litigation. Therefore, in remedying the situation, Francophone African countries should establish a conducive environment for impact litigation. This can be done by the adoption of a constitutionalism informed by a real separation of powers without presidentialism, and by ensuring access to constitutional jurisdictions for all, including NGOs, associations and *amici curiae* and empowering these jurisdictions to address any matter pertaining to fundamental rights.

Furthermore, there is a need to mandate all constitutional jurisdictions to address human rights violations, to educate people and lawyers on the need to use impact litigation to ensure the realisation of human rights, as it has a long-lasting effect. Moreover, it is imperative to give effect to international law in domestic courts by being faithful to the monism doctrine.