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FOSTERING DEMOCRATIC RESILIENCE: THE ROLE OF INTERNATIONALIZED CONSTITUTIONAL ADJUDICATION IN AFRICA

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AU	African Union
BBI	Building Bridges Initiative
CDA	Constitution Drafting Assembly
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IEBC	Independent Electoral and Boundaries Commission
LGBT	Lesbian Gay Bisexual and Transgender
NGO	Non-Governmental Organization
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights

LIST OF KEY LEGAL RULINGS

Atkins v. Virginia (2002) – Supreme Court of the United States

Digashu and Other v. GRN and Others (2023) – Supreme Court of Namibia

Dow v. Attorney General (1991) – High Court of Botswana

Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2016) – Kenya Court of Appeal

Justice Alliance of South Africa (JASA) v. President of the Republic of South Africa and Others (2011) – Constitutional Court of South Africa

Katiba Institute v. Director of Public Prosecutions (2023) – High Court of Kenya

Kauesa v. Minister of Home Affairs and Others (1995) – Supreme Court of Namibia

Kika v. Minister of Justice Legal and Parliamentary affairs and 19 others (2021) – High Court of Zimbabwe

Mlungwana and Others v. S. and Another (2018) – Constitutional Court of South Africa

Motshidiemang v. Attorney General (2019) – High Court of Botswana

Ndii & Others v. Attorney General & Others (2021) – High Court of Kenya

Peta v. Minister of Law (2018) – High Court of Lesotho

Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera (2020) – Malawi Supreme Court of Appeal

Raila Amolo Odinga v. IEBC and others (2017) – Supreme Court of Kenya

Roper v. Simmons (2005) – Supreme Court of the United States

State v. Makwanyane (1995) – Constitutional Court of South Africa

U.S. v. Burns (2001) – Supreme Court of the United States

UOBU v. Attorney General (2021) – Constitutional Court of Uganda

INTRODUCTION

The present research was originally prompted by the will to investigate features of democratic decay. The processes that have lately been catalogued under such definition are varied, and they comprehensively describe the ways in which an established pluralistic society may suffer from democratic setbacks. More in particular, democratic decay does not only comprise instances of sudden authoritarian restorations, usually by means of force. It also aims at describing the more subtle and covert ways in which constitutionally legitimate acts may lead to the collapse of the very democracies that pass them. Such enhanced understanding of processes of democratic reversion took the name of constitutional retrogressions. It is under said category that the interest towards processes of democratic decay intertwined with constitutional law, paving the way for the thesis's main subject matter.

Since the work, from its conception, wanted to engage in an international perspective, attention was turned to the so-called phenomenon of internationalization of constitutional law. As the research will further elaborate on, constitutional internationalization has been an observable feature for the most part of the last seventy years. The international community, coupled with cultural, economic and technological processes of globalisation, influenced domestic systems at their core. Today, when we talk about constitutional internationalization we refer to two main distinguished but interrelated tendencies. The first one concerns the integration, in one form or the other, of international treaties (specifically those concerning human rights) into national constitutions. The second involves national constitutional courts and the ways in which constitutional judges interpret the law having due regard to international legislation and foreign jurisprudence. Although the thesis will consider both of these aspects, the main interest of this work lies in features of internationalization of constitutional adjudication.

Needless to say, this disposition of the judiciary, also known with the name of judicial cross-fertilization, could potentially have a significant impact on constitutional implementation and, overall, the state of democracy in a given country. Indeed, judicial review is one of the most fundamental features of modern constitutional democracies. Since the second half of the last century the creation of ad-hoc watchdog bodies,

guardians of constitutional principles, has been essential for the endurance of pluralistic systems in the world. It is thus evident that the widespread diffusion of an internationalized interpretative trend could have some consequences over the general state of democracy. All the more so, cross-judicial fertilization allows constitutional judges to interpret domestic law more freely: they derive persuasive authority for their decisions not only from the constitution itself, but also from a variety of similar judicial rulings, implemented in other countries. In this way, constitutions enhance their range of action and meaning, going far beyond their literal understanding. Could democracies be favoured by this new internationalized approach to constitutional adjudication? Is there a positive correlation between the use of foreign material for constitutional evaluation and the state of democracy? Ultimately: does the internationalization of constitutional law, in the form of cross-judicial fertilization, bolster and strengthen democratic systems from the risk of constitutional setbacks? These were some of the questions sparked by the conjunction of constitutional adjudication with trends of democratic decay.

The above queries, however, in order to be properly analysed and considered, needed to be applied to a specific, geographically limited field of research. Alternatively, the adoption of a global perspective on the matter would have made much more difficult to find potential correlations between the two phenomenon under consideration, therefore hindering the entire work's outcome. Not to mention the fact that the inherent nature of this thesis, along with its scope and reach, does not allow for such a comprehensive viewpoint. Eventually, the inspiration for the adoption of the African continent as an appropriate investigation field came from the work of prominent South African scholar Charles M. Fombad, more specifically from its article *"Internationalization of Constitutional Law and Constitutionalism in Africa"*. In point of fact, the preliminary review of academic literature on the matter revealed a scarcity of sources specifically centred around the interrelation between internationalized constitutional adjudication and democratic decay. Interestingly enough, Fombad gave some meaningful insights on the argument, and it functioned as the starting point for a broader research on the continent. Assuming an African perspective ultimately turned out to serve the thesis' research questions best. The continent, although diversified into an incredible variety of political and institutional traditions, went through different constituent moments quite homogenously. It will be interesting to see whether the almost concomitant adoption of

constitutional democratic charters gave rise to different outcomes in terms of constitutional adjudication and democratic resilience.

Considering all of this, the present work will try to answer the following research question: does the adoption of a more internationalized approach towards constitutional adjudication and judicial review in the African continent has a significant impact on democratic resilience? In view of this, here's how the thesis will be developed.

Chapter I will introduce the phenomenon of internationalization of constitutional law. Starting from an historical perspective, it will differentiate between the two components this trend has been developing: the incorporation of international treaties into domestic constitutions and the use of foreign judicial decisions from constitutional courts as authoritative source of interpretation. Both instances will be applied to some specific cases in order to give a better understanding of the trends at issue. Taiwan will serve as an example for the integration of human rights treaties into national systems, while a comparative approach on the abolition of death penalty by constitutional courts will highlight features of international judicial dialogue. Section 1.2 will also dwell on the ways international features are integrated into national law, as to offer a better understanding of the ways the two systems relate to each other.

Following on, Chapter II will specifically consider instances of incorporation of international provisions into African constitutions. This section will initially elaborate on the pivotal role that the African Union played internationalizing African constitutional law. In the last decades, the Union has indeed succeeded in mainstreaming the human rights discourse, to the point of setting a shared, common standard for African constitutionality. Continuing, section 2.2 will elaborate a systematic categorization of African constitutions, based on their overall level of internationalization. Domestic charters will be methodically grouped into different gradients of integration of international features. Such classification will be useful as it highlights trends and shared practices, as well as to look for possible correlations between internationalized constitutions and instances of cross-judicial dialogue.

Chapter III is precisely dedicated to this pursuit. In this part we will first deliberate on causes and possible explanations behind the phenomenon of international judicial fertilization. Sections 3.2 and 3.3 will be then dedicated to the consideration of cases in

which judicial dialogue for constitutional adjudication has been either applied to internationalized constitutions or to charters that have not incorporated international law. It will be interesting to see to what extent internationalized judicial review depends on constitutional openness to foreign influences, or if it is rather a separate and independent phenomenon.

The fourth Chapter of the thesis will at last introduce democratic decay in all its components and relevant applications, with regards to our research question. At first, a methodological premise is proposed: upon introducing the research structure, this section will lay out the rationale behind the adopted approach, and why it has been favoured over others. Consequently, theories of democratic decay will be illustrated, concentrating on the most common threats liberal democracies may face via constitutional amending procedures and ordinary legislations. Said considerations will lay the basis for the forthcoming comparative research.

Chapter V consists of a comparative analysis of African case law, and it will serve as the main theoretical framework of the research. In order to answer the thesis' main question, we have selected recent African judicial decisions where democratic principles were at stake. Mindful of Chapter IV findings, we have analysed rulings questioning the outcome of electoral processes, the balancing of the different powers of the state and individual or groups rights. The research wants to essentially see whether foreign jurisprudence has been employed for constitutional evaluation in these cases. More specifically, it is interested in assessing the importance of foreign material for judicial decision making. Is foreign jurisprudence used in African countries to halt legislations damaging democratic principles? If so, has it been used as a supplementary and supportive tool or as a significant and decisive source of inspiration?

In conclusion, Chapter VI is built on the considerations made in the precedent chapter. Indeed, the comparative examination of African case law dealt within Chapter V will underline some significant tendencies. Namely, only anglophone African countries were found using foreign material for constitutional interpretation in cases involving democratic principles. This observation will prompt an evaluation on the differences between English and French African legal systems, and the ways they may have impacted judicial review openness to international jurisprudence. On the basis of such remarks,

some correlations will be drawn between legal traditions and the proclivity to an internationalized type of constitutional adjudication, as to give new and meaningful insights into the thesis' research question.

CHAPTER I

INTERNATIONALIZATION OF CONSTITUTIONAL LAW

From the sixteenth century onward, constitutions have developed concurrently with the concept of statehood. In fact, although several documents codifying limitations on the exercise of power might already be found in medieval times (the Magna Charta being the most notable example), constitutions as we know them today set out from the modern state.

The Westphalian system that rose from the remnants of the unceasing rivalry between secular and religious power originated a new political and bureaucratic organization, led by a legitimate centralized authority which was invested in governing a rather homogenous population over a defined territory. Whether power's legitimization derived from god's will, blood, aristocracy's trusteeship or parliament's confidence, there was no doubt its influence was enclosed by the borders of the state. And indeed, as state's territoriality is exercised through some degree of authority over a group of individuals, and it is based on the control of the use of property within a delimited space (Preuss) it is clear how sovereignty holds a territorial dimension. More to the point, sovereignty expressed its coercive power by virtue of territory itself: as Poggi put it "the state does not have a territory, the state is a territory"[1]. Eventually, authority came to be limited, controlled, or divided, in the name of guarantees on individual freedoms or some forms of initial representation, and the codification of these limitations took the form of 'laws of the land': conceded statutory norms valid throughout the state's possessions. Following this argument, constitutionalism is so inherently concomitant to the state and its territory that, in a time where the boundaries between internal and external, national, and international are blurring ever so rapidly, its importance is surely condemned to fade. But is it so? Can we conceive constitutionalism beyond the state?

Some academics argue that constitutionalism as a political and legal theory is indeed able to endure at least some features of internationalization. The reasoning behind this belief

[1] G. Poggi, *The State: Its Nature, Development and Prospects*, Stanford University Press, Stanford Cal. 1994, p. 22.

observes a general tendency of constitutional law where the aforementioned interconnection between constitutional sovereignty and territoriality is loosening up. Preuss makes this statement quite efficiently[2]. He begins by asserting that the constituency's co-dependence to a territorial dimension is a specifically unique feature of early absolutist forms of government. Of course, territoriality survived the fall of absolute monarchies, enduring in some form or the other in constitutional regimes where the Rousseauian system of checks and balances maimed the unchallenged power of the king. But constitutions are not only about "taming the Leviathan" and warding off the dangers that come with any abuse of power. On the contrary, constitutionalization processes succeeded in conferring constituent power to the people themselves. In fact, when cultural, philosophical, and historical developments led a diversified multitude to identify as a unitary collective entity, as "the people", the state assisted to a shift of power from the sovereign to a collectivity[3]. As this shift needed codification, modern constitutions were founded on the deconstruction of absolutism and a renewed link to the people as constituent powerholders. Subsequently, a simultaneous change relocated the reciprocal connection between sovereignty and territoriality, developing a new foundational relation bounding national constitutionality with the people. Preuss's considerations release constitutions from their territorial outset, and in so doing he dissociates constitutional law from statehood. To whomever may share this line of reasoning, here lies the key to constitutional resilience to processes of internationalization. Here lies the theoretical basis which may lead to a new form of constitutionalism, able to endure beyond the state.

It is still true that the lawfulness of domestic jurisdiction and national sovereignty is a primary attribute of contemporary international law. Article 2(7) of the UN Charter affirms that *"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present*

[2] Ulrich K. Preuss, *Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?,* part of *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, Oxford University Press, Oxford 2010, pp. 23-46.

[3] Fioravanti describes the newly gained awareness of "the people" in relation to their constituent power as follows: *"La 'costituzione' non è una norma che si applica alla comunità, per volontà di un potere definito, perché essa è, nella sua essenza, nient'altro che la comunità stessa, nel suo aspetto più basilare e caratterizzante"*, referring to "revolutionary constitutionalism" as opposed to "constitutionalism of the origins": Maurizio Fioravanti, *Costituzionalismo – Percorsi della storia e tendenze attuali*, Laterza, Bari 2009, p. 16.

Charter" but then the article concludes by adding: *"[…] this principle shall not prejudice the application of enforcement measures under Chapter VII*"[4]. Therefore, peace and international security (the protection of which is dealt in the mentioned Chapter VII of the Charter) are so foundational to the new international order that their infringement can disregard the sovereignty and territorial integrity of a state: national sovereignty is not an absolute principle anymore. Besides, after the second world war the international community established an increasingly comprehensive number of binding treaties, which set standards for states' constitutions and legislations to comply with, eroding their sovereign power in favour of a new understanding of international law, not just as regulatory but as a thoroughly prescriptive system. In this sense, emblematic is the development of international and regional courts of justice and the growing importance of their decisions in defining international law and state's jurisdiction. Globalization and the growing economic and political interdependency between states acted upon such legal background, enhancing the deterioration of national sovereignty.

So, if modern day constitutionalism has indeed succeeded in harnessing the outcomes of the western post-revolutionary constitutional tradition, at least partially freeing itself from its affiliation to the state and its territory, there is reason to believe it may endure said national loss of sovereignty. Overcoming the partial and gradual dismantle of statehood, one of the cornerstones of modern constitutionalism, is not a foregone conclusion. Yet, constitutional law somehow adapted to such a shift of paradigm. The way in which constitutionalism has exceeded its national attributes is twofold: by incorporating international laws and practices in its national systems, and by "constitutionalizing" international law itself[5]. The latter approach aims at giving to international bodies and organizations constitutional value. Indeed, once such a malleable concept as "the people" is identified with the whole international community, foundational documents like the UN Charter may gain constitutional relevance. On this matter, the EU's Court of Justice constitutional interpretation of the founding treaties of the Union is the most relevant

[4] United Nations, *Charter of the United Nations*, 24 October 1945, available at: https://www.un.org/en/about-us/un-charter

[5] Martin Loughlin, *What is Constitutionalization?*, part of *The Twilight of Constitutionalism?*, edited by Petra Dobner and Martin Loughlin, Oxford University Press, Oxford 2010, pp. 47-72.

example to be found. On the other hand, a more complex and nuanced approach to constitutionalism is the one involving its own internationalization.

The phenomenon that takes the name of internationalization of constitutional law represents the main interest of this current chapter and its understanding will determine the theoretical basis upon which the thesis research question will set out. Some academics believe that the process we are about to describe will result in a worldwide multilevel-constitutionalist system in which national, post-national and international constitutional documents will integrate each other in a mutually reinforcing way[6]. It is, however, beyond the interest of this work to identify future outcomes and possible evolutions. The following section will be limited to a mere description of the process in all its diverse components, providing significant examples and giving relevance to the different academic approaches on the matter.

1.1 Trends of internationalization

Today, the process of "internationalization of constitutional law" is credited as separate and distinct from the one involving the constitutionalization of international law itself. Nevertheless, the two phenomena are deeply interconnected, representing two different ways of interaction between international and national legal systems. In fact, after the second world war, these two different approaches have developed concomitantly to each other, mutually reinforcing and accelerating their effects (Chang and Yeh, 2012). On the one hand, once the human rights discourse mainstreamed its influence to become a universally accepted principle, some features of international law either gained direct applicability status or became at least binding to domestic law, sometimes even at a constitutional level, placing national constitutions' influence outside their territorial dimension. On the other, traditional western constitutional concepts such as the rule of law, democratic accountability or judicial review, shaped international community's institutions and decision-making bodies upon the national-constitutional model of

[6] Ibid.

governance. So much so that some authors talk about global constitutionalism as the natural evolution of modern international law[7].

Speculations aside, interestingly enough these interrelated and self-strengthening tendencies might have both originated from a gradual weakening of national governance and a reorganization of national authority. Authors such as Anne Peters[8] are of the opinion that national constitutions gradually assisted to a partial reduction of their influence through the work of international institutions and non-state actors, which were delegated with a growing number of competences. Matters like defence, security or financial planning were allocated to international bodies, placing states' governance outside their territory. Said process, which took the name of "domestic de-constitutionalization"[9] redirected national governance outside the constitution's influence: for the first time from their conceptualization, constitutions were not allowed to regulate the totality of their national interests.

This "hollowing out of national constitutions"[10] calls for a counterweight to balance out a vacuum of power, and indeed international law is filling these gaps of governance through a process that has been called "compensatory constitutionalism". This concept describes a system in which international law takes advantage of said shift in governance and compensates it both by infiltrating constitutional law and by constitutionalizing its own structures. Being aware of this kind of reciprocal and complementary relation that aims at bridging gaps of governance is quintessential to a better understanding of the interactions between international and domestic law. More in particular, the process of internationalization of constitutional law is a complex and diversified one, but at its core is based on the assumption that the international community is a legal community[11], and that as such it seeks paths through which it imposes its authority with binding rules and obligations, even at the expense of national governance.

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[7] For a comprehensive view of the ideology of global constitutionalism and its trends *see* David S. Law, Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, California Law Review, 99(5), 1163–1257, 2011.

[8] Anne Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures. Leiden Journal of International Law, 19, pp 579-610, 2006, available at: https://www.cambridge.org/core/journals/leiden-journal-of-international-law

[9] Ibidem, p.580.

[10] Ibidem.

[11] Ibidem, p.586.

1.1.1 Incorporation

One of the ways through which international rules imposed their influence on domestic systems is as anticipated, constitutional incorporation.

The principle of incorporation gained momentum during the wave of democratization that western Europe experienced after the end of the last global conflict, alongside an upsurge of independence movements in European colonies in Africa through the 1960s[12]. At a time in which the new international legal order was just setting his pace, with the first founding treaties of the United Nations being ratified, such a widespread constitutional impulse favoured the involvement of the international community in shaping new democratic orders. In various forms, the incorporation of human rights treaties and newly signed covenants into national constitutional charters represented one of the first safeguards against gross human rights violations[13].

The way in which a western theory such as the human rights doctrine succeeded in being so efficiently incorporated on a global level has certainly been up for debate. Cultural relativists have long been insisting on portraying the national incorporation of human rights treaties and the universal acceptance of their validity as a form of western-hegemony or neo-colonialism[14]. And while it is true that human rights fundamentally owe their existence to the centuries-long western European legal tradition (Sergio Bartole profusely elaborates on this matter as a former member of the Venice Commission[15]), today the incorporation of human rights treaties in national constitutions is regarded as conventional practice and, most importantly, a central feature of how constitutional law came to be internationalized.

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[12] Svitlana Chernykh, Zachary Elkins, Tom Ginsburg, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, University of St. Gallen Law School Law and Economics Research Paper Series, Working Paper No. 2007-07, July 2007.

[13] For a rights-based approach in constitution making see Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights and Constitution Making*, United Nations, New York and Geneva, 2018.

[14] For a quick introduction on Universalism and Cultural Relativism see Nagengast Carole, Terence Turner, *Introduction: Universal Human Rights versus Cultural Relativity*, Journal of Anthropological Research 53, no. 3, 1997, pp. 269–72.

[15] Sergio Bartole, *The Internationalisation of Constitutional Law A View from the Venice Commission*, Series Parliamentary democracy in Europe, volume 5, Hart Publishing, Oxford 2020.

As states inevitably pursue their national interests, it might appear counterintuitive to convert international non-binding norms into constitutional legal obligations. But there could be different reasons for states to incorporate international human rights treaties into their constitutional charters. At a regional level, the mechanism of conditionality might have had an impact[16]. This principle binds the accession to an international organization to the observance of certain criteria, fundamental to the organization's values. Oftentimes, a solid democratic form of government, the respect of the rule of law and the recognition of basic human rights represents the criterion that states have to meet in order to accede to a regional or subregional organization. In this sense, to incorporate human rights international obligations, giving them constitutional relevance and implementation, is a fundamental step towards the conditions of accession to an international body. The Council of Europe best exemplifies this approach. Accession to the organization is usually conditioned to domestic reforms, based on the principles enlisted in the ECHR, so much so that some countries' bills of rights are shaped in almost total accord to the Convention[17]. The same is true for the European Union, which in article 6(3) TEU mentions: *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] shall constitute general principles of the Union's law"*[18].

Proof that the incorporation of human rights treaties into national constitutions facilitates accession procedures is indeed the fact that many countries designed their bill of rights as coherently as possible to their regional treaty of reference. The American Convention on Human Rights (1978) shaped the constitution of Chile, Ecuador, Honduras and of Colombia[19]. Likewise, the African Charter of Human and Peoples' Rights (1981) greatly influenced countries like Congo, Madagascar and Niger in their constitutional design[20].

[16] Ibidem. pp. 32-43.
[17] Ibidem.
[18] European Union, *Treaty on European Union (Consolidated Version),* 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF
[19] European Commission of Democracy Through Law (Venice Commission), UNIDEM Seminar *"The Status of International Treaties on Human Rights"*, Report: The direct Applicability of Human Rights Treaties, Coimbra (Portugal), 7-8 October 2005, p.2: https://www.venice.coe.int/webforms/events/default.aspx?type=6
[20] Ibidem.

These foundational documents served not only as a model for domestic law, but their integral or partial incorporation might have contributed to a smoother accession in the organizations.

But conditionality, either explicitly requested or just assumed, may have different effects when applied more or less strictly. Boateng[21] applies the case of the Organization of African Unity to his theory, stating that the failure to implement and apply accession conditionalities may result in a high level of non-compliance within the organization. The OAU, unlike today's African Union, was not founded on the idea of achieving economic and political cooperation, but with the sole purpose of uniting the anti-colonial effort in a single cry for independence[22]. These being the preconditions, human rights and democracy were prevailed by the predominant pan-Africanist impetus, and their application upon accession was not implemented, with the African Union inheriting these vague membership requirements as of 2002, contributing to *"[...] the non-payment of membership dues and non-implementation of continental policies"*[23]. Therefore, binding states to human rights law via integration of international treaties in national constitutions may not only ease the way for accession as a conditionality requirement, but it might also prove to benefit cooperation and policies' application.

And then, domestically, incorporation has one fundamental outcome: it entails national judges to implement the integrated international provisions. Of course, this translates in a much enhanced and capillary application of human rights norms, with local judges more able to oversee government's behaviour and point at possible violations. But to some authors incorporation implies a distancing from international monitoring mechanisms[24]. First of all because a state that has constitutionally incorporated at least some human rights treaties might be subject to a less meticulous policing activity from international bodies *"because of the belief that their judicial systems will enforce these norms on their*

[21] Oheneba A. Boateng, *Membership accession in the African Union: The relationship between enforcement and compliance, and the case for differential membership*, South African Journal of International Affairs, 2017.
[22] Ibidem. p.5.
[23] Ibidem. p. 10.
[24] Mary Kathryn Healy, *Constitutional Incorporation of International Human Rights Standards: An Effective Legal Mechanism?*, Chicago Journal of International Law, Chicago 2023, available at: https://cjil.uchicago.edu/online-archive/constitutional-incorporation-international-human-rights-standards-effective-legal

own"[25]. And secondly, it might represent a façade, with governments strongly committing to international norms without any real intent of application. The motives underlying such a pretended conduct may be guided by international reputational concerns. Chernikh, Elkins and Ginsburg[26] assert that this behavioural trend is specifically present during democratic transition times, when state undergo a foundational constituent phase. In these circumstances, which are often parallel to overall territorial instability and political vulnerability, leaders may be tempted to gain international favour in the name of some degree of international treaties' incorporation. Not to mention that reproposing well-established and consolidated international norms as such may build the necessary consensus of the constituency in a much delicate phase.

Whatever the reasons, be it to follow a general trend or to benefit the state's best interests, incorporating - in some form or the other - human rights treaties into national legal systems has become common practice, and one of the main features of the process of internationalization of constitutional law.

1.1.1.1 The case of Taiwan

Remarkably, the integration of human rights treaties into domestic law occurs even in cases where the nation involved is not integral part of the international community. Wen Chen Chang, in "An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan"[27], describes this peculiar case of constitutional integration.

Since 1971, the United Nations, according to resolution No. 2758[28], recognized the People's Republic of China as the legitimate representative of the Chinese people, declaring the Taiwanese Republic of China unlawful. From that moment on, Taiwan has been internationally isolated, with no possibility of accession to any of the human rights

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[25] Ibidem. p. 117.

[26] *See supra* note 12.

[27] Wen Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan,* National Taiwan University Law Review, Vol. 4, No. 3, Taiwan 2009, pp 203-235.

[28] United Nations General Assembly (UNGA), *Restoration of the lawful rights of the People's Republic of China in the United Nations*, 26th session, 25 Oct. 1971, UN Doc A/RES/2758(XXVI), available at: https://documents-dds ny.un.org/doc/RESOLUTION/GEN/NR0/327/74/PDF/NR032774.pdf?OpenElement

foundational treaties that grouped over the years following the establishment of the United Nations. Nevertheless, in the last decades, the government of the Republic of China has made a series of unilateral declarations, mimicking the accession to many human rights treaties; the most recent example is the ratification of both the ICCPR and the ICESCR in the year 2009[29].

Chang, reconstructing the mechanisms that brought the government to make such declarations, spots the essential role played by local NGOs and civil society at large[30]. Indeed, both the accession procedures to the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) present similar features. Once civil society learned of the international treaties on the matter, they organized theme-specific organizations, building a strong network with other international NGOs. Said transnational dialogue was quite effective in bringing Taiwan's activists to the table, incorporating the accession of the treaties in the government agenda and even by participating as advisors to government's committees on the matter. Ultimately the treaties were incorporated into domestic law, to the point that we now have recent cases of the Constitutional Court referring to the CRC for matters of constitutional interpretation[31].

In calling this model "bottom-up transnational constitutionalism", it is evident that the integration of human rights law into domestic constitutions is vital to the process of internationalization of constitutional law. So much so that it occurs even in cases of partial international isolation. Human rights treaties have indeed become fundamental yardsticks of international law, setting standards for national constitutions to follow and incorporate in their legal systems.

[29] Press release on the signing of the two Covenants, dated 14/05/2009, released by the Office of the President of the Republic of China, available at: https://english.president.gov.tw/NEWS/3151
[30] *See supra* note 22, pp. 222-226.
[31] R.O.C. (Taiwan) Constitutional Court decision no. 587 (30/12/2004), available at: https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310768 , and no. 623 (26/01/2007), available at: https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310804

1.1.2 Judicial Convergence

The gradually increasing incorporation of a growing number of rights-related international treaties into domestic law has one consequent outcome: constitutions are progressively sharing between them a consistent part of their contents, namely the part concerning fundamental rights and freedoms. This process has surely been favoured by the widespread consensus that has been reached over the human rights theory, both locally and internationally. Assuming some fundamental rights as universal, writing them down in international agreements and therefore incorporating them into national law has indeed produced what someone has called a global "common law of human rights".[32] Some recent empirical studies on the matter have been carried out to better understand up to what degree constitutions are sharing some critical parts and if so, what are these parts specifically. Indeed, a comparative analysis has found that constitutions have in common a growing number of "general" rights, that this list of rights is growing in length, and that their enforcement is being delegated to constitutional courts (Law and Versteeg, 2011). This "global bill of rights" fundamentally concerns some basic human rights acknowledgements such as freedom of religion, expression, of property or the right to assembly, as *"each of these rights can be found in no less than 97% of all constitutions in force as of 2006"*[33].

The expanding reliance on judicial review for human rights' implementation, combined with the fact that globalization and the digitalization of courts' activities has facilitated enormously the access to national jurisprudence[34], has led to an active dialogue between national and international courts about their common rights-based approach. In fact, courts have growingly been referring to other states' case law and, vertically, to international courts' decisions to formulate their judgements[35]. Moreover, reference to

[32] Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, Oxford Journal of Legal Studies, Vol. 20, pp. 499-532, Oxford, 2000.

[33] David S. Law, Mina Versteeg, *The Evolution and Ideology of Global Constitutionalism*, California Law Review, Vol. 99, No. 5, October 2011, p. 1163.

[34] A prominent example is the Council of Europe's Venice Commission CODICES InfoBase on Constitutional Case Law: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm

[35] For instance, former U.S. Supreme Court justice Antonin Scalia has analysed many U.S. Supreme Court decisions as proof that reliance on international law for constitutional interpretation has indeed increased over the years, see for example: Antonin Scalia, *Outsourcing American Law Foreign Law in Constitutional Interpretation*, American Enterprise Institute for Public Policy Research, working paper 152, available at: https://www.aei.org/wp-content/uploads/2011/10/20090820-Chapter2.pdf

international case law has not limited its influence on a mere reception or evaluation of foreign jurisprudence, but it has evolved into a reciprocal and multidirectional dialogue. Such an active exercise has been called "constitutional global fertilization"[36]: a definition that already contains a qualitative assessment but gives the idea of the mutually enriching process that international judicial dialogue is.

Courts have been referring to international jurisprudence not by granting to it binding effects on domestic law, but by recognizing its authoritative relevance on human rights cases, to the extent of being cited as a "persuasive authority"[37] for the formulation of the decision. Concerning human rights application, judicial dialogue and international judicial reference might be used with different intentions. First of all, a court may be interested in adding new rights that are at the time not recognized by its own constitution, aiming at enriching its list of constitutional guarantees by virtue of prominent foreign examples. It may also want to use the same instrument to enforce a specific definition, expanding an already existing right's interpretation beyond its original or literal understanding. Lastly, a court might refer to international law to push the national government to adopt a new legal provision on human rights, given the example of other national legislatures (Chang and Yeh, 2012).

1.1.2.1 Case law: the death penalty

A meaningful example of this emerging global jurisprudence of human rights, and its relevance to the advancement of the process of internationalization of constitutional law, may be represented by three cases, close in time, which make use of judicial reference for constitutional interpretation on a much delicate matter such as the death penalty.[38]

The less recent one is South Africa's Constitutional Court case *State v. Makwanyane* (1995)[39]. Most notably, following the will of post-apartheid South Africa to break its

[36] Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton and Oxford, 2004.
[37] Ibidem.
[38] Since states that come from similar legal traditions are more prone to use judicial reference, the cases in question will include three common law countries. Nevertheless, we will see that references to international law in these decisions will not be limited to common law traditions.

[39] S v Makwanyane and Another (CCT3/94) [1995], available at: http://www.saflii.org/za/cases/ZACC/1995/3.html

international isolation, Section 39 (1) of the Constitution[40] explicitly binds the judiciary to take appropriate consideration of international and foreign law in interpreting the Bill of Rights. This decision concerning the legitimacy of capital punishment makes no exception. The Court takes indeed a comparative approach, considering how the death penalty has been abolished by a vast number of democracies such as the European ones, and by its neighbouring countries of Namibia, Mozambique and Angola, and citing: *"international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue"*[41]. And proceeds by taking into consideration U.S., India, and the European Court of Human Right's case law, besides referring to international human rights law such as the ICCPR. Incidentally, the Court talks about what we have previously described as "persuasive authority", meaning that international jurisprudence is useful as it gives precious insights, but does not represent a binding precedent for domestic interpretation: *"comparative law [...] has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."*[42]

Likewise, Canada's 2001 Supreme Court case *U.S. v. Burns*[43], upon deciding on the constitutionality of extradition to countries without assurance that the capital penalty will not be used, draws its ruling from international law. It takes into account the Council of Europe's European Convention on Extradition, European Union Parliament's decisions, UN protocols and case practice in the U.S. and the U.K.; moreover, it carefully considers civil society insights, like Amnesty International's intervention, or international academic opinions on the matter. Indeed, the Court concludes by considering that its final decision is not only in line with the country's constitution, but *"is also consistent with the practice*

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[40] Constitution of the Republic of South Africa, 1996, available at: https://www.gov.za/documents/constitution-republic-south-africa-1996

[41] *See supra* note 39.
[42] Ibidem.
[43] United States v. Burns, 2001 SCC 7 (CanLII), [2001] 1 SCR 283, available at: https://www.canlii.org/en/ca/scc/doc/2001/2001scc7/2001scc7.html

of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States".[44]

Finally, U.S. *Roper v. Simmons* (2005)[45] let us appreciate the change in that the United States do not just function anymore as mere reference for foreign judiciary, but that today the U.S. Supreme Court highly considers international and foreign law cases for constitutional interpretation.[46] On the use of death penalty in specific circumstances, *Atkins v. Virginia* (2002)[47] had already used foreign states' practices over people with intellectual disabilities. In this case, deciding if the same principle is applicable to underage people, the Court looks once again at states' practice as a means of legitimization: "*Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"*[48]. Moreover, the Court, admitting that international law *"while not controlling our outcome, does provide respected and significant confirmation for our own conclusions"*[49], makes reference to the Convention on the Rights of the Child as a prominent confirmation of the majority's reasoning, even though the United States is not party to that particular convention. As if international human rights law has the authority to influence domestic law even when that state's government did not fully agree with the contents of the treaty.

These three cases of judicial convergence and judicial dialogue on prominent human rights matters are just an example of how this trend is recently developing. The emerging of a human rights jurisprudence on an almost globally shared bill of rights is more than just judicial confrontation. It pertains constitutional interpretation of domestic law as it changes and influences national charters in the light of human rights international law.

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[44] Ibidem.

[45] Roper v. Simmons, 543 U.S. 551 (2005), available at: https://supreme.justia.com/cases/federal/us/543/551/

[46] Recent conservative appointments to the Supreme Court might have had an impact on this trend, namely that today just a minority of the Court might have the tendency to rely on international law. Nevertheless, on a long-term perspective, international judicial reference has indeed increased over the years. *See supra* note 35.

[47] Atkins v. Virginia, 536 U.S. 304 (2002), available at: https://supreme.justia.com/cases/federal/us/536/304/

[48] *See supra* note 45.

[49] Ibidem.

And as such, it is a fundamental feature of internationalization of constitutional law on a global juridical perspective.

1.2. International and national law

As we have seen in the previous section, an essential aspect of how constitutional law came to be internationalized is the assimilation, in one form or the other of international human rights law within a domestic legal system. This second part is interested in looking at the ways said assimilation may occur and in analysing the effects that such an integration triggers at the national constitutional level.

1.2.1. Monism and Dualism

The study of the ways in which national and international legal systems interact has long been a matter of great interest for jurists and legal philosophers, as such questions ultimately concern a hierarchical fight for legal primacy, if not a redefinition of national sovereignty itself.[50] Legal scholars dealing with these arguments have conventionally distinguished two general approaches: monism and dualism[51]. Theoretically, dualism conceives national and international law as two distinctly separate legal systems, concerned with the regulation of different matters, while monism disregards this division, ascribing domestic and international law within the same category of interests.

Today, this distinction is particularly useful as it applies to the description of different national legal systems based on their reception of international law. Typically, the legislative power is asked to express its opinion in order to grant to the government the necessary consensus required for the ratification of an international document. But dualistic and monistic systems diverge on the potential need for a second involvement of the legislative chamber after the treaty's ratification, to give it full effect on the national territory. Above all, the main difference between a monist and a dualist system concerns whether the adoption of an *ad hoc* legislative act is needed in order to give domestic implementation to an international agreement (Sloss).

[50] See for instance Hidemi Suganami, *Understanding Sovereignty through Kelsen/Schmitt*, Cambridge University Press, Review of International Studies, July 2007, Vol. 33, No. 3 pp. 511- 53, 2007.
[51] *See supra* note 12, p.4-10.

Whereas domestic courts in monist states can directly apply international treaties as national law without the need for a specific legislative act, courts participating in legal systems where all international law is not directly applicable do not have the power to do so. In the first case, at least some international agreements that have been signed by the government automatically end up in the hierarchy of the sources of national law. On the contrary, in cases of absence of a legislative implementation act, dualistic courts can only apply newly ratified treaties indirectly, using them as a general parameter of interpretation for national or statutory law (Sloss). Such an oblique application is one of the reasons why, to some scholars, the differences between these two systems are significantly blurring[52]. Today most of the states rely on a mixed system, in which some monist features coexist with some more dualistic ones. Nevertheless, these models are still useful to understand the main ways international law is received by domestic institutions and the essential role played by national courts in attributing applicability of some kind to it.

1.2.2. Direct effect of treaties

Some states that rely on a monist reception of international law came to distinguish two different methods of applicability, dividing treaties into self-executive and non-self-executive. Quite evidently, treaties to which is attributed the status of self-executive can be applied by judges without the need for legislative action. Most importantly, the power to adjudicate whether an international treaty has indeed self-executive status or not is in the hands of the same national courts.

Over the last decades, the increasing activity of domestic judges has led to the adoption of the described concepts even in traditionally dualist systems, up to the point of depleting the dualist working of most of its peculiarities. Waters[53] observes, in what she calls "creeping monism", a general trend, at least regarding dualist common law courts, by which judges interpret human rights international law as self-executive despite the dualist legal vocation of their state. In fact, these national judges are "eroding the traditional dualist approach"[54] by adopting a series of interpretative techniques which result in a *de*

[52] Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*. Columbia Law Review, vol. 107, no. 3, 2007, pp. 628–705. Available at: https://www.jstor.org/stable/40041716

[53] Ibidem.

[54] Ibidem.

facto integration, overstepping any formally needed prior legislative approval. In doing so, courts are justifying such an unorthodox approach through the use of what we already described as international judicial dialogue[55], based on the international convergence that sees human rights law as a universally accepted source of law's legitimation.

But even though, through the interpretative incorporation of national courts, human rights treaties are growingly considered self-executive at the domestic level, the way they are formally integrated in the state and their place in the sources of law vary significantly.

1.2.3. Human rights treaties as domestic law

We previously mentioned how the incorporation of international treaties into domestic legal systems represents one of the main ways through which the process of internationalization of constitutional law has been unfolding. As per the very nature of international law, translating international provisions into national ones turns out to be one of the most effective ways to ensure a certain level of implementation. And sure enough, many international bodies advise this approach, encouraging incorporation especially of human rights treaties. While the Human Rights Committee, for instance, advises a more general conformity with the Covenant[56], the Committee on Economic Social and Cultural Rights, in its General Comment n.9, explicitly states that *"[...] while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable"*[57], pointing out that direct incorporation may prevent misinterpretations and may lead to a more efficient invocation of the treaty's provisions in front of national courts[58].

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[55] *See* para. 1.1.2.
[56] Human Rights Committee 80th session, General Comment n.31 (2187th meeting) "The nature of the general legal obligation imposed on States Parties to the Covenant" (2004) para. 13: *"Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. […] States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant",* available at: https://digitallibrary.un.org/record/533996?ln=en#:~:text=General%20comment%20no.%2031%20%2880%29%2C%20The%20nature%20of,%282187th%20meeting%29%20%2F%20Human%20Rights%20Committee%2C%2080th%20session
[57] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment n.9 "The domestic application of the covenant" (1998) para. 8, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11
[58] Ibidem.

In cases of partial or integral incorporation, it is of significant importance to understand what legal value treaties have into the national legal system, as conflicts may well arise between domestic and international law. Such matters are usually regulated by national law provisions, establishing the various degree of legal force an international treaty has in the national territory, if they have any. Human rights treaties in particular are oftentimes regarded as a separate category, with a specific legal status related to their importance in defining rights and national obligations (Wagnerova, 2005). Ultimately, whichever legal force an international treaty is recognized domestically, its local application should prevail against any rising conflict with the national system. Or at least this is the standard imposed by, among others, the Vienna Convention on the Law of the Treaties, that in Article 27 affirms: *"[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"*[59], clearly imposing an ordering of relevance amongst national and international acts.

Thus, integration of international human rights treaties is highly recommended by the international community, they are sometimes granted an enhanced legal status compared to other international provisions and their implementation should overcome conflicts arising with national law. Owing to such considerations, as any state is free to determine at which level the integrated treaties should act, we are left with the compelling matter of determining which hierarchical status is granted to said category of treaties in the sources of national law.

In relation to ordinary law, conflicts with international provisions are more likely to occur in those states that concede self-executive status to certain categories of treaties, since international provisions which must be translated into domestic law through a specific parliamentary act are already harmonized with the national legal system. Hence, where treaties may be integrated without legislative intervention, eventual legal discrepancies are resolved by considering the legal force of the different sources of law. In most cases, international treaties shall take priority over ordinary law (Hollis). Some exceptions however, subordinate self-executive international law to any parliamentary act adopted by the legislature. This is, for instance, the case of South Africa which, in article 231(4)

[59] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at:
https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

of the Constitution affirms that: *"[…] a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"*[60].

The greater part of the states adopts a different approach: international provisions take precedence over any parliamentary act or ordinary law directive, still being subordinate to the national constitution (Sloss). Consequently, the range of influence of the integrated treaty is as wide as it does not contrast with the provisions of the law of the land. But even this layout is marked by some noticeable exceptions, to the point where some systems regard treaty law as superior in status to the constitution itself (Hollis). This is the case of the Netherlands (prior approval of the States Generals[61]), of Austria (by the support of the Nationalrat and the Federal President[62]) and of Russia (in which the article that regulates this matter has been interpreted by the Supreme Court in a rather dualist fashion[63]). Accordingly, as in all the aforementioned cases the integration of a treaty is tied to an incumbent vote of approval, every formal ratification functions as a *de facto* constitutional amending procedure[64].

Finally, states oftentimes opt for a much more comprehensive integration of human rights treaties, thoroughly including them as part of their constitutional charters. In doing so, these jurisdictions resonate the common belief that regards constitutional integration as the most effective way to ensure full treaty implementation. And indeed, while

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[60] *See supra* note n. 40.

[61] The Constitution of the Kingdom of the Netherlands, as amended 2018, Art.90 (1): *"The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament"*, available at: https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands

[62] The Federal Constitutional Law of Austria, as amended to 2019, Art.50 (1) "*Political State treaties, [and] others insofar as their contents are law-amending or law supplementing and do not fall under Article 16 Paragraph 1 may only be concluded with the authorization of the National Council. To the extent that such State treaties regulate matters within the independent area of competence, they require, moreover, the consent of the Federal Council*", available at: https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf

[63] Ruling of the Plenary Session of the Supreme Court of the Russian Federation No.5, *On Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction*, Moscow 10 October 2003, available at: http://www.supcourt.ru/en/files/16426/

[64] Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, part of *National Treaty Law and Practice*, Studies on the Law of Treaties, Volume 1, edited by Duncan B. Hollis, Merritt R. Blakeslee, L. Benjamin Ederington, Martinus Nijhoff Publishers, Leiden and Boston 2005, pp. 1-58.

international treaties never call for a comprehensive constitutional integration of their contents, such an approach is valued as the most effective way for a state to meet its international obligations and for the state's citizens to appeal for any possible violation of the treaty's provisions more easily. In the words of The Office of the High Commissioner for Human Rights (OHCHR): *"the highest source of law – in almost all countries, the constitution – should guarantee these rights because this is the premise of the consistency of the entire body of law of the country with international standards"*[65].

International human rights law can be incorporated into national constitutions in multiple ways, depending on the degree of compliance to the treaty that a state wants to pursue. The most prevalent method involves constitutions making general statements of support for a specific international agreement, citing how the state is determined to follow the directives enunciated on the treaty and committed to its directives. Such an approach, however, does not indicate the ways in which the agreement in question should be implemented nor does it offer any applicable way of recourse for future rights violations[66]. These indefinite and ambiguous references to international law do reveal a genuine political will to implement the ratified convention but lack an effective mechanism of implementation. For a more useful reference, both Algeria's[67] and Niger's[68] constitutions rely on the illustrated method of application when deferring to UN and regional level human rights agreements.

Other constitutional documents go as far as explicitly state that the country's bill of rights should be interpreted in the light of international human rights law. In such cases, even if international treaties are not incorporated in the body of laws, they contribute to the general meaning of the rights enlisted in the constitutions[69]. This is the case, among

[65] United Nations publication issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights and Constitution Making*, New York and Geneva 2018, available at: https://www.ohchr.org/en/publications/special-issue-publications/human-rights-and-constitution-making#:~:text=Human%20Rights%20and%20Constitution%20Making%20aims%20to%20offer,constitutions%20and%20in%20the%20writing%20of%20new%20ones.
[66] *See supra* note 24.
[67] The Constitution of the Republic of Algeria, as amended to 2020, Preamble, available at: https://www.constituteproject.org/constitution/Algeria_2020.pdf?lang=en
[68] The Constitution of Niger, as amended to 2017, Preamble, available at: https://www.constituteproject.org/constitution/Niger_2017
[69] *See supra* note n.66.

others, of the South African constitution with Article 39(1)[70] or the Ethiopian constitution with Article 13[71]. Lastly, certain states take a more radical approach as they make reference to several international human rights treaties, comprehensively giving them full constitutional value as the highest source of domestic law[72]. In said systems, the constituents' consensus has been reached over a sentiment that places constitutional law in an open international framework.

[70] *See supra* note n. 40.
[71] The Constitution of Ethiopia, 1994, available at:
https://www.constituteproject.org/constitution/Ethiopia_1994.pdf?lang=en
[72] *See supra* note no.66.

CHAPTER II

INTERNATIONALIZATION OF AFRICAN CONSTITUTIONALISM

The preceding chapter tried to delineate a relatively general overview of the notion of internationalization of constitutional law, for this concept represents the premise from which the paper's topic will develop. Thus, as we first introduced its theoretical foundation, we briefly described some of the ways through which national constitutional law assimilates features of internationalization, and the way said contamination impacted the sources of domestic law and their constitutional interpretation.

In the next sections we will turn our attention to the effects that this process might have had on liberal constitutional democracies. More specifically, our interest lies in understanding to what extent the internationalization of a state's constitutional structure might influence its state of democracy and rule of law.

Previous studies mainly focused on problems of democratic accountability (Wen-Chen, 2012). In this sense, opponents to processes of internationalization of constitutional law pointed out that democratic participation diminishes significantly when the people have less access to decision making and legislative procedures. Following this argument, delegating a part of national sovereign authority to non-democratically chosen international bodies weakens the system of checks and balances that pertains to liberal democracies. In so doing, features of internationalization would have a major impact on democratic accountability and the rule of law, undermining foundational principles such as legal certainty and judicial appeal.

Para. 1.2.1 already shed some light on such criticism, as we have seen that only a negligible fraction of states does not involve the national legislature in processes of incorporation of international law. The vast majority of national systems require people's representatives' consensus either prior or after the adoption of an international treaty. Moreover, partial erosion of national sovereignty always pertains a shift of power rather than an outright suspension of authority. But of course, the debate on this matter is much more articulated and quite controversial, to the point that it exceeds the scope of the present paper.

On the contrary, this research will consider the phenomenon of internationalization of constitutional law and the effects that it might have on processes of so-called "democratic decay". When we talk about democratic decay we mainly refer to the critical efforts of Aziz Huq and Tom Ginsburg[73], who through their work contributed greatly to the understanding of notions like authoritarian reversion and constitutional retrogression. Such a field of study goes well beyond accountability and representational concerns, undertaking a deep and multilayered analysis of how liberal constitutional democracies might witness a gradual deterioration of some of their uniquely constitutional features such as the division of power, the effective protection of liberal rights, regular competitive elections and the overall state of democracy.

We have indeed seen how regional and international human rights treaties, through constitutional assimilation and judicial convergence, are turning into a widespread component of modern constitutional democracies. To the point that they are becoming a fundamental source of law in matters of constitutional interpretation. Human rights treaties are, in the end, advancing to be foundational yardsticks and essential parameters of constitutional adjudication. The question we will try to put forward is: to what extent the use of human rights treaties as sources of constitutional interpretation might have an impact on processes of democratic backsliding?

Since we will properly introduce the notions of constitutional retrogression and democratic decay in the next chapters, this section will be merely devoted to the analysis of processes of internationalization on a rather limited research field. Sure enough, to answer such a wide question, one needs to evaluate and study a number of states' constitutions, to consider their level of internationalization and the state of their democracy, and to consequently try to draw some conclusion through a comparative analysis. It is, of course, quite unrealistic to adopt a global viewpoint on the matter, not to mention that to consider states that have a more or less common tradition could result in a more homogeneous and comparable analysis. For these reasons, we delimited our research field to a specific geographic area: the African continent.

[73] Aziz Z. Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy,* UCLA Law Review, Vol. 65, Forthcoming, U of Chicago, Public Law Working Paper No. 642, January 18, 2017. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776

Due to its peculiar constitutional past and its recent and, to some, ongoing constitution making and constitutional amending drive, Africa's legal tradition and its regional history could function as a solid ground for our research analysis. Some have indeed defined the continent's constitutional history as a multilayered juxtaposition of different constituent moments[74]. And while many countries around the world experienced in the course of time what scholars defined as waves of constitutionalism, the common colonial past of most African states contributed to a cohesive and more or less consistent development.

The first constituent impulse arose from the decolonization process that most countries experienced during the 1950s and 1960s. In this moment in time constitutional charters, even when inspired by a strong anti-colonial drive and by profound national or ethnic identifications, were deeply influenced by European colonial powers. To the point that most democratic transitions were shaped on the legal tradition of the former occupying countries.

The 1970s world crisis concurred with a widespread authoritarian regression in the continent. Military juntas set forth a new amending impulse, aimed at legitimizing the progressive concentration of power and the partial dismantle of democratic institutions. Quite the reverse, the end of the Cold War and the bipolar hegemony saw a new upsurge in democratic movements in Africa, and through the 1980s and 1990s several countries transitioned to constitutional democracies (post-Apartheid South Africa being the most famous and emblematic example of such transition).

As Hessebon has profusely dwelled on, in its 2016's *"The Fourth Constitution-Making Wave of Africa: Constitutions 4.0?"*[75], a last and more recent amending wave has been developing in Africa in the last decades. Such a constitutional momentum would aim at improving the deficiencies of present constitutions, namely by implementing mechanisms to avoid concentration of power on the executive and secure democratic representation.

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[74] Among others: Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J.COMP. L. 1, 2-3 (2007).

[75] Gedion Timothewos Hessebon, *The Fourth Constitution-Making Wave of Africa: Constitutions 4.0?*, Temple International & Comparative Law Journal, Vol. 28, No. 2, 2014 (February 22, 2016). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736553

This last constitution-making and constitution-amending wave has been developing concurrently with the creation of Africa's most prominent regional international organization: the African Union. Supplanting what once was the Organization of African Unity, the Union was funded to promote political and economic integration by achieving "*greater unity and solidarity between the African Countries and the peoples of Africa*"[76] and it became operative in 2002. Shortly after, in 2004, a Protocol to the African Charter on Human and Peoples' Rights entered into force establishing the African Court on Human and Peoples' Rights[77], the main judicial body of the Union.

As we said, such a call for regional cooperation was concurrent to many states undertaking radical amending procedures to their constitutions, which might lead to a more internationalized approach regarding constitutional law implementation and interpretation. On the other hand, judicial dialogue might not be strengthened from an all too brand-new international monitoring body, which authority is still under question by so many African governments (twenty states have yet to sign the Protocol[78]).

Alongside said constitutional developments, however, several countries in the region have experienced some forms of authoritarian regression during the last years. From 2020 onward, Mali, Chad, Guinea, Sudan, Burkina Faso, Niger, Gabon, Guinea Bissau, The Gambia and Sierra Leone all faced failed or successful attempts of coups against democratically elected bodies. Such high instability rate, and the fact that many countries' democratic institutions have been shown to be rather weak against the military, is of course valuable to our analysis. A comparative perspective could highlight some common features and general patterns, in relation to instances of internationalization of constitutional law, giving credit or not to the belief that a more internationalized approach

[76] Constitutive Act of the African Union, Article 3 (a), Lome, Togo, 11 July 2000. Available at: https://au.int/en/treaties/constitutive-act-african-union
[77] https://au.int/en/treaties/1164
[78] "The 34 States which have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Democratic Republic of Congo, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Libya, Lesotho, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Zambia. To date, only eight (8) of the thirty-four (34) State Parties to the Protocol have deposited the declaration recognizing the competence of the Court to receive cases directly from NGOs and individuals. The eight States are: Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger and Tunisia". Source: https://www.african-court.org/wpafc/welcome-to-the-african-court/

to constitutional law and its interpretation might provide some fundamental tools against democratic backlashes and authoritarian regressions.

In the present chapter we will lay the notional basis for the aforementioned question, by specifically considering the ways in which African constitutions have been (if they have) incorporating international human rights treaties, and what kind of legal domestic authority has been given to them. We will then consider those cases in which national courts are undertaking a prolific dialogue with any other domestic or supranational court of justice, and if national judges have ever referred to international law in order to give interpretation to constitutional charters.

2.1 The African Union: setting standards for African constitutionality

When we talk about international human rights treaties, regional organizations and multilateral agreements oftentimes take relevance over more general provisions valid on a global scale. Regional monitoring bodies are indeed more representative of the concerned population, and they tend to act upon a more cohesive and homogenous territory (Smith, 2014, pp-122-132). Even though the African continent does not a share a distinctive legal tradition, and it's rather composed by a multifaceted patchwork of socio-political identities, it has still managed to unify its influence under the banners of the African Union (former Organization of African Unity), by instituting competent bodies and issuing regulations concerning human rights, democracy and the rule of law.

The Organization of African Unity was originally established with the foremost concern of freeing the African continent from the remnants of the European colonial occupation. In its constitutive Charter's Article 2, the organization enunciates its guiding principles, with the aim of "*eradicating colonialism, national independence, defend territorial integrity*"[79]. Since independence and territorial emancipation were seen as central elements by those that established the organization, it is no surprise that the principle of non-intervention and non-interference in member state's affairs was so explicitly articulated in Article 3 of the Charter, which reaffirms:

[79] Organization of the African Unity Charter, Addis Ababa, 25 May 1963. Available at: https://au.int/en/Treaties/1157

1. *The sovereign equality of all Member States.*
2. *Non-interference in the internal affairs of the states*
3. *Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence*[80]

Asserting the non-involvement in states' internal matters, the Organization of African Unity disengaged not only from any form of military intervention in cases of territorial disputes (despite promoting the peaceful resolution of conflicts between its members). But, on a more implicit level, it also distanced itself from the possibility of becoming a benchmark for post-colonial constitutional democracies, to the point of efficiently reacting in front of democratic setbacks and unambiguous violations of democratic instances. Our understanding is that, since the principle of non-intervention even applied to cases of mass human rights violations, the OAU didn't have any aspiration of establishing a paradigm for African democratic constitutionalism.

The principles that have just been mentioned and the more general unwillingness of the Organization to function as a standard for African constitutional democracies ultimately had a huge impact on the socio-political instabilities that afflicted Africa in the second part of the twentieth century.

Not only did the Organization of African Unity not have the means to get involved and mediate in the many civil wars that burst during the decades of its activity. It also didn't develop either the power or the will to engage in big-scale interstate wars in the continent. One of the most significant examples of the sort is represented by the two Congo wars that indeed involved a significant number of African states during the 1990s[81]. Prior to this, despite recognizing the human rights doctrine as foundational to the organization's existence, the OAU aimlessly witnessed to mass human rights infringements within its territory of influence. The Rwandan genocide and its aftermath or the human rights

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[80] Ibidem.

[81] Truthfully, the Congo Wars witnessed a partial involvement of the OAU, by means of creating an ad-hoc commission to deal with potential negotiations. Nevertheless, the fact that the commission's decisions weren't binding for the involved parties, coupled with the internal divisions that split the organization on the conflict's resolution, resulted in an absolute failure to implement peace and contribute to stability in the region. Regarding the involvement of the OAU in the Congo Wars see: Corinna Billmaier, *Why did the OAU fail to bring about a solution in the Congo Crisis?*, February 6, 2020, available at: https://innovativeresearchmethods.org/the-organisation-of-african-unity-and-their-role-in-the-congo-crisis-why-did-they-fail-to-bring-about-a-solution-in-the-crisis/

violations perpetrated by Idi Amin's regime in Uganda[82] (just to name a few cases in the same region), saw no involvement of the organization's institutions, like many other rights violations in the whole African continent (Fombad, 2007).

The inability of the OAU to set a standard for democratic constitutionalism didn't change even after the adoption of the African Charter of Human and Peoples' Rights in 1981, failing to implement the treaty's provisions in the face of new human rights violations (Fombad, 2007). However, such a tendency begun to significantly shift during the late 1990s. Charles M. Fombad (Fombad, 2012) refers to the 2000 OAU Summit in Lome, Togo, as the sheer manifestation of a turning point in the organization's approach to unconstitutional shifts of power. Indeed, the reawakening of democratic aspirations brought by the end of the Cold War led heads of government to adopt the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government. Of course, the development of an interventionist doctrine in the OAU and the African Union and its effectiveness in tackling authoritarian regressions in the region deserves an in-depth analysis on its own. Yet, the Declaration definitely draws our interest as one of the first documents in which the African organization's treaties are acknowledged as a reference point for liberal democratic constitutional rule of law. In trying to give a definition of democracy, the document states:

"[…] consideration could be given to the elaboration of a set of principles on democratic governance to be adhered to by all Member States of the OAU. These principles are not new; they are, as a matter of fact, contained in various documents adopted by our Organization. What is required here is to enumerate them in a coherent manner which will bear witness to our adherence to a common concept of democracy and will lay down the guiding principles for the qualification of a given situation as constituting an unconstitutional change"[83]

The Declaration goes on outlining some fundamental features of what constitutes a democracy, emphasizing how any democratic government in Africa should be "in

[82] For further reference see: https://web.archive.org/web/20150418220949/http://www.foreignaffairs.com/articles/29141/richard-h-ullman/human-rights-and-economic-power-the-united-states-versus-idi-ami

[83] Declaration on the framework for an OAU response to unconstitutional changes of government, Organization of African Unity, Assembly Collection [1643], 2000, AHG/Decl.5 (XXXVI), available at: https://archives.au.int/handle/123456789/915

conformity" with such a definition. In other words, for the first time the OAU was openly referring to its constitutive documents like they embodied a blueprint for democratic constitutionalism in the continent.

Warner[84], putting together the efforts of many academics in trying to understand the reasons behind such a change of paradigm, recalls historical developments and the end of the bipolar hegemony, the widespread acceptance of the responsibility to protect principle in international customary law, the impact that concomitant mass human rights violations had on the pan-African agenda, and lastly, the drive to emulate international political structures such as those of the European Union and the United Nations itself.

For the sake of our thesis, said shift of paradigm, which some authors referred to as "from non-interference to non-indifference" (Williams, 2007), is emblematic as it efficiently describes the determination of African regional bodies to adhere to a sort of pan-African rule of law, entrenching the foundational acts of the new African Union with constitutional value. And indeed, the Constitutive Act of the African Union establishes a significant number of institutions, mimicking the divisions of powers proper of constitutional orders[85]. Most importantly, it gives birth with Article 18 to the African Union Court of Justice[86] (today African Court of Justice and Human Rights – ACJHR). In line with the last documents of the OAU, The Constitutive act of the Union imposes the landmark Article 4 (h), which has later been amended in the following:

"*the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as serious threats to legitimate order to restore peace and*

[84] Jason Warner, *The African Union and Article 4(h): Understanding Changing Norms of Sovereignty and Intervention in Africa Through an Integrated Levels-of-Analysis Approach*, part of *Democracy, Constitutionalism, and Politics in Africa – Historical Contexts, Developments, and Dilemmas*, Contemporary African Political Economy series, edited by Eunice N. Sahle, University of North Carolina Chapel Hill, North Carolina, USA, 2017, Chapter 6, pp. 167-203. Available at: https://link.springer.com/chapter/10.1057/978-1-137-55592-2_6

[85] Constitutive Act of the African Union, July 11, 2000, Lome, Togo. Access at: https://au.int/en/Treaties/1157

[86] Ibidem.

stability to the Member State of the Union upon the recommendation of the Peace and Security Council"[87].

As we said, the consequences of the adoption of the principle of intervention in domestic affairs in cases of human rights violations are twofold: first of all, the African Union is founded on the belief that its institutions should work as to guarantee the respect of AU's founding treaties, therefore relating to them as the highest source of law within the regional community; secondly, it proclaims the primacy of the human rights doctrine and of international human rights law over national legislations. It seems that, for the first time, a higher-in-status system of law has been recognized by the Union, overcoming the Westphalian system of constitutional primacy that emerged from the end of the decolonization process. The ways in which this new framework has been integrated or not in domestic national systems will be analysed later in the following chapters.

Besides its constitutive act, the African Union delineated principles and standards of what concerns a democratic government in later documents such as the African Charter on Elections, Democracy and Governance[88]. Other than tackling once again the issue of unconstitutional changes of government, the Charter affirms the:

"*1. Respect for human rights and democratic principles;*

[…]

4. Holding of regular, transparent, free and fair elections;

5. Separation of powers;

6. Promotion of gender equality in public and private institutions;

7. Effective participation of citizens in democratic and development processes and in governance of public affairs;

8. Transparency and fairness in the management of public affairs;

[…]

[87] Ibidem.

[88] African Charter on Elections, Democracy and Governance, January 30, 2007, Adopted by the Eight Ordinary Session of the Assembly, Held in Addis Ababa, Ethiopia. Accessed at: https://au.int/en/treaties/african-charter-democracy-elections-and-governance

11. Strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law."[89]

Evidently enough, principles of what constitutes a democratic government and the protection and promotion of basic human rights, are matters which African states must now deal making reference to the general instances and guidelines established by the AU and its treaties.

2.1.1. Monitoring mechanisms of African Human Rights Law

We have now seen how, through the imposition of a more interventionist approach in states' affairs, the African Union's founding documents reveal the implicit or explicit intent of placing themselves as the central source of African law, acquiring primacy over domestic jurisdictions. We shall now turn to a brief analysis of the African Union's implementing mechanisms regarding, more specifically, human rights law (namely the African Charter on Human and Peoples' Rights). Hopefully, this final enquiry about the organization will shed light on its effectiveness, establishing if the legal norms of the AU function as a *de fact*o yardstick for constitutionalism in the whole continent.

The African Charter on Human and Peoples' Rights itself establishes, in Article 30, the creation of an African Commission on Human and Peoples' Rights, in order to "*promote human and peoples' rights and ensure their protection in Africa*"[90]. The Commission, however, became what experts begun to a call a "quasi-judicial body"[91], since its decisions are not binding on member states and its nature is not that of a court in the first place. Such maiming of the body's functions deprived commissioners of any real power to influence states' practices and possible violations of the Charter.

Truthfully, since the Commission was established in 1981, concomitantly with the adoption of the Charter, its partial deficiencies were perfectly in line with the political

[89] Ibidem.
[90] African Charter on Human and Peoples' Rights, adopted by the eighteenth Assembly of Heads of States and Government, Nairobi, Kenya, June 1981. Accessed at: https://au.int/en/treaties/1164
[91] Frans Viljoen, Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, The American Journal of International Law, Vol. 101, No. 1 (Jan. 2007), pp. 1-34.

unwillingness of local governments to concede part of their sovereign integrity[92]. A first draft of the Charter, the one which has then taken the name of "M'Baye draft", shows just that. As the draft goes, Article 32 was originally intended to be the following:

"Everyone has the right to simple and [prompt] recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the Constitution or laws of the state concerned or by this Charter, even though such violation may have been committed by persons acting in the course of their official duties"[93].

The reach of the quoted article was clearly intended to erode the sovereign power of member states at least partially, giving to the Commission jurisdiction over domestic constitutions and the power to adjudicate the Charter's violations with mandatory decisions. As the author of the draft Charter later reported[94], the times were not ready for national governments to agree on a proper judicial body regarding the implementation of the Charter.

In the late 1990s, the conditions for the creation of a judicial institution for African human rights law seemed to be in place. A Protocol to the Charter establishing the African Court of Human and People's Rights was signed in June 1998: for the first time, an extensive framework for an actual judicial court was written and agreed by African heads of states. The Court was designed to "complement" and balance the work of the Commission on the judicial interpretation of treaties and the resolution of contentious cases. Indeed, Article 30 of the Protocol obliges member states to "*comply to the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution*"[95]. On said compliance, the Court is asked to regularly submit reports to the Assembly, as to monitor the full implementation of the Court's judgements.

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[92] See para. 2.1

[93] *Draft African Charter on Human and Peoples' Rights*, prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, by Kéba M'baye, OAU/CAB/LEG/67/1, as quoted by: Misha Ariana Plagis, Lena Riemer, *From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples' Rights and the Enigma of Article 7*, Journal of the history of International Law (2020) pp. 1–33.

[94] *See supra* note 91

[95] *The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCH. Available at: https://au.int/en/treaties/1164

The Protocol, however, only entered into force in January 2004[96] and, although the first judges were elected two years later, the Court didn't start to operate until the year 2008, with the merging of the Court on Human and Peoples' Rights with the African Court of Justice[97], due to the Union's lack of fundings. Therefore, at present it's only been 16 years since the Court was officially able to deliver decisions and impose its jurisdiction on member states. Today, the Court has filed some 391 decisions, comprising of 231 judgements regarding contentious cases, advisory opinions, reviews and interpretations[98].

Of all 55 signatory states to the Protocol, however, only 34 have officially ratified the document, significantly downsizing the Court's jurisdiction and the range of its decisions. More to the point, Article 5(3) of the Protocol, which states that "*the Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it [...]*"[99] requires each member state, under Article 34(6), to issue a declaration conceding said right to appeal by individuals. So far, only 8 states have made such a declaration, in compliance with Article 34(6): Burkina Faso, Gambia, Ghana, Guinea Bissau, Malawi, Mali, Niger, Tunisia[100].

Eventually, the Court's relatively late set off, combined with a part of the states not ratifying the Protocol and the fact that only a fraction of those that recognize the Court's jurisdiction accepted the admissibility of individual complaints, appears to be a rather off-putting framework. Yet, despite these setbacks, the African Union has succeeded in establishing a proper judicial body regarding the protection and the interpretation of the Charter on Human and Peoples' Rights and international human rights law in general. On account of this, the Union has manifestly shown its willingness to give to its founding human rights treaties regional applicability, through monitoring mechanisms, judicial interpretation and intervention in cases of mass violations. Clearly, the intentions are for African human rights law to represent a continental standard for democracy and the

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[96] https://au.int/en/treaties/1164

[97] Protocol on the Statute of the African Court of Justice and Human Rights, July 01, 2008, accessed at: https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights

[98] https://www.african-court.org/cpmt/statistic

[99] *See supra* note 95.

[100] https://www.african-court.org/wpafc/wp-content/uploads/2023/03/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf

protection of rights within domestic constitutional systems. Whether said intentions have been met by national constitutions, by way of incorporating, making reference or appealing to the African Union Charter, will be the interest of the following section.

2.2 Constitutional incorporation of international law provisions

To this point, the present chapter tried to set forth the international human rights law framework that concerns and affects sovereign states in Africa, as it is generally composed by: the African Union provisions we just covered, UN-level human rights treaties and, above all, international customary law and *jus cogens*.

Since our interest currently lies in constitutional texts and, strictly speaking, the ways they might be influenced by said international layout, we shall thus turn to a brief assessment of instances of incorporation of human rights law in African constitutions. Indeed, as para.1.1.1 already mentioned, the assimilation of human rights law provisions in national fundamental laws is one of the main manifestations of the process of internationalization of constitutional law.

This section will consider the constitutions of fifty-two African states, each one being member of the African Union and the international community at large. It is hereby noted that the constitution of Libya has not been taken into account since the draft that came out of Libya's Constitution Drafting Assembly (CDA) in 2017 hasn't been accepted yet, and the country, still waiting for an election date, doesn't have a constitutional document to abide by.[101]

In order to efficiently describe the different ways in which international law has been incorporated in African constitutions, states have been grouped in four different categories or "gradients" of incorporation. While said categorization has been partially guided by works of academics on the matter, most notably *Constitutional Incorporation of International Human Rights Standards: An Effective Legal Mechanism?* by Mary Kathryn Healy[102], the following classification stands out as a simple crescendo of degrees

[101] For an analysis of Libya's 2017 draft Constitution see: https://constitutionnet.org/sites/default/files/2020-12/Libya%20analysis%20-%20Zaid%20Al-Ali%20%28December%202020%29%20%28English%29.pdf

[102] *See supra* note 24.

of assimilation. Meaning that, for now, it leaves out any division based on the hierarchical place that treaties take in the sources of domestic law once they are assimilated, sticking to a more formal evaluation of the constitutional charters' content.

Therefore, the next sections will develop in the following: constitutions where no reference has been made to international law, or where it has been referred to in a general and vague manner; constitutions where one or more international human rights treaties are cited and the adherence to their precepts is confirmed; charters that include the assimilation of international customary law as part of national law; states that equate international law provisions to the ones in the constitution and explicitly refer to international law as a source for constitutional interpretation. See fig.1 for reference.

Fig. 1

No reference to International Law	Botswana, Eritrea, Liberia, Mauritius, Zambia
General Reference to International Law	Egypt, Morocco, Nigeria, Eswatini, Lesotho, Namibia, Sierra Leone, South Sudan, Uganda
General Reference to Specific Treaties	Algeria, Cameroon, Central African Republic, Congo (Democratic Republic of), Cote d'Ivoire, Burkina Faso, Chad, Comoros, Djibouti, Equatorial Guinea, Gabon, Ghana, Guinea, Madagascar, Guinea Bissau, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Tanzania, Tunisia
Assimilation of Customary Intern. Law	Kenya, Namibia, South Africa
Full assimilation with the constitution	Benin, Burundi, Congo (Republic of), Sudan, Togo
Intern. Law for constitutional interpretation	Angola, Ethiopia, Gambia (The), Malawi, Cape Verde, Seychelles, Somalia, South Africa[103], Zimbabwe

[103] South Africa and Namibia are named in two different categories as their constitutional charters present different features of internationalization.

2.2.1 General or no reference to International Law

Let's first consider all those cases in which constitutional documents do not make any reference whatsoever to either international law and human rights treaties or to the relation between domestic law and foreign provisions. Most notably, only a small fraction of African constitutions falls under said category. That is, the constitutions of Botswana, Eritrea, Liberia, Mauritius, Zambia[104].

It is indeed emblematic that only five African countries out of fifty-two do not regulate matters of international human rights law. In chapter I, upon describing general features of processes of internationalization of constitutional law, we highlighted how the human rights discourse, alongside with globalization and inter-dependency impulses, mainstreamed its impact on an ever-growing number of domestic legal systems. Besides, the influence of international law and, in particular, the multi-level consensus built around human rights international treaties in present-day international relations, has made quite challenging for any national constitution not to refer to international law in any way.

It is hard to find a correlation between the five African constitutions that represent an exception to such a trend, in order to give a potential explanation for said shortcoming. Three charters out of five are the product of what we indicated as the first wave of African constitutionalism[105], having been adopted in 1966, 1964 and 1968 respectively by Zambia, Botswana and Mauritius. However, all three documents have been repeatedly amended over the last sixty years, with the last significant amending procedures undertaken in 2016[106], in line with the so-called fourth (and ongoing[107]) wave of African constitutionalism. Up until now, constitutional revisions have failed to effectively integrate international law and human rights instruments in the charters. The lack of political will and the reluctance to increase the reach of constitutional interpretation might be the main reasons behind such deficiencies.

[104] All constitutional charters can be accessed at: https://www.constituteproject.org/

[105] *See supra* note 74.

[106] *See supra* note 102.

[107] See, for instance, on the present constitutional revision process happening in Botswana: https://constitutionnet.org/news/promise-fulfilled-botswanas-first-comprehensive-constitutional-review-process-gets-underway

As *figure 1* shows, a second category refers to states' constitutions addressing international law in some way, without reporting any specific treaty or human rights law provision. Once again, these charters represent a minority in the whole continent, revealing the extensive application and integration of international human rights law in constitutional documents in Africa. Nevertheless, they belong to important and influential countries in the region, namely: Egypt, Morocco, Nigeria, Eswatini, Lesotho, Namibia, Sierra Leone, South Sudan and Uganda[108].

It has been deemed appropriate to group these states with cases of total absence of constitutional reference to international law. This is because the vagueness and ambiguity of this general kind of incorporation ultimately results in the formal non-implementation of international human rights provisions. For instance, states like Morocco and Uganda place said indefinite commitment to international law in their Preamble, a section of the constitution that is usually supposed to give broad and non-specific guiding principles, rather than factual rules and procedures. The constitution of Morocco goes as follows:

"*the Kingdom of Morocco, active member within the international organizations, is committed to subscribe to the principles, rights and obligations enounced in their respective charters and conventions [...] To comply with the international conventions duly ratified by it, within the framework of the provisions of the Constitution and of the laws of the Kingdom, within respect for its immutable national identity [...]*".[109]

It neither specifies any real commitment to human rights treaties, nor it refers to implementation mechanisms and monitoring bodies on the rights it is supposed to enhance. More to the point, it highlights the fact that international norms have to be read under the light and "within the framework" of the national constitution, making clear the supremacy of the principle of constitutional primacy over international human rights obligations.

Other states go as far as granting the status of ordinary law to human rights treaties (prior to parliamentary approval), like the case of Egypt's Article 93:

[108] *See supra* note 102.
[109] Constitution of the Kingdom of Morocco (2011), available at: https://www.maroc.ma/en/content/constitution

"The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances"[110].

But again, the elusiveness of such a commitment and the lack of any real constitutional obligation towards international law makes it a good theoretical pledge with no real political will behind it.

2.2.1.1 Comparative interpretation in the absence of constitutional integration: the case of Botswana

As Nsongurua J. Udombana noted in its "*Interpreting rights globally: Courts and constitutional rights in emerging democracies*"[111], the question that arises in cases of partial or total lack of constitutionalization of international human rights law is the following: can a comparativist approach to constitutional adjudication be justified and adopted when the constitution does not make reference to international law? Should international law be taken into account even when not specified by any constitutional provision?

In para. 1.1.1.1 we submitted a similar query, considering the *de facto* integration of human rights law in a domestic system that is not part to the international community. To answer the present assessment, we shall consider a country that, on the contrary, has deliberately refrained from including international law in its constitutional text[112]. And, more specifically, the way said country's constitutional court has justified the use of foreign law for constitutional interpretation.

The case in question is Botswana High Court's famous decision Dow v. Attorney General (1991)[113], on instances of gender disparities related to citizenship clauses.

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[110] The Constitution of the Arab Republic of Egypt (2014), available at: https://www.sis.gov.eg/section/10/2603?lang=en-us

[111] Nsongurua J. Udombana, *Interpreting rights globally: Courts and constitutional rights in emerging democracies,* African Human Rights Law Journal, Vol. 5, p. 47, 2005. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925456

[112] *See* The Constitution of Botswana (1966): https://www.parliament.gov.bw/images/constitution.pdf

[113] DOW v. ATTORNEY-GENERAL, 1991 BLR 233 (HC), Lobatse, June 11, 1991. Available at: https://citizenshiprightsafrica.org/wp-content/uploads/2016/07/Dow-vs-AG-HCt.pdf

For the sake of our analysis, we are considering the opinion of justice Martin Horowitz whom, to structure his argument, refers to the case of a fellow Commonwealth member state regarding constitutional interpretation[114]; citing a fragment of the decision, it affirms how the constitutional text should be considered *"in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning"*[115].

Hence, having made reference to foreign law cases that justify a more creative approach of the interpretation of the law, the Court's justice frames such perspective within the principles of international law. Indeed, it goes on citing international human rights treaties, despite the constitution not giving to them any domestic enforceability:

"I am strengthened in my view by the fact that Botswana is a signatory to the O.A.U. Convention on Non-Discrimination. I bear in mind that signing the Convention does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be preferable to a "narrow construction" which results in a finding that section 15 of the Constitution permits unrestricted discrimination on the basis of sex. [...] Botswana also adheres to the International Covenant on Civil and Political Rights 1966, article 26 of which D prohibits discrimination [...]"[116].

The fact that, in a system that does not guarantee any applicability status to foreign and international law, one's argument on the interpretation of a domestic provision is validated by reasoning of consistency with international norms, is quite emblematic. In the end, it might be difficult for a state that is an integral part of the international community to adjudicate a national proceeding without taking into account foreign law cases and international standards. Of course, explicit incorporation of international treaties will result in a more cohesive and efficient application of international law. But the general consensus that was built over human rights obligations allows for constitutional gaps to be sometimes bridged by such a mainstreamed approach to the law. As if processes of

[114] JAMES v. COMMONWEALTH OF AUSTRALIA, (1936) 55 Ll.L.Rep. 291. Accessed at: https://www.i-law.com/ilaw/doc/view.htm?id=142335
[115] *See supra* note 104.
[116] Ibidem.

internationalization of constitutional law could occasionally hold sway regardless of national regulations.

2.2.2 Explicit reference to Human Rights Treaties

A substantial majority of African states has, over time, adopted constitutions that include a more or less general reference to some specific international human rights treaties or covenants[117]. In this sense, some academics have employed a comparativist approach on a global scale, gathering the necessary data to assert that 28 percent of the constitutions written after the end of the Second World War explicitly mention at least one international human rights treaty in their text (Chernykh, Elkins and Ginsburg, 2007). According to our analysis related to the African continent, twenty-three countries out of fifty-two belong to this category (approximately 44% of the total).

The Universal Declaration of Human Rights, followed by the 1966 UN Covenants and the African Charter on Human and Peoples' Rights are the most cited human rights instruments. Below, the Preamble of the Constitution of the Central African Republic as one of the more exhaustive examples on the matter:

*"[*reaffirms its*] adherence to the Charter of the Organization of the United Nations, to the Universal Declaration of the Rights of Man of 10 December 1948, to the International Pacts of 16 December 1966* […] *to the African Charter of the Rights of Man and of Peoples of 27 June 1981 and to the African Charter of the Democracy, of the Elections and of the Governance of 30 June 2007;* […] *to all International Conventions duly ratified, notably those concerning the prohibition of all forms of discrimination with regard to women, to the protection of the rights of the child and those relative to the autochthonous and tribal peoples"*[118].

While it may be true that such an approach articulates a more explicit (and therefore efficient) method of constitutional incorporation, it is also worth noting that only a fraction of states goes as far as thoroughly enlisting in the constitution all the rights and provisions present in the cited treaties[119]. Thus, states pledge to comply with the

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[117] See figure 1.

[118] Constitution of the Central African Republic (2016), available at: https://www.constituteproject.org/constitution/Central_African_Republic_2016

[119] *See supra* note 12.

obligations of the signed conventions without fully integrating their contents in their own fundamental law, and consequently not granting them constitutional relevance.

In such circumstances, since the application of specific rights and international standards is not based on *ad hoc* regulations but rather on a more general commitment to international treaties, an "interpretative elaboration" is required, in the words of Sergio Bartole[120]. In other terms, responsibility of application lies now upon the judiciary and its capacity to give constitutional relevance to international norms on a case-by-case basis. The next chapter of this work will be devoted to the analysis of the ways in which said judicial interpretative incorporation takes place.

An additional element working against a full assimilationist scenario is represented by the fact that many domestic systems adopt a dualist approach towards international law[121]. Meaning that they oftentimes require a legislative act of approval for an international treaty to be adopted and integrated into the national constitutional order, therefore making it harder for the judiciary to interpret constitutional provisions in light of international human rights obligations. Besides, the majority of the African constitutions we have gathered under the present category does not properly specify what kind of legal status is granted to the international treaties they are referring to. Only a portion of national documents clearly recognises international human rights laws cited by the constitution as an integral part of national law; this occurs in the constitutions of, among others, Kenya, Mozambique, Rwanda and Namibia which, in Article 144 affirms that:

"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".[122]

In any case, when the states in question give an explicit legal hierarchical position to international human rights law, they always place it under the influence of the constitution, and sometimes above ordinary national laws. In such instances, even if explicit commitments to specific human rights treaties are made, international law is

[120] *See supra* note 15.
[121] See para. 1.2.2, Chapter I.
[122] The Constitution of the Republic of Namibia (1990), available at: https://oag.gov.na/documents/86672/149049/Namibia_Constitution.pdf/4c835a76-5297-9976-e924 c5c76c226ee0

nevertheless subject to domestic provisions, significantly weakening the range of potential occurrences of constitutional internationalization. In this regard, some constitutions, like the ones of Djibouti[123] or Mauritania[124], mention that in cases of incongruences between international and constitutional law, the latter must be duly amended (with the potential consent of the legislature) as to prevent any legal conflict. Systems of the sort end up considering accession to international treaties and conventions as *de facto* constitutional amending procedures, yet still underlining the hierarchical inferiority of international human rights obligations to the constitutional charter.

2.2.3 Incorporation of International Customary Law

Among the constitutions that have been considered for the present research, three stand out due to a peculiar feature: the explicit incorporation in their respective legal systems of international customary law.

The informal assimilation of unwritten international customs is widespread practice in today's international arena, ultimately embodying one of the most authoritative sources of international law. However, for the purpose of this analysis, the categorical elaboration of a well-defined constitutional article regulating the incorporation of international customary practices (and sometimes their position in the sources of domestic law) denotes a substantial tendency to constitutional internationalization.

The countries following this approach are Kenya[125], Namibia[126] and South Africa[127]. Remarkably, all three of them are former British colonial territories and current parties to the Commonwealth of Nations. That is, they all share a Common law system, consistent with the English tradition. And indeed, the United Kingdom's jurisprudence on matters of international customary law has been steadily sustaining an assimilationist

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[123] Constitution of Djibouti (1992), available at: https://www.constituteproject.org/constitution/Djibouti_2010.pdf?lang=en

[124] Constitution of Mauritania (1991), available at: https://www.constituteproject.org/constitution/Mauritania_2012.pdf?lang=en

[125] Constitution of the Republic of Kenya (1963), Art. 2.5 (6): *"The general rules of international law shall form part of the law of Kenya".* Available at: http://kenyalaw.org/kl/index.php?id=398

[126] Constitution of the Republic of Namibia (1990), Art. 144: *"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".* Available at: https://www.constituteproject.org/constitution/Namibia_2014

[127] The Constitution of the Republic of Sout Africa (1996), Art. 232: *"Customary international law is law in the Republic […]". See supra* note 40.

inclination[128]. The African countries at issue, upon gaining independence, might have been influenced by common law's predispositions to the incorporation of international practices. Likewise, the social and cultural heterogeneity proper of most African territories contributed to the recognition, in one form or the other, of African customary law in national legal systems. More specifically, to the partial or total assimilation of customary non-written tribal laws of indigenous communities within the country's constitutional framework[129].

Whatever the source of said approach to customary law may be, it ultimately results in a greater commitment towards a more sophisticated and comprehensive incorporation of international law's features. That being said, a deeper analysis of Kenya, Namibia and South Africa's constitutions shows that the incorporation of international customary law is tied to its complying with both constitutional norms and, as in the case of South Africa, ordinary acts of parliament: "*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*"[130]. Hence this sort of incorporation is indeed a step closer to the internationalization of constitutional provisions, but it doesn't go as far as shaping the constitutional text and its interpretation on international law practices.

On the contrary, the upcoming lot of states finally represents the only cases in which human rights law is granted equal status to the constitution and it embodies a fundamental point of reference for constitutional adjudication.

2.2.4 Constitutional assimilation and Judicial interpretation

Somewhat following Healy's categorization on international law incorporation[131], this final section will make reference to all those constitutions that explicitly assimilate human rights international treaties by way of assigning to them comparable constitutional relevance. Such hierarchical equivalence in the sources of law is present on a significant

[128] Patrick Capps, *The Court as Gatekeeper: Customary International Law in English Courts*, The Modern Law Review Vol. 70, No. 3 (May 2007), pp. 458-471. Accessed at: https://www.jstor.org/stable/4543145
[129] See: https://theconversation.com/understanding-the-relevance-of-african-customary-law-in-modern-times-150762
[130] *See supra* note 40.
[131] *See supra* note 24.

number of African constitutions, that is the ones of Benin, Burundi, the Republic of the Congo, Sudan and Togo[132].

First of all, the above fundamental documents quite remarkably share the same linguistic pattern when talking about international law. To quote Sudan's constitutional Article 42.2 as an exemplificatory example: *"All rights and freedoms contained in international and regional human rights agreements, pacts, and charters ratified by the Republic of Sudan shall be considered an integral part of this Charter"*[133]. The texts are phrased as to highlight the fact that international human rights treaties are a fundamental, essential and structural part of the constitutions, and therefore of the respective national legal system which they regulate.

These statements' implications are quite straightforward, yet they greatly contribute to our analysis on the methods of constitutional internationalization and to better understand the influence they could potentially have on instances of democratic decay. They first of all tend to mend one of the main procedural problems when it comes to international law: the enforceability and implementation of the law. Indeed, when international treaties acquire constitutional status, their obligations organically become mandatory (even in cases of non-binding regulations, such as the Universal Declaration of Human Rights). Monitoring mechanisms for the respect and execution of rights-related provisions are already in place, as they are ultimately guaranteed by constitutional watchdog bodies that modern constitutions usually establish. The same goes for reparation procedures against possible violations and, more generally, judicial recourses for infringements of the law.

Accordingly, such a constitutional design has critical effects on the judiciary and the interpretation of the law. In para. 1.2.1, talking about the ways in which international and local legal systems relate to each other (with particular reference to the domestic application of treaties), we introduced the categories of monism and dualism as distinct ways of interpreting these interactions. An analysis of the charters at issue makes it clear that the monist and dualist divide becomes irrelevant or at least insufficient when it comes to full constitutional assimilation of international law. The predominant approach

[132] *See supra* note 102.
[133] Constitution of Sudan as signed in 2019, available at: https://www.constituteproject.org/constitution/Sudan_2019

becomes monist by default since it merges the international and national planes in a single interconnected system. In point of fact, the legislature's power is being reduced and downsized, as international law doesn't need a parliamentary act of approval to become effective, but it does so directly, by virtue of its constitutional status. Such direct applicability, as we said, has a profound impact on the judiciary, which is obliged to explicitly refer to constitutional human rights treaties as equivalent sources of law in judicial adjudications and, more essentially, may be required to interpret the constitution itself in the light of the assimilated international documents.

After all, domestic courts have, by definition, both decisional and interpretative authority over the law (Ammann, 2020). And when international treaties are fully assimilated into constitutional charters, to the point of becoming an organic part of the text, constitutional courts are caught up in the midst of the resulting juxtaposition between national and foreign provisions. In such cases, the judiciary may find itself in the position of providing positive interpretation to international law provisions (as they are part of national law), or it could, alternatively, read the constitutional content having adequate consideration of the encompassed treaties as official sources of national law.

Many African constitutions have chosen to adopt a rather direct approach when regulating this last feature of constitutional internationalization. The countries in question are: Angola, Ethiopia, The Gambia, Malawi, Cape Verde, Seychelles, Somalia, South Africa and Zimbabwe (*see* fig.1). In addition to the integral incorporation of some human rights treaties, these states' fundamental laws explicitly require the judiciary to read and interpret the constitution in line and full compliance with the documents at issue. Seychelles' constitutional Article 48 goes as follows:

"This Charter shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provision of this Charter, take judicial notice of-

the international instruments containing these obligations;

the reports and expression of views of bodies administering or enforcing these instruments;

the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms […]"[134]

The Article goes as far as including foreign law and foreign courts' judgements in the list of the sources of constitutional law, to be considered in cases of constitutional adjudication.[135] The Republic of Seychelles only shares such an interpretative openness with the constitutions of Malawi, Somalia and South Africa (with the last two referring to foreign law as not mandatory upon constitutional interpretation).

It would then seem that the tendency towards cross-country judicial dialogue and the overall use of international law for constitutional adjudication is rather limited to a minor part of the African countries. Our analysis of the charters, in fact, reveals how less than a quarter of the states at issue fully complies with features of internationalization of constitutional law. However, the categorization we proposed in this current section merely represents a formal evaluation of the state of constitutional internationalization in Africa. The study of judicial practices we are about to undertake in the next chapter of the thesis might show a different reality. Cases may arise where judicial deference to international and foreign law is used for constitutional interpretation even in states that have not formalized said approach. This would be an indicator that processes of internationalization of constitutional law are unfolding regardless of their *de jure* recognition in national domestic systems.

[134] Constitution of the Republic of Seychelles (1993), Art. 48. Available at: https://www.gazette.sc/sites/default/files/2020-12/Bill%2023%20-%20Constitution%20of%20the%20Seychelles%20%28Tenth%20Amendment%29.pdf

[135] Ibidem. Art.48: "*the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions*".

CHAPTER III

JUDICIAL CROSS-SYSTEMIC FERTILIZATION

In the first Chapter of the present work (para.1.1.2) we provided a general overview of the increasingly extensive use of international and foreign law by national high courts in cases of constitutional adjudication. This phenomenon was portrayed as a pivotal aspect of processes of internationalization of constitutional law. Such an assumption is based on the fact that modern constitutionalism, especially from the second global conflict onward, has extended beyond the mere drafting of a nation's fundamental law. It comprises the establishment of ad-hoc judicial bodies entitled with the interpretation of the charter and the enforcement of the principle of constitutional supremacy. Consequently, the ongoing judicial trend to refer to foreign law for constitutional interpretation serves as a crucial element in dynamics of constitutional internationalization.

As a matter of fact, national courts have always been aware of decisions made by foreign judges, especially those coming from similar legal traditions, often leveraging their arguments to bolster either a majority or minority opinion. Nevertheless, the international order that has emerged over the last 70 or so years has been mounting to a significantly more complex and multifaceted system, going far beyond general global awareness between kin jurisdictions. For instance, domestic judiciaries developed vertical relations with supranational courts whose authority was founded on international cooperation. The ICC, to name the most famous one, was indeed established on the basis of judicial dialogue and collaboration; so much so that Part 9 of the Statute of Rome (articles 86 to 102) is entirely dedicated to delineating courts' relations and mutual assistance[136].

As it has been previously anticipated, much of said constitutional and judicial convergence derives from the near-universal consensus that has been reached on certain liberal notions. Namely, the general inclination towards a centralized and specialized type of judicial review, the respect of principles such as the independence of the judiciary and the separation of powers, the right to a fair trial and, overall, the respect of human rights

[136] Rome Statute of the International Criminal Court (last amended 2010), UN General Assembly, 17 July 1998. Available at: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

and the rule of law. Globalization and technological advancements have undoubtedly played a significant role, at least in facilitating information-sharing and communication between national and international judges.

One of the clearest examples illustrating the influence of international and foreign law on constitutional interpretative decisions can be found in the case of the United States. Historically, the US Supreme Court had largely adhered to a rather dualist approach regarding international law, meaning it typically refrained from applying international provisions without prior legislative assimilation[137]. However, in recent decades, there has been a noticeable shift[138]. In cases like Roper v. Simmons (2005)[139], judges have shown increased openness to international and foreign legal precedents. This trend has progressed to the extent that an International Judicial Relations Committee has been established[140], aimed at promoting global judicial dialogue. Today, recent Supreme Court's rulings such as Knight v. Florida (1999)[141] frequently cite multiple foreign judgments in a single dissenting opinion.

The judicial dialogue that comprises the interest of the current chapter, however, goes beyond simple mutual recognition. On the contrary, it represents a multidirectional and mutually beneficial exchange between national and supranational courts that aims at building a shared understanding of fundamental liberal democratic constitutional principles. The establishment of the CODICES database by the Venice Commission is explicative in this regard. It is not only a comprehensive catalogue of high courts' rulings on matters of constitutional relevance. It has been thought as "*a powerful cross-fertilisation tool that enables courts to draw inspiration from the constitutional practice*

[137] Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties: "Since the ratification of the great human rights instruments of the post-World War II era, policymakers have attached non-self-executing declarations to U.S. ratifications of virtually all human rights treaties to which the United States is a party. United States courts, for their part, have been virtually unanimous in the view that human rights treaty provisions are unenforceable absent implementing".* See supra note 52.

[138] *See supra* note 35.

[139] *See supra* note 45.

[140] https://www.usaid.gov/sites/default/files/2022-05/USAID%20IJRC%20FACT%20SHEET%20%282016%29.pdf

[141] Reference is made to Justice Breyer's dissenting opinion on the case Knight v. Florida, 528 U.S. 990, 120 S. Ct. 459, 464 (U.S. 1999), where decisions of Jamaica, India, Zimbabwe, the UK and Canada are cited. Available at: https://law.justia.com/cases/florida/supreme-court/2017/sc14-1775.html

of their counterparts in other countries"[142]. It is the full recognition of how constitutional law is being internationalized by way of interpreting constitutional articles in the light of foreign case law and international human rights principles.

African nations are integral components of this global judicial framework, partially contributing to trends of cross-courts dialogue and mutual reference to case law[143]. Indeed, as part of the international community, several states in Africa have engaged in global discussions on the importance of building a more cohesive international judicial network. To name an authoritative example, the ECOSOC Bangalore Principles, upon establishing judicial standards, take care of specifying that "*a judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms*"[144]. The document, stating the relevance of international and human rights law on domestic jurisdictions, seems to suggest that an interpretation of the law in line with international conventions is to be preferred to a strict literal understanding of national norms. On this matter, we have earlier seen how national constitutions in Africa vary in their openness to the influence and impact of international and foreign law. The approach of the judiciary, however, could potentially be not in line with the provisions of the referred charter, adding a different layer of analysis to the study of constitutional internationalization.

In this regard, the next section will search for the main causes behind the use of international law and foreign case law by domestic judges. Following the thesis' interest, the analysis will specifically consider cases of constitutional adjudication. The chapter will then refer to relevant cases of judicial cross-fertilization in the African continent, by dividing the examination in two categories. The first one will consider courts' rulings in which the constitutional background is compliant with the influence of international law. Conversely, the last section will look into cases of judicial deference in systems with a

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[142] https://codices.coe.int/codices/documents/welcome

[143] Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, The American Journal of Comparative Law, Volume 60, Issue 2, Spring 2012, Pages 439–473, 01 Apr. 2012. Available at: https://academic.oup.com/ajcl/article-abstract/60/2/439/2571375?redirectedFrom=fulltext

[144] The Bangalore Principles of Judicial Conduct, United Nations Office on Drugs and Crime, adopted by ECOSOC resolution in July 2006. Available at: https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf

more dualist and less internationalized vocation. The objective of said categorization is to highlight how constitutional and judicial internationalization operate on two distinguished, not necessarily overlapping, spheres of influence.

3.1 Causes of judicial deference to international law: an African overview

Quite intuitively, a brief analysis of the ways in which judicial high courts refer to foreign law for constitutional interpretation is enough to reveal how judges that come from common legal traditions are more prone to refer to each other's decisions. Africa makes no exception. The continent's different ways of administration of the law mainly derive from its colonial past. European occupiers essentially passed on two distinguished legal systems: common law (based on English common law) and civil (Roman-Dutch) law.[145] Because of the prolonged Western dominion, African countries coming from similar legal backgrounds usually share the same language. Therefore, communication and the sharing of information is undoubtedly easier. But more significantly, courts that belong to similar legal systems oftentimes share the same functions, an analogous understanding of the law, comparable worldviews, ways of reasoning and of filing an opinion.[146] Hence, where there might already be a proclivity towards international law in cases of constitutional interpretation, courts could be encouraged to refer to foreign decisions for reasons of legal compatibility.

Judges could also refer to foreign case law when the interpretation at issue is relatively new and previews domestic decisions haven't either set a standard or gave an opinion on the matter. When discussing African constitutionalism, we have seen how academics have grouped different waves of constitutionalization, with the last one being traced no further than the 1990s. It is only reasonable that a newly established constitutional court, given the circumstances, cannot rely on a considerable number of judicial precedents. Especially in rights related cases, human rights conventions and international law in general are viewed as authoritative sources of interpretation. In cases of constitutional

[145] For the sake of simplicity and since it does not directly affect our analysis, we will not dwell on the influence that indigenous customary law and religious law (such as Islamic law) had in shaping modern-day constitutions.
[146] *Constitutional Adjudication in Africa*, edited by Charles M. Fombad, Stellenbosch Handbooks in African Constitutional Law, Oxford University Press, 2017.

adjudication courts usually refer to international elements when they might be in need of an interpretative support. That is, in order to reinforce their argument, judges mention a foreign decision on a similarly applicable matter. Such an approach is primarily based on what Irene Spigno[147] calls the "even there, even here" principle: if that decision was deemed valid in another democratic country, it should be recognized as such in our domestic system.

The same is true for all those cases in which the constitution has not undergone any recent amending procedure, but constitutional judges still refer to international foreign decisions for interpretation. This might happen when judges encounter a flaw in a past judgement or a manifest deficiency of the law itself[148]. In such circumstances, international law or foreign rulings assume the function of "persuasive authority", fostering the judges' opinions with new and reliable arguments. We will look at some instances of the sort in the Chapter's following paragraphs.

Ultimately, constitutional courts may have to read and interpret a charter that has been either implicitly or explicitly influenced by international law. We provided relevant examples of this occurrence in Chapter II. As international and regional supranational courts regularly give their opinion on the implementation of fundamental human rights treaties, national judiciaries necessarily rely on their judgements to integrate decisions of constitutional relevance (Spigno, 2013). When the boundaries blur between constitutional and international law, the interpretation of the constitution consequently reflects this trend by way of referring to supranational judges for human rights adjudication cases.

In conclusion, let's hint at Rosenkrantz's "genealogical argument" for the use of foreign law[149], considering that one of the countries we will examine in the following section could serve as an illustrative example of this analysis. The genealogical argument is applicable to all those cases that involve two states that "*are tied together by a*

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[147] Irene Spigno, *Namibia: The Supreme Court as a Foreign Law Importer,* part of: Tania Groppi and Mari-Claire Ponthoreau (eds). *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, 2013.
[148] To make an example, see the case *Eric Gitari v Non-governmental Organisations Coordination Board and Attorney-General* (petition no.440, 2013), where the Court cites international law on a matter that was not articulated when drafting the constitution (namely the registration of an NGO advocating for LGBT rights). Available at: http://kenyalaw.org/caselaw/cases/view/108412/
[149] Carlos F. Rosenkrantz, Against borrowings and other nonauthoritative uses of foreign law, International Journal of Constitutional Law, Volume 1, Issue 2, April 2003, Pages 269–295. Available at: https://academic.oup.com/icon/article/1/2/269/650661

relationship of descent and history"[150]. Kariseb elaborates on this, presenting the case of a constitutional article or piece of legislation that is "*modelled and influenced by the textual and structural basis of a similar legislation*"[151]. The "parent" system will then offer interpretative and judicial support to the judicial bodies of the state that has "inherited" the legislation in question.

3.2 Judicial dialogue in cases of internationalized constitutions: evidence from South Africa and Zimbabwe

Among the above-mentioned causes for judicial deference to foreign case law, space has been given to instances where judicial dialogue aligns with an already internationalized constitutional setting. Meaning the judges are supported in their deference to foreign and international law by charters that already provide for some features of internationalization regarding their interpretation. In this sense, the present section will illustrate the cases of South Africa and Zimbabwe's constitutional courts, focusing on some significant judgements in regard of their use of foreign law. The fact that these two countries belong to the same legal tradition (as well as being part of the Commonwealth[152]) is evidence of how courts are more likely to refer to kin jurisdictions' judgements in cases of constitutional adjudication.

We already talked about South Africa's constitutional background on the incorporation of foreign and international law when we categorized African constitutions based on their openness to international and foreign provisions[153]. Article 39 (c) of the charter affirms

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[150] Ibidem.

[151] Kennedy Kariseb, *Reflections on judicial cross-fertilisation in the adjudication of human rights and constitutional disputes in Africa: The case of Namibia*, Special Issue on African Courts and Contemporary Constitutional Developments Enyinna S Nwauche Guest Editor, Vol 35 No 1 (2021) Published 31 March 2021.

[152] In 2003 Zimbabwe withdrew from the organization: https://web.archive.org/web/20080705162909/http://www.thecommonwealth.org/press/31555/34582/35505/zimbabwes_withdrawal_from_the_commonwealth.htm But as of 2024 is once again seeking membership, which is currently under scrutiny: https://lordslibrary.parliament.uk/the-commonwealth-zimbabwes-return/

[153] *See* Chapter II

that, when interpreting the constitution, the court "*may consider foreign law*"[154]. This concept is once again reiterated by Article 233 on constitutional adjudication[155].

Our comparative analysis on the death penalty of 1.1.2.1. already partially covered the South African constitutional court's landmark decision *State v. Makwanyane* (1995)[156], in which a significant number of international human rights conventions and foreign law judgements were used to bolster the majority's decision. Christa Rautenbach (Groppi, Ponthoreau, 2013) helps us keeping track of the massive use of foreign case citations in the judgement: justice Chaskalson referred to foreign law in 124 different occasions, followed by justice Ackermann with 33 citations, mounting to a total of 220. Such a widespread deference to foreign case law has been explained referring to the fact that State v. Makwanyane is considered to be the first decision that the South African court ever delivered. The absence of domestic judicial precedents, supported by the Article 39 of the Constitution, definitely fostered such an approach to constitutional adjudication.

And yet, over the years the court has kept an international breadth, frequently considering foreign law for the interpretation of the charter. A more recent example is the 2020 decision *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*[157] on the constitutionality of a provision not allowing citizens to be elected as independents, without being affiliated to any political party. This time the court didn't lack judicial precedents, and indeed it cited a conspicuous number of past decisions. But this didn't refrain the judges from making extensive use of international law and foreign case law to strengthen their argument. Besides referring to the works of academics and various authors (downright to Alexis de Tocqueville), the judges mention several US Supreme Court's cases, among which: Roberts v. United States Jaycees (1984), Minister of Justice and Constitutional Development v. Prince (2018) and Bernstein v. Bester NO (1996)[158]. Upon mentioning German case law and the Canadian Supreme Court's judgement in the case Lavigne v Ontario Public Service Employees Union (1991), the South African judges list a series of decisions from the European Court

[154] *See* supra note 40.
[155] Ibidem.
[156] *See* supra note 39.
[157] New Nation Movement NPC and Others v President of the Republic of South Africa and Others, Case CCT 110/19 [11 June 2021], available at: https://www.saflii.org/za/cases/ZACC/2020/11.pdf
[158] Ibidem.

of Human Rights, like Young, James and Webster v. UK (1981), Sigurjònsson v. Iceland (1993) or Chassagnou v France (1999). Ultimately, the almost concomitant Tanganyika law society v. Tanzania (2020) from the ACHPR. It is indeed evident how the use of foreign case law for constitutional adjudication by the South African court is common standard and rooted practice.

Along the same line, Zimbabwe's constitution, in its Article 327.6 makes explicit reference to an interpretation of the charter that is as consistent as possible with international law[159]. Even though it doesn't go as far as saying that foreign law should be considered for constitutional interpretation, the judges of the supreme court have been regularly acknowledging foreign decisions in their rulings.

An example of the sort is the 2019 case State v. Chokuramba, on the constitutionality of a procedural article that *de facto* legalized corporal punishment on minors[160]. Given the human rights' relevance of the decision, the court included in its argument a wide number of international treaties (UDHR, ICCPR, ACHPR, CRC and its Committee's decisions, and the Beijing Rules[161]), along with contributions from academics and international NGOs[162]. Such an approach is made explicit by passages as the following:

"The making of the value judgment requires objectivity to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the people as expressed in their national institutions and the Constitution. Further, regard must be had to the emerging convergence of values in the civilised international community[163]".

Then, the judges give extensive relevance to their neighbouring states of Namibia and South Africa, by respectively citing their constitutions on rights-related articles. Remarks

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[159] Constitution of Zimbabwe Amendment (No. 20) Act, 2013, available at: https://zimlii.org/akn/zw/act/2013/1/eng%402017-09-07#

[160] The State v. Willard Chokuramba, CCZ 10/19, Constitutional Application No. CCZ 29/15, 3 April 2019, available at: https://www.veritaszim.net/sites/veritas_d/files/S%20v%20Chokuramba%20%28CCZ%2010-2019%29%20%28Corporal%20Punishment%29.pdf

[161] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Adopted by General Assembly resolution 40/33 of 29 November 1985. Available at: https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/beijingrules.pdf

[162] *See* supra note 161.

[163] Ibidem.

are made on the Namibian supreme court's case Ex-Parte Attorney General (1991), together with a number of South African case law, starting from the abovementioned Makwanyane case and followed by State v. Williams and Others (1995), State v. Liebenberg and Another (2005) and Nkosi v. the State (2005). A noteworthy number of US supreme court's cases (six in total) are also referred to, beside several rulings from international courts such as the European Court of Human Rights and the Inter-American Court of Human Rights. Clearly enough, Zimbabwe's constitutional court persistently follows the provisions of its constitution, going as far as having systemically integrated foreign law in its interpretative judgements.

3.2.1 Benin's exception: the absence of judicial dialogue in a rather internationalized setting

Among the countries classified as successfully integrating international law into their system (*see* figure 1), Benin stands out. Not only its constitutional preamble declares full assimilation and compliance with key human rights treaties, including the UN Charter and the Universal Declaration of Human Rights. Most notably, Article 147 of the constitution places treaties that have been ratified by the state above the status of law[164]. In this sense, constitutional equivalence is fully achieved with regard to the African Charter on Human and People's rights, which rights and duties should be, according to Article 7 "*an integral part of the present Constitution and of Beninese law*"[165].

One would assume that, with such a strong degree of constitutional assimilation, Benin's constitutional court would certainly lay out its decisions on the basis of international law and with due regard to regional courts' rulings. This is not, however, the case. Even if the state's top court has undoubtedly played an essential role in defending and promoting the respect of human rights within the Beninese territory[166], and besides Benin being one of the few countries that have fully integrated the African Charter in their constitutions, little reference has been made to foreign and supranational case law in the court's decisions.

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[164] *"Treaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws* [...]*"*: Constitution of the Republic of Benin, 1990. Art.147, Title IX, Treaties and International Agreements. Available at: https://www.constituteproject.org/constitution/Benin_1990

[165] Ibidem.

[166] On the functions of the Beninese Constitutional Court see: Anna Rotman, Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights, Harvard Human Rights Journal, Vol. 17 (2004).

Quite the contrary, Benin's constitutional court has issued a series of statements that goes openly against previews rulings from the African Court of Human and People's Rights on contentious matters[167]. In a decision of November 2020, the court highlights its jurisdiction over constitutional matters, disregarding foreign opinions:

"*la Cour constitutionnelle qui n'est soumise qu'à la volonté souveraine du Peuple béninois, a seule pouvoir pour se prononcer sur la conformité à la Constitution d'une loi en vigueur sur le territoire ou se prononcer sur le respect des droits fondamentaux de la personne dont elle assure la garantie*"[168].And in a different ruling issued the next year, it reiterates: *"lorsqu'il est relevé une contradiction entre une décision rendue par une telle juridiction constitutionnelle, la et une décision autre rendue rendue par la Cour juridiction constitutionnelle prime sur celle de la juridiction internationale ou Communautaire*"[169].

This brief analysis of Benin's case law only serves as proof of the fact that constitutional internationalization is not a fundamental precondition for the use of international and foreign law as instruments of constitutional adjudication. An internationalized charter may surely aid the judiciary in its attempt to read constitutional articles through the lenses of international human rights provisions. But it is not a *sine qua non*, as an internationalized interpretation of the constitution is ultimately attributable to a multitude of factors.

3.3 Judicial dialogue for the interpretation of not internationalized constitutions: instances from Namibia and Lesotho

Building upon the preceding discussion, this section will delve into the analysis of judicial dialogue and courts' cross-fertilization in countries where the constitution does not

[167] Trésor Muhindo Makunya, *The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin,* part of: A life interrupted: essays in honour of the lives and legacies of Christof Heyns, Pretoria University Law Press, January 2022. Available at: https://www.researchgate.net/publication/357717557_The_application_of_the_African_Charter_on_Human_and_Peoples'_Rights_in_constitutional_litigation_in_Benin
[168] Decision DCC 20-641 of 19 November 2020. Available at: https://courconstitutionnelle.bj/public/en/decisions/DCC20-641
[169] Decision EP 21-003 of 17 February 2021. Available at: https://courconstitutionnelle.bj/public/en/decisions/EP21-003

explicitly incorporate the use of foreign precedents in matters of constitutional interpretation. The states that will be considered have been arbitrarily selected in light of the considerations that have been made in Chapter II about the internationalization of African constitutional law. The forthcoming rulings are not presented with the purpose of encompassing every possible scenario or to offer a comprehensive study, but rather to outline a general trend, providing context for the discussion at interest.

Thus, following our prior overview on African constitutionalism, let us now refer to the state of Namibia. The Republic has indeed been included in the quite broad category of states that do make reference to international or foreign law in their constitution, but in a rather general and indeterminate fashion. Such considerations have been made on account of Article 96(d) of the Namibian constitution, stating an unspecified compliance with international law, and Article 144, which we already analysed (see para. 2.2.2) and that only reaffirms the state's dualist approach towards international law by assimilating "*public international law and international agreements*"[170] duly ratified by the government. Remarkably, no reference is made to foreign law, nor to its use for constitutional interpretation.

Nevertheless, empirical analysis on Namibia's constitutional case law (Spigno, 2013) shows it is very much common practice. The constitutional court has in fact adopted a rather internationalized approach on instances of constitutional adjudication. Earliest court's decisions cite the widest number of foreign case law: a behaviour that we enlisted among the causes of judicial dialogue as it manifests that *"the need to strengthen the newly established democracy has pushed the constitutional judge 'to look around' at other democratic constitutional experiences"*[171]. Such a practice, however, has not diminished over the years and with the development of significant judicial precedents. Up to the point that over 93% of the court's rulings (the number is higher for human rights-related cases) make use of foreign law for constitutional interpretation[172].

The rationale behind said tendency has been elaborated by the court, which justified the use of foreign and international law in cases of lacunae, shortcomings or ambiguity of the

[170] *See* supra, note 122.
[171] *See* supra, note 147.
[172] *See* supra note 122.

domestic legislation as meaningful interpretative support for their arguments. This approach has been explicated, for instance, in the case Kauesa v. Minister of Home Affairs and Others (1995), where judges affirm: *"In cases where the provisions of the Namibian Constitution are equivocal or uncertain as to their scope of application, such provisions of the international agreements must at least be given considerable weight in interpreting and defining the scope of a provision contained in the Namibian Constitution"*[173].

In some cases, the court seems to broaden its perspectives over the use of international provisions for the interpretation of the Namibian charter. In the application of Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State (1991), the judges assert that "[…] *regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share.*[174]*"*

Despite the constitution falls short of provisions integrating international law, the court can't avoid conceiving its judgements in a global perspective. More to the point, in human rights decisions Namibian judges make such an extensive use of foreign precedents for constitutional adjudication, and so consistently over time, that judicial deference doesn't seem an occasional exception occurring in cases of constitutional uncertainty. Instead, it appears to be a conscientious and methodical prerogative for constitutional interpretation.

A similar pattern, both in judicial interpretative behaviour and constitutional design, is portrayed by Lesotho. Indeed, much like the Namibian charter, the Kingdom's constitution limits its reference to international and foreign law provisions to Article 133F(j), which merely encourages international cooperation in the field of human rights promotion and protection[175]. Lesotho's constitutional court, however, is once again

[173] Kauesa v Minister of Home Affairs (SA 5 of 1994) [1995] NASC 3 (11 October 1995). Available at: https://namiblii.org/akn/na/judgment/nasc/1995/3/eng@1995-10-11

[174] Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State, (SA 14 of 1990) [1991] NASC 2 (5 April 1991). Available at: https://namiblii.org/akn/na/judgment/nasc/1991/2/eng@1991-04-05

[175] "[…] *work in cooperation with the United Nations, regional mechanisms, national human rights institutions of other countries, in the areas of the promotion and protection of human rights".* Constitution of the Kingdom of Lesotho, Art. 133F(j). 2 April 1993. Available at: https://www.constituteproject.org/constitution/Lesotho_2018

adjudicating constitutional cases with due regard to foreign judicial decisions. To validate this assumption, let us consider the explicative ruling Peta v. Minister of Law (2018). In this case the court is asked to express its opinion over a defamation accusation, tackling an article of the penal code and consequently deciding upon restrictions on the freedom of expression. The decision is quite recent in time, meaning the judges didn't lack judicial precedents on human rights cases to refer to, in order to bolster their argument. Yet, surprisingly, Peta v. Minister of Law properly cites only three past decisions. On the contrary, an impressive number of foreign rulings are mentioned, to the extent that they truly constitute the backbone of the court's argument. The ECHR is regarded for a total of 8 rulings, amongst which: Editions Plon v. France (2004), Blindender Kunstler v. Austria (2007) and Sunday Times v The United Kingdom (1979). Such a high amount of citations is only paralleled by the South African supreme court, which is referred to 8 times through cases such as the 2004 Independent Newspapers Holdings Ltd and others v Suliman, and S. v. Hoho (2009). The only two other African precedents that are applied to strengthen the court's opinion are Zimbabwe's (2 cases) and Kenya's. Konate v. Burkina Faso (2013) is the only sentence ruled by the ACHPR. Finally, 4 cases by Canada's supreme court, such as R. v. Oakes (1986), are also mentioned[176]. This partial overview is just to give a non-exhaustive impression of the extensive use of foreign material for this constitutional case.

Nonetheless, reference to foreign judiciaries is barely justified by the court. In the same Peta v. Minister of Law, Lesotho's judges affirm that the mentioned foreign decisions represent *"analogous scenarios"* that are consequently *"applicable with equal force"*[177]. These considerations are reiterated by both parties to the case. Mr. Leppan, representing the government and referring to a South African ruling, sustains that: *"since the courts in South Africa have upheld the constitutionality of the crime of defamation, then on the strength of persuasion of those decisions, criminal defamation should be declared constitutionally compliant in the kingdom as well"*[178].

[176] Peta v Minister of Law, Constitutional Affairs and Human Rights (CONSTITUTIONAL CASE 11 of 2016) [2018] LSHC 3 (18 May 2018). Available at: https://lesotholii.org/akn/ls/judgment/lshc/2018/3/eng@2018-05-18
[177] Ibidem.
[178] Ibidem.

The interesting thing is that the "*force*" and the "*strength*" that these assertions award to foreign law do not derive from constitutional authority, nor from any other domestic legislative act. They are the result of arbitrary judicial practice, following internationally recognized patterns of dialogue rather than constitutional-bound interpretative provisions. This trend shows once again the relevance and the distribution of instances of judicial cross-fertilization in constitutional matters, regardless of national charters' provisions.

CHAPTER IV

DEMOCRACY AND CONSTITUTIONAL RETROGRESSION

Thus far, much of the present research has been concerned with the notion of constitutional internationalization. We initially presented the theoretical basis that allowed such process to develop, mainly talking about the gradual but incremental detachment of modern constitutionalism from its territorial features. The work has since proceeded describing the main characteristics and trends of processes of internationalization of constitutional law: namely the incorporation, in one form or another, of international laws into domestic systems and the extensive tendency of the judiciary to read and interpret national fundamental laws in light of foreign judgements and international provisions.

These peculiar aspects of present-day constitutionalism are of course interrelated, as they both add to a new understanding of constitutional law, one which properly reflects the creeping blurring of the boundaries between the national and international sphere. Still, our analysis on instances of constitutional interpretation and judicial deference in the African continent (see Ch. III) has somehow demonstrated that the level of internationalization of a constitution does not automatically influence judges' interpretative behaviour. Notwithstanding that a charter which explicitly incorporates international features is more likely to be interpreted with due regard to foreign and international law, the interpretative doctrines of national courts seem to depend on a number of other variables too (personal inclinations, cultural background, historical influences, the legal system's layout etc.).

Our work is not interested in enquiring into the reasons why constitutional judges lean toward a more or less internationalized approach. Rather, it aims at evaluating whether the use of foreign and international features for constitutional interpretation has a noticeable effect on democracy itself. In essence, our research question seeks to understand whether employing international and foreign law in cases of constitutional adjudication enhances the resilience of a country's democracy vis à vis threats of authoritarian regressions. This new layer to the research, which weaves in democratic

resilience with constitutional internationalization, requires a closer look at the phenomenon that came to be widely known as democratic decay.

To begin with, we are going to draw up some methodological premises. Indeed, despite the limited capacities a work of this sort is bound to (and all the more because of them) a research method was ultimately favoured, in an effort to deliver empirically valuable conclusions. Once the research's approach has been sorted out, we will dwell on the notion of democratic decay, briefly defining its fundamental features. Attention will be specifically paid to the distinction between authoritarian regression and constitutional retrogression, as this differentiation is functional to our analysis. In view of these considerations, the chapter will finally try to delineate what are the most common and reiterated threats to democratic systems.

4.1 Methodological premise

So far, the assessment of different levels of internationalization of African charters (Chapter II) allowed for the adoption of a quantitative methodology. Indeed, we had the chance to read and examine fifty-two fundamental laws and to eventually classify them according to some common criteria (see fig.1). In the present case however, given the different nature of judicial decisions, both in terms of number and diversity, we believe that a quantitative approach is not to be preferred. As anticipated, the limited scope of the research precludes a comprehensive and exhaustive examination of the questions at issue. Despite having narrowed the area of study to the African continent, the extensiveness of available sources inevitably requires the adoption of a qualitative method when considering judgements from African constitutional courts. The same conclusions can also be applied to the previous section, interested in assessing features of judicial deference and the overall use of foreign and international law by African constitutional judges.

More to the point, the state of democracy of a given country is of course influenced by a wide number of factors, not limited to the sole use of foreign material for constitutional adjudication. For these reasons, a quantitative analysis cross-checking judicial decisions with democratic standards would not be useful, in our opinion, to find relevant

correlations. Owing to such methodological considerations, the following section will engage in a non-quantitative analysis of several judicial decisions. Potential causative relations will be based on a contextualized examination of said constitutional rulings in a comparative perspective. Specifically, the qualitative analysis of high court's judgements over matters of democratic stability that will follow, is going to provide the groundwork for an ensuing comparative evaluation, in order to find causative correlations between the use of foreign features for constitutional interpretation and the stability and resilience of democratic systems.

Consistently with our focus of investigation, primary and secondary sources that will be considered are confined to the African continent. Limiting the research field to African states has for sure facilitated the organization and elaboration of primary sources. At the same time, it might have also narrowed down the range of the examination, making it harder to find correlations. We still tried to delineate general trends and find macroscopic interrelations that might prove our point. We will see in the next chapters if some sort of conclusions can eventually be drawn.

4.2 Democratic decay

The fundamental contribution of Aziz Huq and Tom Ginsburg on democratic decay has already been mentioned[179] in Chapter II. Their pioneering dissertation on the state of democracy in the United States has paved the way for a new series of studies focusing on the various threats (both endogenous and exogenous) that a democratic form of government might face.

Distinguishing and classifying the ways through which a democratic society may experience a series of setbacks it's not a foregone conclusion. For one, there is not a univocal definition of what a democracy actually is. Evidence of this is the proliferation of intrinsically contradictory terms used to describe "flawed" or "partial" democracies, such as: illiberal, authoritarian, conservative. Common knowledge goes that in a democratic system, the power is of the people. Such a simplification, however, is hardly sufficient to describe the phenomenon. Simply put, the democratic form of government

[179] *See supra* note n.73

lays its theoretical foundation on one essential principle: equality of the people. This egalitarian assumption was revived by sixteenth century's enlightenment and thoroughly applied to the post-World War II constitutional momentum. But Weimar's canonical example serves to illustrate how universal equality cannot be exercised at the expenses of fundamental human rights. The state's legitimacy cannot derive merely from majoritarian rule[180]. Modern-day democracies have adopted a richer and more profound conception of equality, which:

"*It's not mathematical, it's a matter of status. Political equality means, each person in the community is regarded as equally important in two dimensions: what happens to that person is equally important, and that person's voice and opinion is equally demanding of attention*. […] *So, political equality is indispensable, but political equality must be understood as a matter of equal concern and respect for people, not any striving for a mathematical equality in the impact, still less in the influence, people have in politics"*[181].

Said enhanced understanding of equality of the individual comes with a renewed set of guarantees. More-than-mathematical equality means equal dignity, right to representation despite one's characteristics, free speech, freedom of assembly, of protest, of expression. It's about harvesting and safeguarding the plurality of individuals and groups in a community. With time these rights, among others, have been enshrined in national constitutions and their protection has been bestowed upon the judiciary. Such layout, alongside regular elections, the respect of the rule of law and the establishment of other checks and balances to constraint the political power, constitutes what Dworkin calls "participatory self-government".

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[180] Tom Gerald Daly, Diagnosing Democratic Decay, Comparative Constitutional Law Roundtable Gilbert & Tobin Centre of Public Law UNSW, Sydney Monday 7 August 2017:
"A governance system that evinces little concern for core democratic rights and minority rights, collects inordinate power at one site, or views political power as unconstrained by constitutional law quite simply cannot be a liberal constitutional democracy, no matter how much electoral support it commands".
[181] Ronald Dworkin, What is Democracy?, part of Constitution for a Disunited Nation: on Hungary's 2011 Fundamental Law, edited by Gabor Attila Toth, Central European University Press, 2012, pp.40-50. Available at:
https://www.jstor.org/stable/10.7829/j.ctt2tt27x?turn_away=true&saml_data=eyJzYW1sVG9rZW4iOiIxNWIwMTc3NS1iZWFmLTQzNmItYjRmZS05ZWRjM2JkZTI2ZTEiLCJpbnN0aXR1dGlvbklkcyI6WyJlNDE3YzhkNS0wMWU2LTQ3NjEtYmUwNS03MjQ4NmQ2OGJlZDMiXX0

Subtly redefining democracy in a more elaborated manner reveals the complexity of the phenomenon and lets us fully appreciate how threats to pluralistic systems do not only concern electoral processes and representation. They also tend to undermine the legitimacy and independency of watchdog bodies, to reshape the constitutional text and to ultimately limit and redefine freedoms and rights. Democratic decay encompasses all these features, as it has proven to be effective in analysing the various ways in which a system may undergo some setbacks regarding its state of democracy.

Sure enough, pluralist systems may fail to uphold democratic principles due to diverse factors, some may be structural (an outright change of government, institutional amendments etc.) and others more substantial. This last category has long been overlooked, but it includes essential components to processes of democratic regression. For instance: political or bureaucratic corruption (be it real or perceived), loss of trust in democratic institutions or the judiciary, lack of representation, detachment of the people from public issues, economic inequalities, populist political discourse or general abuse of repressing power from the police (Daley, 2017). Not to mention exogenous factors such as economic or climate crises, conflicts and external wars.

Undoubtedly, this paper main focus is on structural and institutional components of processes of democratic decay. That is because the primary sources that have been and will continue to be under scrutiny for the purpose of the research are constitutional charters and, more importantly, judicial decisions. Still, the discussion above serves to illustrate the extensiveness of the notion of democratic decay and, consequently, the multi-disciplinary approach that ought to be adopted in order to have a comprehensive insight of the process.

Going back to Huq and Ginsburg's definition, a fundamental distinction is made between what they call authoritarian regression and constitutional retrogression. The first one quite intuitively concerns all those cases where there is an outright change of form of government, from a democratic to an authoritarian one. This category includes coup d'état, forceful removal of incumbents or more generally, any illegal and coercive attempt to substitute democratically elected officials. Constitutional retrogression, on the contrary, rarely involves the use of violence. It refers to the imposition of setbacks to the democratic system by way of legitimate constitutional revisions. Said definition

substantially reflects what a previous work of David Landau had been calling "abusive constitutionalism", pointing out to "*the use of the mechanisms of constitutional change — constitutional amendment and constitutional replacement — to undermine democracy*".[182] More specifically, in "*How to Lose a Constitutional Democracy*"[183], the term "constitutional retrogression" intends to describe all those cases where, by way of constitutional reforms (amending procedures or the adoption of a new charter) competitive elections, the right of free speech and association and the rule of law are challenged, questioned or thoroughly disregarded. According to the authors, an essential feature of processes of constitutional retrogression is the adoption of a piecemeal approach, meaning that the adoption of non-democratic provisions happens gradually, so much so that on their own appear to be "*incremental in character and perhaps innocuous*".[184]

The next chapter will indeed consider some cases in which this kind of constitutional submissions are challenged in front of African high courts, their legitimacy contended. We will see if the use of international and foreign law provisions has helped the courts upholding the unconstitutionality of said proceedings, therefore making democracy more resilient in front of potential setbacks. However, before delving into that, it might be useful to engage in a deeper analysis of the ways in which constitutional retrogressions might take place, as well as to recognize patterns and general outlines.

4.3 Threats to liberal constitutionalism

The Huq-Ginsburg approach is once again useful for it dwells on a comprehensive analysis of the ways in which constitutional retrogression may take place. Truthfully, the means through which an incumbent could potentially undermine the democratic principles of liberal constitutionalism are varied. Our interest, however, lies in mechanisms of constitutional amendment. It has already been covered how an essential feature of modern constitutionalism is the entrenchment of human rights and fundamental

[182] David Landau, Abusive Constitutionalism (April 3, 2013). 47 UC Davis Law Review 189 (2013), FSU College of Law, Public Law Research Paper No. 646, Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244629
[183] *See supra* note n. 73.
[184] Ibidem.

democratic values in the fundamental law. Therefore, it only stands to reason that an executive that is willing to challenge those principles and structures will aim at the constitution itself. More to the point, constitutional change as a method of democratic retrogression takes out of the equation questions of legitimacy. It may well be the only instrument in the hands of a government that wants to change the rules of the game, still claiming to respect the constitution (Landau, 2013). It would also reflect the elusive and oblique nature of processes of constitutional retrogression, as Huq and Ginsburg defined them.[185]

Our understanding is that such amending procedures (or the adoption of a new constitution) usually follow two distinct but oftentimes overlapping patterns: they are either aimed at the judiciary (more specifically towards constitutional judges) or to an overall reinforcement of the executive, centralizing powers in the hands of the government.

The first step in this course of action typically involves modifications to constitutional amending procedures (Huq, Ginsburg, 2017). They usually include lowering the required majority for a constitutional revision to be approved or facilitating in any way the amending process. An incumbent that has popular support, and therefore a strong majority in parliament could potentially adopt such measures. But then parliamentary majorities can also be easily favoured by specific electoral systems. Indeed, the adoption of an electoral law that will favour the executive in the next round of elections is oftentimes a sign of centralization of power or a prelude to constitutional ambitions. Occasionally government officials may specifically target election monitoring bodies or the judiciary, delegitimizing their effort or defunding their institutions. A less ambiguous scenario could degenerate in open interferences, corruption and irregularities in electoral processes, to the point of using violence and intimidation to channel the results. If, as we mentioned, media pluralism is an essential component of democratic systems, executive hypertrophy could also manifest itself in limiting the freedom of the press, of association and protest (in the name of public security). Other common features usually comprise the extension of presidential term limits (in presidential forms of government), de-powering the

[185] Ibidem.

legislative chamber, appointing officials in key public roles and, in the end, undermining and repressing political competition (Huq, Ginsburg, 2017).

Constitutional courts are the only obstacle in the way of said centralization of power in the hands of the executive. That is precisely the reason why they tend to be a major target in processes of constitutional retrogression. Governmental instruments are limited, and they often include: extending the retirement age of constitutional judges, changing nomination and appointment procedures or openly "packing the court" (Huq, Ginsburg, 2017). All these measures aim at obtaining courts' judicial majorities that are closer and more in line with the governments' views, therefore less likely to struck down their amending aspirations.

Finally, there certainly is a philosophical and cultural component to democratic resilience. As Dworkin highlights, no democratic institution can survive in the face of a lack of democratic culture in the people[186]. But at some point, he also adds: "*when the spirit of liberty still lives in the hearts of men and women then law, courts, and constitution are the indispensable oxygen, indispensable to keep that flame of liberty still alive*"[187]. This passage powerfully stresses the importance of constitutional watchdog bodies as guardians of democracy. The strength of modern liberal constitutionalism lays in what Landau called the "unconstitutional constitutional doctrine"[188]: undemocratic and unelected officials as the most valuable defence against prospects of democratic decay. In the upcoming chapter we will try to determine whether international and foreign law play a role in this scenario, functioning as necessary tools for the judges to retain their independence and weaken undemocratic drives.

[186] *See supra* note n. 181.
[187] Ibidem.
[188] *See supra* note n. 182.

CHAPTER V

DEMOCRATIC RESILIENCE: A COMPARATIVE STUDY ON JUDICIAL CROSS-FERTILIZATION

There's no need to dwell on the pivotal role that judicial review plays in modern constitutionalism. Be it in civil or common laws systems, constitutional adjudication is tantamount to the rule of law. Ultimately, it is an indispensable criterion and fundamental condition for assessing democratic governance[189]. Lusting and Weiler, revisiting the work of Mauro Cappelletti, describe how constitutional adjudication became, over time, *"part of democratic ontology"*[190]. In the context of human rights protection, judicial review has always ensured some degree of legal certainty against incumbents' potential violations.

Previous chapters have already illustrated the ways in which judicial review has shaped and contributed to processes of constitutional internationalization. On the one hand, we have witnessed to an *"outburst in the evolution of legal regimes and law production among states and beyond the state in a plethora of international regimes, regional and global, bilateral and multilateral, with a concomitant growth in judicial organs responsible for its enforcement."*[191] On the other, both the incorporation of international treaties into domestic constitutions and the permeability of the judiciary to foreign jurisprudence have changed the way constitutional rights are to be interpreted and the democratic order ought to be protected. Thus, a constitutional outset that is open to international influences, as well as the tendency of domestic constitutional courts to adopt a broader and less rigid approach to interpretation, both contribute to strengthening democracy and its ability to endure assaults to its principles and institutions.

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[189] See the opinion of the Venice Commission (CoE): *"The basic principle of the guidelines of the Commission is that constitutional courts should be 'specific, permanent and independent judicial bodies'. This is because their task is the prevention of the arbitrariness of the authorities, and their interpretations of the constitution have to be respected in that the other authorities shall recognise the supremacy of the document9 and not amend it". See supra* note 15.

[190] Doreen Lustig, J. H. H. Weiler, *Judicial review in the contemporary world— Retrospective and prospective*, International Journal of Constitutional Law, Volume 16, Issue 2, April 2018, Pages 315–372. Available at: https://academic.oup.com/icon/article/16/2/315/5036485

[191] Ibidem.

When constitutional judges implement an interpretative doctrine that goes beyond the plain literal meaning of the charter, their influence, function and responsibility change dramatically. They are not only mere guardians of fixed perpetual principles, but the active interpreters of a living everchanging document. The principle of *stare decisis* and the relevance of judicial precedents are overshadowed by the need to "breathe life into the constitution". Such "transformative" constitutional interpretation, as it is often called, ultimately elevates judges to the role of *de facto* policy makers*: "At the core of the concept is the notion that in deciding a case judges—particularly those of the appellate court—may, or some advocate must, reform the law if the existing rules or principles appear defective. On such a view, it could be argued that judges should not hesitate to go beyond their traditional role as interpreters of the constitution and laws given to them by others in order to assume a role as independent policy makers or independent "trustees" on behalf of society".*[192]

Without going deeper on this interpretative behaviour and on the debate it might trigger, our interest lies in the fact that a more open constitutional adjudication cannot do without international and foreign law. As judicial reasoning needs sources of legitimization, transformative judicial review is largely based on a plethora of non-domestic resources. We already went through this in the preceding chapters, disserting on judicial cross-fertilization in the African continent. The assumption that the thesis is trying to elaborate on is that an active constitutional interpretation, through the use of foreign case law, is able to boost democracies' resilience to instances of constitutional retrogression. The research question is once again tied to an African perspective. On this, Fombad attributes the failure of the first waves of constitutionalism in the continent to the inactivity of the judiciary, adding that: *"the African judiciary cannot be immune from the forces of globalization which has affected all areas of political, social, and economic life. The conservative inward-looking culture which was characteristic of the old judiciary has to be abandoned as judges must now see themselves as members of a global legal community where knowledge and ideas are exchanged across jurisdictions."*[193]

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[192] Charles Manga Fombad, Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects, Buffalo Law Review 59 (4), August 2011. Available at: https://www.researchgate.net/publication/265493847_Constitutional_Reforms_and_Constitutionalism_in_Africa_Reflections_on_Some_Current_Challenges_and_Future_Prospects
[193] Ibidem.

We have seen how the trend that Fombad advocates for (a more internationalized interpretative approach by constitutional courts) is already common practice in several African states. Constitutions have been incorporating international treaties (Chapter II) and courts have been more and more prone to rely on foreign jurisprudence (Chapter III). This current chapter is interest in assessing and demonstrating whether said judicial tendency has contributed to preserving democracies. In order to find such correlation, the rulings selected for scrutiny have been chosen because their judgements have halted potential threats to democratic systems across different areas of interest. In short, we will analyse decisions in which the legislation before the court, if approved, would undermine in some way the democratic order. The considerations made in Chapter IV on the different ways in which democratic systems are challenged will prove useful in finding the relevant decisions. In light of this, the chapter is divided into 3 different sections, analysing the main type of threats to African democracies: manipulation of electoral processes, changes to the constitutional division of powers and checks and balances, attacks on specific individual rights.

In examining these sentences, we will pay attention to the ways the judges make use of foreign material for constitutional evaluation. Is foreign law a mere corollary of interpretation? Is it used as a marginal and peripheral addition to the judges' decision? Or is it a meaningful, necessary source of inspiration and legitimization? Does it have the power to influence the court's interpretative behaviour and, in so doing, to facilitate the protection of fundamental democratic features? These are the questions at the basis of the following comparative analysis of different African constitutional rulings.

5.1 Electoral processes

Talking about the ways in which processes of constitutional decay usually develop, we have been mindful of the fact that democracies entail more than elections alone. Meaning that the progressive deterioration of constitutional democracies manifests itself in different aspects of the polity, not always involving the quality and value of the popular vote. Having said that, however, the holding of free and regular elections in a society is for sure a fundamental feature of its democratic essence. Following on, this section will

examine two different rulings on matters related to the regularity of electoral processes, in order to evaluate the use of foreign law for constitutional interpretation.

The first judicial decision concerns the contested 2017 Kenyan general elections. Accusations of overall unfairness and the opposition's leaders conviction that the electoral commission was not able to manage and supervise the counting of the ballots,[194] led the case for an illegitimate election in front of the Supreme Court of the country. The relevance of this groundbreaking judgment (*Raila Amolo Odinga v. IEBC and others*) lies in the fact that the court, for the first time ever in Africa, deemed an election unlawful, nullifying and invalidating its outcome and therefore calling for a new vote. In this landmark decision, the alleged attempt of the incumbent to interfere with an electoral process was halted by the intervention of a non-democratic judicial body. Thus, a clear example of a constitutional court trying to protect the state against democratic deterioration, this case fits perfectly within the scope of our research interest. All the more so, the whole decision is heavily based on international and foreign law. We now turn to an in-depth analysis of the judgement, as to assess the role that foreign material played in the case, either as an additional resource for the majority argument or as an essential feature of constitutional adjudication.

It is worth noting that this ruling didn't directly concern a specific constitutional article. It rather involved the interpretation of the Kenyan Elections Act. However, as the country's Court of Appeal affirmed in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*[195]*,* such statute can only be interpreted by the Supreme Court and not by the Independent Electoral and Boundaries Commission (IEBC). It therefore has constitutional value and relevance.

From the outset of the decision, during the court's hearings, the arguments presented to the judges were clearly built on international material. The way it was applied doesn't appear to be incidental, but rather foundational to the different viewpoints. First of all, the petitioners to the case, questioning former interpretations of Article 83 of the Election Act

[194] https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html?rref=collection/timestopic/Kenyatta,%20Uhuru&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=7&pgtype=collection

[195] *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others.* Constitutional Petition No. 207 of 2016, Nairobi. Available at: https://oarklibrary.com/file/1/b1bd9be9-7a3f-4de6-b981-60044e5ca2c3/civil-appeal-105-of-2017-pdf.pdf

and advocating for an enhanced standard of proof for the present judgement, build their opinion on two sentences from the United Kingdom, one from the Republic of Seychelles and another from the Canadian Supreme Court.[196]

Similarly, the respondents based their defensive reasoning on a comparative international approach, focusing on foreign judicial decisions. Besides the US Supreme Court's *Bush v. Gore*, a series of African decisions were cited: more specifically from Botswana, Uganda and several from Nigeria. On the pivotal matter of the invalidation of ballots, the respondents made reference to Ghanaian Supreme Court's case *Nana Addo Dankwa Akufo-Addo & 3 Others v. John Dramani Mahama & 2 Others.*[197] On her part, the Attorney General argued on the distinction between "vote and informal vote" and what specifically is a rejected ballot, once again citing a number of foreign courts' rulings from India, Ghana and Uganda, besides referring to the UK's Representation of the People's Act of 1983, 1993 New Zealand Electoral Act and South Africa's Electoral Act of 1993. Proof of the fact that these sources have not been used *en passant*, is the way the Attorney General admits they have been essential to show that: *"the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the Constitution and the applicable electoral law."*[198]

The ruling of the court was not entirely based on foreign materials, as it significantly depended on an important domestic precedent: Odinga's previous attempt at nullifying elections in 2013 and the consequent ruling *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*. It can be safely assumed, however, that the court's majority opinion was heavily influenced by international and foreign precedents. Much of the justices' decision is centred around a renewed understanding of the burden of proof (who has to provide for evidence) and the standard of proof (its quality and value). The Kenyan Supreme Court finds that in cases involving elections, the burden of proof shall lay on those who seeks to question the validity of the vote and nullify it. Most notably, this approach is delivered in the light of prominent African jurisprudence on the

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[196] *Raila Amolo Odinga vs IEBC and Others*. Judgement Petition no. 1 of 2017, Nairobi. Accessed at: https://supremecourt.judiciary.go.ke/judgements/2017-2/

[197] Ibidem.

[198] Ibidem.

matter: Ghana's *Nana George Mike Wanjohi v. Steven Kariuki & 2 others*, Uganda's *Amama Mbabazi v. Yoweri Kaguta Museveni & 2 Others* and Nigeria's *Abubakar v. Yar'adua*[199] (besides a Canadian Supreme Court's ruling on the matter[200]). Likewise, regarding the standard of proof, it is evident that the court originates its assertions from a comparative perspective: *"Various jurisdictions across the globe have adopted different approaches on the question of the requisite standard of proof in relation to election petitions"*[201]. Upon deeming general elections a "sui generis" civil proceeding and, consequently, establishing the "beyond reasonable doubt" standard of proof, the Kenyan judges refer to external decisions from countries like India, the UK, Mauritius and Tanzania (and a number of domestic precedents).

The court goes on tackling the key interpretation of Art. 83 of the Elections Act. The dispute revolves around whether the article in question should be read with a disjunctive or conjunctive meaning. Petitioners pushed for the former interpretation. They requested the high court to take into consideration the Nigerian case *Buhari v. Obasanjo* and the UK constitutional case *Morgan v. Simpson*. Paradoxically, the judges employ the same English decision to justify their preference for a conjunctive reading of the article. In doing that, they refer to the constitution as an integrated document that must be understood in its whole and according to its general spirit. Once again, they draw this interpretative approach from foreign jurisdictions: mainly from Uganda (*Col. DR Kizza Besigye v. Attorney-General*), and the US (*State of South Dokota v. State of North Carolina*). Considering the UK case, Kenya's justices explicate how foreign law should be used as guidance but still be applied with a grain of salt, taking into account domestic legal traditions and constitutional principles: "[…] *while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election"*[202].

More practical concerns are also examined in the light of alien case law. On the nature of rejected votes the court takes by example a Seychelles (*Popular Democratic Movement*

[199] Ibidem.
[200] Opitz v. Wrzesnewskyj. *See supra* note 196.
[201] Ibidem.
[202] Ibidem.

v. Electoral Commission) and an Australian (*Kean v. Kerby*) constitutional case. On the distinction between a ballot paper and a vote two US Supreme Court rulings are cited (*Brown v. Carr* and once again *Bush v. Gore*). On the meaning of "undue influence" the Indian Penal Code and two Indian Supreme Court's rulings are considered. Finally, the opinions of the former chief justice of Ghana and two Indian decisions serve to illustrate how elections should be valued as a process rather than a singular event. As if this long list of foreign cases was not enough to underline how alien law represents the structure and the spirit of this decision, the Indian Court of Appeal is once again used in the conclusions to strengthen the court's final remarks.

Such an internationalized interpretative approach to domestic constitutional features is all the more worth mentioning because of the fact that never in the African continent a high court stepped in to nullify a national electoral outcome. The mainstream of international influence worked against domestic precedents, founding the basis for a pioneering intervention in the name of cross-judicial deference and the internationalization of constitutional adjudication.

Merely three years after Kenya's landmark decision, the state of Malawi faced a similar scenario[203]. The High Court of the country found irregularities in the 2019 general elections with the decision *Saulos Chilima and Lazarus Chakwera v Peter Mutharika and Electoral Commission*[204]. Malawi's Supreme Court of Appeal upheld the judgement, invalidating the result and calling for a new ballot in the case *Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera*[205]. We shall now proceed in the analysis of the constitutional court's ruling, seeking once again for a significant application of foreign and international law.

The judges had the recent and authoritative example of the above-mentioned Kenya's *Raila Amolo Odinga v. IEBC and others*. And indeed, the decision is cited many times, and it is most significantly referred to as "instructive" on the matter. Sure enough,

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[203] https://www.theguardian.com/world/2020/feb/03/malawi-court-annuls-2019-election-results-calls-new-ballot

[204] https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2023/07/Prof-Arthur-Peter-Mutharika-and-Electoral-Commission-Vs-Dr-Saulos-K-Chilima-and-Dr-Lazarus-M-Chakwera-MSCA-Constitutional-Appeal-No-01-of-2020.pdf

[205] *Chilima & Anor. v Mutharika & Anor*. (Constitutional Reference 1 of 2019) [2020] MWHC 2 (3 February 2020). Accessed at: https://malawilii.org/akn/mw/judgment/mwhc/2020/2/eng@2020-02-03

Malawi's supreme court shared with its Kenyan counterpart many of the same contentions in need of interpretation. On these matters, there's full conformity between the two rulings. Regarding the standard of proof, the Supreme Court makes extensive reference to Ugandan and Kenyan case law, ultimately leaning toward the Kenyan perspective, with the distinction that an intermediate standard is preferred by the Malawian judges as to facilitate access to appeal[206]. *Raila Amolo Odinga v. IEBC and others* is by far the most mentioned foreign piece of jurisprudence. Likewise, the court agrees with Kenya regarding the fact that the burden of proof must be on the party that is questioning the legitimacy of the elections' results: *"Looking at cases from a number of jurisdictions, though not in the clearest of terms, there seems to be acceptance that the petitioner bears the burden of proof"*[207]. To further elaborate on this point, the court refers to a wide number of external judgements: UK's *Miller v. Minister of Pension*, *Director of Public Prosecutions v. Jugnauth* from Mauritius, Zambia with the case *Lweanika and others V. Fredrick Chiluba*, Uganda's *Amama Mbabazi v. Yoweri Kaguta Musueni* (where the justices iterate the relevance of foreign material for constitutional interpretation: "*We draw inspiration from* […]*"*) and Canada's constitutional court in the cases *Regina v. W M Drup, Matt* and *R. v. Oakes*.[208]

On the more stringent matter of the counting of the ballots, Malawi's Supreme Court of Appeal introduces the distinction between a qualitative and quantitative approach to the problem. Basing once again its opinion on the decisions of foreign jurisdictions, the judges mention Zimbabwe's case *Chamisa v. Mnangagwa and 24 others* and Uganda's *Col. DR Kizza Besigye v. Attorney-General.* They ultimately lean toward Uganda's methodology, adopting a rather quantitative viewpoint, establishing that irregularities should affect the final result for an election to be nullified. This is, evidently enough, a key component of the decision's outcome, and it is once again drawn from a foreign judicial opinion.

The ruling goes on deciding on some more technical issues, but even in these cases the court doesn't refrain from adhering to foreign law. For instance, on the importance of polling units as significant evidence Nigeria's *Atikv Abubakar v. INEC* provides important

[206] Ibidem.
[207] Ibidem.
[208] Ibidem.

elements. Or on the fact that the signature of the presiding officer in a poll's station is mandatory on the result tallying sheet *Raila Amolo Odinga v. IEBC and others* serves once again as an essential guideline. More generally, the whole structure of the ruling is heavily influenced by foreign law. The petitioners call for the judges to recognize four UK judicial decisions they brought as evidence, as they "*should be regarded as persuasive interpretation"*[209]. Malawi's court spends also some time giving necessary definitions, citing *Bush v. Gore* regarding the ultimate responsibility of courts judging cases concerning elections, and stating that *"the court agrees with the observations of"* US' decision *Wesberry v. Sanders*, Canada's *Haig v. Canada* and South Africa's *NNP v. Government of South Africa* on the importance and the extensiveness of the right to vote.[210] It is obvious that the judges rely on foreign law for both general contexts and technical applications.

It is worth noting, however, that alongside this conspicuous list of external decisions, the court in this specific case makes use of a significant amount of domestic precedents. To the extent that it seems they roughly outnumber foreign rulings. Surprisingly enough, this is happening in a country with a highly internationalized constitution (*see* fig. 1) and at a time where the influence of Kenya's precedent decision should have been unavoidable. On this, the interpretation that the court gives of Sect. 80(2) of Malawi's constitution regarding the electoral law is emblematic. In deciding to shift from a "first past the post" system to a two-rounds system (in case none of the candidates obtains an absolute majority) the judges do not refer to any international source. Our understanding is that such technical and local matters (like an electoral law) are better delt with in a national perspective. However, the fact that the final decision takes into account foreign law for some pivotal matters (like burden and standard of proof), persuades us in assessing that international elements had a significant impact in the outcome of the decision. In our opinion Malawi's case *Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera* is still substantially built in accordance with foreign jurisprudence and in accordance with instances of international judicial dialogue.

[209] Ibidem.

[210] Constitutional courts' decisions from Zimbabwe, Kenya and Ghana are also mentioned regarding the importance of electoral processes in democratic societies. *See supra* note 205.

Another relevant example of a constitutional court intervening to safeguard the electoral process involves the Republic of Senegal. The reiterated attempts of former president Macky Sall to indefinitely postpone elections after the end of his term had sparked concern for an authoritarian turn in the country. Senegal's Constitutional Council, however, swiftly intervened in February 2024 to rule the National Assembly's decision to delay elections unconstitutional, calling for a ballot to be held "as soon as possible"[211]. Such decision is in line with the two mentioned above and shows fervid judicial activism in protecting and safeguarding democratic constitutional principles. Unfortunately, we haven't been able to acquire to original document of the Council's decision. Thus, an assessment of the use of foreign material for constitutional interpretation couldn't be done. Still, the decision is worth mentioning as it contributes to a better understanding of the ways in which constitutional judicial bodies can intervene against democratic backslidings.

On the other hand, there is a significant number of recent examples where petitions challenging the outcome of general elections were dismissed by constitutional courts for "lack of merits". This is the case for states like Ghana, the Democratic Republic of the Congo, Egypt, Sierra Leone, Uganda, Nigeria and Madagascar. In some of these countries there could effectively be a lack of merit for courts to take appeals under consideration. Some others cannot be identified as full-fledge democracies, and presumably their judicial bodies don't have the authority to challenge elections' legitimacy. However, the rulings analysed in this current section show a recent trend of judicial activism that is based on the use of foreign sources of law. When courts decide to act and intervene in electoral processes, they derive legitimacy for their decisions from other countries' precedents. Our view is that in cases of constitutional interpretation involving the validity of elections, judicial cross-fertilization substantially contributes to the protection of the electoral process and, overall, democracy.

[211] https://www.aljazeera.com/news/2024/2/16/senegals-top-court-reverses-salls-election-delay-bid

5.2 Division of Powers

Every democratic constitution regulates, in some way or another, the division of powers among the state's institutions. The careful tailoring of checks and balances between different recipients of authority is foundational to any democratic order. It is no surprise that Chapter IV, referring to the different manifestations of instances of democratic backsliding, highlights the importance of a solid division of powers for a democracy to hold its elementary features. General trends indicate that the degeneration of pluralistic societies usually involves a hypertrophy or hyperactivity of the executive, that seeks centralization of power at the expense of other constitutional branches. More in particular, since the executive usually presides the legislative assembly, governments typically attempt at undermining the judiciary and its powers. These demeaning efforts from incumbents towards judges (especially belonging to constitutional courts, as they represent the highest safeguard against unconstitutional dictates), clearly belong to the category of constitutional retrogression. As such, they are the main interest of this current section. Hereafter we will take into consideration some cases in which constitutional judicial bodies have been able to prevent said shift in the balance of public powers, acting as a last barricade against incumbents' authoritarian tendencies. As per our research question, the analysis of these rulings will be interested in assessing if the use of international and foreign law has played a decisive role in halting undemocratic dispositions.

The first case we are going to consider refers to the High Court of Zimbabwe's decision *Kika v. Minister of Justice Legal and Parliamentary affairs and 19 others*[212]. With this ruling, the court found that the 2021 constitutional amendments which, among other provisions, gave the President the ability to extend the term of constitutional judges, is unconstitutional as it bestows too much power on the executive. Critics to the amendment argued that the act would have served to extend chief justice Luke Malaba's term in office (that was just about to expire), considered close and favourable to the acting president[213].

[212] *Kika v. Minister of Justice Legal & Parliamentary Affairs & 19 Others* (HC 2128 of 2021; HC 264 of 2021) [2021] ZWHHC 264 (15 May 2021). Accessed at: https://zimlii.org/akn/zw/judgment/zwhhc/2021/264/eng@2021-05-15
[213] https://www.africanews.com/2021/05/16/zimbabwe-court-orders-chief-justice-to-retire-in-blow-for-mnangagwa/

Upon examining the court ruling in its entirety, it becomes evident not only that the justices widely referred to foreign law but also that the large majority of these references are attributed to a distinct country: South Africa. So much so that it can be asserted that the whole decision is inspired by and draws justification from South African case law. This can be explained by the geographic proximity of the countries, their common legal background and similar cultural frameworks.

From the outset of the decision, Zimbabwe's constitutional judges endorse the South African interpretative perspective on constitutional provisions by mentioning two landmark rulings of the neighbouring court: *"The textual provisions must be construed contextually having regard to the constitution as a whole, see Matatiele Municipality v President of the republic of South Africa. The preferred approach is the 'generous' and 'purposive' interpretation that gives expression to the underlying values of the Constitution, as was held in S v Makwanyane"*[214].

South African jurisprudence is also used as a blueprint for the definition of the doctrine mootness and how it can be applied to the present case. The rulings *S v. Dlamini*, *S v. Dladla*, *S v. Joubert* and *S v. Schietakat* are applied to support the thesis for which a case is moot and thus not justiciable if it no longer sparks controversy[215].The same principle is presented in the South African case *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*. Such definition is useful because it establishes that, by contrast, the court has jurisdiction over the amendments under scrutiny since they stir up major disputes between the involved parties.

The same reasoning is used by the judges referring to the US Supreme Court's case *DeFunis v. Odegaard*. The ruling regarded a black student who was not enrolled on racist grounds. By the time the appeal came before the constitutional court, he had been admitted. The US justices deemed illegitimate to rule on a matter that had already been resolved. In the present case, however, the contention is very much alive, the judges can therefore rule an opinion following the directions set by foreign precedents. On this the court also mentions an additional South African decision, stating that *"as explained in the*

[214] *See supra* note 212.
[215] *"A case is moot and therefore not justiciable if it no longer raises an extant or live dispute, harm, controversy or threat of prejudice to the applicant* [...]*"*. Ibidem.

case of JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others, courts should avoid deciding points that are "abstract, academic or hypothetically"[216]. From *Bernet v. Absa Bank Ltd* (yet another South African decision) the High Court derives the principle of "double requirement of reasonableness" regarding allegations of judicial biases.

The Zimbabwe court's decision ultimately revolves around the fact that, according to the judges, reforms of the judiciary mustn't favour in any way the incumbent or, more generally, the executive power.[217] This decisive standpoint is yet again derived from a judicial precedent coming from South Africa. The case in question is *Justice Alliance of south Africa v. President of the Republic of South Africa & Others*, and its relevance to the case is highlighted by the fact that it is mentioned both by the applicants and the respondents, besides being used by the court in its majority opinion.[218] The High Court asserts that the extension of constitutional justices' terms of office by the hands of the acting president of the republic constitute an attempt by the executive power to influence, manipulate and, at last, control the judiciary.[219] The court, in its concluding remarks, strengthens its opinion claiming that, as the UK ruling *MacFoy v. United Africa Co. Ltd*. established, the fact that chief justice Luke Malaba's term had already terminated at the time the amendments were approved, makes the acts proposed by the president void and unconstitutional.

Interestingly enough, a case analogous to Zimbabwe's *Kika v. Minister of Justice* already occurred precisely in South Africa. In 2011 President Zuma sought to extend the term of Office of the Chief Justice of the Supreme Court referring to Section 8(a) of the Judges' Remuneration and Conditions of Employment Act. According to constitutional article 176(1), the power to prolong the office of a constitutional judge belongs to the parliament alone[220]. By acting unilaterally Zuma bypassed the legislative chamber in what the Supreme Court deemed to be an abuse of power in constitutional case *Justice Alliance of*

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[216] Ibidem.
[217] Ibidem.
[218] Ibidem.
[219] Ibidem.
[220] *See supra* note n.40.

South Africa (JASA) v. President of the Republic of South Africa and Others.[221] This ruling is noteworthy because it happens 10 years prior to Zimbabwe's similar decision. Hence, the South African court didn't have any relevant precedent in the region to consider and seek inspiration from. Yet, the 2011 ruling is still considerably shaped by international and foreign material.

To begin with, the court underlines the importance of the principle of the independence of the judiciary, a basic component of any democratic system. In support of this consideration, several international instruments are mentioned, like the "Principles on the Independence of the Judiciary" and the "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa".[222] Indeed, the court finds that a non-renewable term of office for a constitutional justice is a necessary prerequisite to maintain the overall independence of the judicial branch: *"Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment"*.[223] More specifically, on the role and the importance of the chief justice of a constitutional council (basically viewed as a primus inter pares), the judges refer to *R. v. Reilly* and *Gillespie v. Manitoba*, both rulings from the Canadian Supreme Court.[224]

The core of the decision, however, is centred around the importance of the legislative power in upholding and defending the independence of the judiciary, in the delicate scheme of the different checks that preserves democracies from authoritarianism. This principle and its relevance for the constitutional order is derived from a wide number of foreign judicial decisions. To name a few: *Bradley v. Fisher* (Supreme Court of the District of Columbia – US) and *R v. Kirby and Others* and *Ex Parte Boilermakers' Society of Australia* (High Court of Australia).[225]

This case prompts some relevant considerations. Ruling against President Zuma's attempt to control the judiciary the Supreme Court of South Africa, as we said, didn't have significant African jurisprudence on the matter. The fact that, on the contrary, Zimbabwe's

[221] *Justice Alliance of South Africa (JASA) v President of the Republic of South Africa and Others*. (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23. Accessed at: https://www.saflii.org/za/cases/ZACC/2011/23.html
[222] Ibidem.
[223] Ibidem.
[224] Ibidem.
[225] Ibidem.

2021 decision profusely mentions continental precedents indicates that, if there's the possibility to do so, African courts prefer to apply African judicial decisions for constitutional interpretation. This last judicial decision shows that, in the absence of regional sources, constitutional judges tend to seek interpretative authority from states coming from similar legal traditions. In this case, US, Canada and Australia: common law systems that have much in common with the South African approach to judicial review.

One doesn't have to conduct overly extensive research in order to find many other examples of incumbents attempting to centralize and retain power. The African continent is no exception to this trend. It is very much harder, on the other hand, to find cases in which this widespread tendency is countered by the intervention of African judicial institutions. Few are the rulings that, as we have analysed thus far in this section, halt the executive from downsizing judicial authority and concentrating power. Remarkably, when constitutional courts succeed in doing just that, they apply an open and international approach to the interpretation of the charters. The Supreme Court of Kenya's ruling *Ndii & Others v. Attorney General & Others*[226] makes no exception. The case was built after President Kenyatta proposed a series of amendments to the constitution that took the name of Building Bridges Initiative (BBI). According to some, such constitutional modifications aimed at strengthening the executive and wrest power to the other sovereign branches of the state. The government's initiative was found in breach of Kenya's constitution by the High Court. The judges' opinion affirmed that such massive amendment process ought to be put forward by the legislative chambers, not by the acting president.[227] Their decision was then upheld by the Court of Appeal and finally brough before the Supreme Court for its final judgement. The following analysis wants once again to assess whether foreign jurisprudence significantly influenced the constitutional court in halting the allegedly undemocratic reform.

The petitioners' argument is basically centred around the doctrine of the basic structure. The principle asserts that some features of the constitutional text are so foundational to its spirit and to the constituents' aspiration that they cannot be amended in any way. Such

[226] *Ndii & others v. Attorney General & others.* [2021] KEHC 9746 (KLR), Nairobi. Accessed at: http://kenyalaw.org/caselaw/cases/view/212141/

[227] https://www.theguardian.com/global-development/2021/may/27/kenyas-high-court-overturns-president-uhuru-kenyatta-bbi-bid-to-amend-constitution

consideration are not drawn from the constitution itself. They are rather based on neighbouring Uganda's case law and, most importantly by the Supreme Court of India landmark decision *Kesavananda Bharati v State of Kerala & another*.[228]

The respondents, representing the government's interests, tried to elaborate on the fact that the doctrine of the basic structure cannot be applied to the constitution of Kenya, therefore asserting that the document in its whole could potentially be amended by a legitimate authority. To prove our point, even this defence is built on a wide number of foreign cases. Indeed, in their argument respondents make reference to decisions from: Singapore, Uganda, Zambia, Malaysia, India and Tanzania.[229] This interpretation is backed up by the Attorney General, who seeks legitimation to her argument by yet another Indian judicial decision, namely *AK Gopalan v. the State*.[230].

Amid this crossfire of foreign references, the court, illustrating its interpretative approach, seems to mediate between the parties. The Kenyan judges give relevance to the country's legal tradition, stating that *"references to foreign cases will have to take into account these peculiar Kenyan needs and contexts"*.[231] They too make reference to *Kesavananda Bharati v. State of Kerala & another,* affirming that some key principles of the constitution cannot be amended as not to empty the text of its original meaning. But the court also refers to a wide number of domestic rulings, calling on Kenya's constitutional history and its jurisprudence. It therefore seems that the doctrine of the basic structure, rather than being derived from foreign law, finds in alien judicial decisions an additional element of legitimacy. However, the fact that the petitions and the government's defence are heavily based on foreign material underlines the importance of external judicial deference in building arguments for the case.

As the BBI committee, whose main task was to put together a list of structural amendments to the national constitution, was in its entirety nominated by the president rather than elected by popular initiative, it is found to be unconstitutional and therefore all its acts and decision void of authority. The UK's decision *South Bucks District Council v. Flanagan* serves to highlight the importance of pluralistic representation in such

[228] *See supra* note n. 226.
[229] Ibidem.
[230] Ibidem.
[231] Ibidem.

committees.[232] Moreover, as this decision takes the form of a civil proceeding the president, as the main proponent of such amendment, ought to have appeared in front of the court. The judges draw these more than significant conclusions from three United Kingdom's judicial opinions.[233]

The rest of the decision revolves around the fact that the amending power ultimately rests on the people, not the executive. This conclusion is significantly based on South African case law. *Matatiele Municipality & others v. The President of South Africa & others* supports the argument that the people should be regarded as a constituency, and that they alone, as holders of the constituent power, are the ultimate authority in cases of amending procedures. *"In the persuasive authority of" President of the Republic of South Africa & others v. M & G Media Ltd*[234] the constitutional judges highlight the importance of an easy access to information when it comes to processes of constitutional reform, condemning the lack of communicative efforts from the government and the BBI Committee regarding their decision process. The court goes further, assessing that the doctrine of the basic structure does indeed apply to Kenya. And therefore, not even legislative bodies like county assemblies or even the parliament can "alter" and "mutilate" the constitution in its basic principles. *"In this regard we associate ourselves with the position adopted in United Democratic Movement v Speaker of the National Assembly"*[235] (Supreme Court of South Africa) and Tanzania's *Court of Appeal Ndyanabo v. Attorney General,* in the opinion that any amending procedure should be mindful not to change or drastically modify the core principles and values of the constitution (among which, the separation of powers and the institution of proper checks and balances is pivotal). Such principles can sometimes be found in the preamble of the constitution, on which *"We agree with the opinion expressed in Olum & another v Attorney General"*[236] (Court of Appeal of Uganda) giving the preamble constitutional relevance as expressing unamending fundamental values.

The overall impression is that, in the few cases where constitutional courts have the power and the credibility to halt amending procedures that more or less explicitly aim at either

[232] Ibidem.
[233] Ibidem.
[234] Ibidem.
[235] Ibidem.
[236] Ibidem.

attacking the judiciary or strengthening the executive, foreign law is a fundamental tool in the hands of the judges. As democracies cannot do without a proper system of checks and balances between the powers of the state, cross-judicial dialogue seems to contribute extensively to the defence of these guarantees.

5.3 Individual rights

Modern democracies are not only defined by their institutional structures. The first constitutional documents were designed to limit and control the power of the sovereign, but also to ensure some level of protection to the individual, conceived as the ultimate recipient of rights. From the second half of the last century, the international community has increasingly sought to link the promotion of democracy with both security and peace, as well as the recognition of fundamental freedoms. Over the decades, international treaties enhancing and increasing the number of rights attributed to human beings have raised the bar as to what it means to live in a democratic and pluralistic society. Eventually, democratic governance and human rights have come to be considered an unbreakable combination. Undermining democracy oftentimes happens in concomitance with the limitation or the elimination of rights. In this current section we will take into consideration three constitutional decisions, adjudicating the constitutional rights to assembly, to protest, and the protection of ethnic minorities. These rulings add up to our list of analysed constitutional decisions that substantiate our research assumption because they make extensive use of foreign material for constitutional interpretation. Examining them we will assess whether judicial deference is a decisive or ancillary tool for the protection of constitutional rights.

The first one concerns the South African Supreme Court and the interpretation given to the right to assembly in its decision *Mlungwana and Others v. S. and Another*.[237] The court was asked to adjudicate a section of the Regulation of Gatherings Act seeking to criminalize (for security reasons) public gatherings between three or more people that failed to give prior notice to the local municipality. The court reaffirms the international vocation of the constitution of South Africa: *"It is trite that international law must be*

[237] *Mlungwana and Others v. S and Another*. (CCT32/18) [2018] ZACC 45. Accessed at: https://www.saflii.org/za/cases/ZACC/2018/45.html

considered when interpreting the Bill of Rights, including (albeit with less weight) non-binding international law."[238] The final judgement, however, not only refers to a number of international treaties, but goes as far as structuring the decision's argument on foreign jurisprudence, especially international courts' decisions.

Major relevance is given to the UN Human Rights Committee ruling *Kivenna v. Finland Communication*. According to the Committee's opinion, to prohibit the right of manifestation because it has not been priorly notified to the authorities is an example of excessive limitation. The absence of notification is no adequate justification for prohibiting gatherings, and the right to assembly in general. Any act designed to do that goes against Article 21 of the ICCPR. The African judges agree with the international Committee on this point, saying that the criminalization of unauthorized gatherings as prescribed by the act under scrutiny is an abuse of limitation on the right to gather and manifest. The Supreme Court mentions four other rulings from the UNHRC that reiterate this interpretation.[239] On the more general principle that the right to assembly should not be given any restrictive interpretation, the court mentions an impressive amount of rulings from the European Court of Human Rights (as far as nine in total)[240]. *Kudrevičius v Lithuania* (ECHR), for instance, affirms that rights such as the freedom to gather should always be interpreted in the broadest way possible, in order not to excessively restrict and diminish the capacity and applicability of a right so foundational to democracy. On this, rulings from the ACHPR, the ECHR and the UNHRC establish the principle according to which a right can be restricted only for a "legitimate purpose". The opinion of the South African judges, derived from all these international judicial decisions, is that failing to notify local authorities in advance is not a legitimate enough reason to pose limitations to the right to gather.

South Africa is not the sole country implementing this adjudicative approach. Examples of the sort can be observed across the continent, where courts follow the persuasive authority of foreign judicial decisions in order to protect and better guarantee constitutional individual rights. Such interpretative behaviour, for instance, has

[238] Ibidem.
[239] *Pavel Levinov v. Belarus*; *Zinaida Shumilina v. Belarus*; *Anatoly Poplavny and Leonid Sudalenko v. Belarus*; *Sergey Praded v. Belarus.* Ibidem, para 50.
[240] Ibidem.

sometimes been adopted by Uganda's constitutional court. Let us refer to the case *UOBU v. Attorney General*, involving the recognition of land rights for indigenous people.[241] As it was the case with previously analysed rulings, the Ugandan judges do not merely refer to foreign decisions for practical and specific aspects of the law, they also rely on them in order to determine the best way to interpret and read the constitution itself. This is all the more valid in the present case, where the constitutional court wasn't asked to implement or enhance an existing constitutional right, but to recognize one that wasn't included in the text by the drafters. Indeed, the constitution of Uganda does not provide for a specific article on the rights of indigenous people *"as understood by international law"*.[242] The court, however, is of the opinion that, in cases like this one, a less literal approach to the constitution should be adopted when interpreting its articles. When it comes to human rights, it's not the specific provisions but the general spirit of the charter that has to be considered. Remarkably, the judges draw this interpretative perspective from UK's decision *Inco Europe Ltd. v. First Choice Distribution* (and the general definition of "interpretation" given by the Merriam Webster dictionary).[243] Obviously every court, as it is made by different individuals and everchanging majorities, independently decides the best way to read the constitution. But the fact that the adoption of an interpretative approach is founded on (and to some extent justified by) the decisions of external judiciaries, exemplifies the extent to which constitutional interpretation can transcend national borders. This is particularly evident when the internationalization of constitutional interpretation is instrumental in implementing existing rights and ensuring new ones.

UOBU v. Attorney General, following this trend, relies on foreign law to acknowledge the constitutional land rights of Uganda's indigenous groups. The African Commission on Human and Peoples' Rights is given due regard by the judges, who mention the case *Ceramide and MRG v. Kenya*. According to the Commission's opinion, the universally recognized right to own property also includes and protects the right of indigenous people to possess their ancestors' land. The court then elaborates on the right of self-

[241] *United Organisation for Batwa Development in Uganda (UOBU) and 11 Others v Attorney General and 2 Others* (Constitutional Petition No. 3 of 2011) [2021] UGCC 22 (19 August 2021). Accessed at: https://ulii.org/akn/ug/judgment/ugcc/2021/22/eng@2021-08-19
[242] Ibidem.
[243] Ibidem.

determination of indigenous people, asserting that the state can only acknowledge and accept the inherent nature of aboriginal sovereignty. The rights of indigenous groups (such as possession of the land) are pre-existing, meaning they predate the state and the constitution. The charter must therefore provide for the protection and implementation of this set of liberties, in conformity with its purpose.[244] The constitutional court of Uganda is able to deliver said opinion on account of the jurisprudence of other nations with indigenous minority populations. Above all, Australia's *Mabo v. Queensland* is frequently mentioned, especially regarding the "doctrine of native title".[245] The Australian case was also applied by South Africa, with the Supreme Court decision *Richtersveld Community et al. v. Alexkor Ltd. and Another,* which the court also regards as persuasive authority on the matter.[246] The Botswanan case *Sesana v. Attorney General*, which prominently formulated its opinion on the right of indigenous people to freely access water resources, was also mentioned in the case.[247] Finally, the court held that the state has a duty to ensure the implementation of these rights by means of affirmative actions, as stated in the decision *R. v. Van Der Peet* by the Supreme Court of Canada.

Evidently enough, a constitutional lacunae regarding indigenous minorities' rights was rectified by way of interpreting the constitution in consideration of foreign national jurisprudence. The systemic reference to external courts that Ugandan judges engaged in provided the authoritative legal grounds for a new set of rights to be recognized.

An additional example illustrating the fact that the use of foreign material for constitutional evaluation is an effective tool for protecting constitutional rights and securing new ones comes from Kenya. In particular, from the Supreme Court case *Katiba Institute v. DPP*.[248] The contention revolved around a specific article of the Penal Code of Kenya, establishing the ambiguous crime of subversion. More specifically, it involved the arrest of a person who wrote a tweet that was believed *"prejudicial to the public*

[244] Ibidem.
[245] Ibidem.
[246] Ibidem.
[247] Ibidem.
[248] *Katiba Institute v. The Director of Public Prosecutions.* Petition no. E016 of 2023, Nakuru. Accessed at: https://katibainstitute.org/wp-content/uploads/2024/03/Judgment-Katiba-Institute-8-Ors-Vs-DPP-2-Ors-HCCHRPET-No-E016-of-2023-1.pdf

order".[249] Petitioners contended that the article in question was unconstitutional, as it poses a *de facto* limitation on the right to manifest dissent.

After stressing the importance of free information as a necessary requirement for any democratic society (referring to the ICCPR and the ACHPR), the court builds its interpretative approach on a series of foreign opinions. For instance, it makes reference to Uganda's *Tinyefuza v. Attorney General* and South Africa's *Re Hyundai Motor Distributors (PTY) & others v. Social No & others,* relying on them for the general interpretation of the charter and for more specific matters applicable to the case (like the right to privacy).[250] Subsequently, the Kenyan judges criticize the piece of legislation under examination because, in their opinion, it is too vague (and its interpretation could therefore be arbitrary). On this, the court cites a US case (*Grayned v. Rockford*) and a decision from the ECHR (*Sunday Times v. United Kingdom*).[251]

The section of the Penal Code, however, is not found unconstitutional only on the basis of its vagueness. The main reasoning of the Kenyan Supreme Court is that the right to manifest dissent is a fundamental constitutional provision, and as such any limitations on it should be justified. According to the judges, the alleged crime of subversion does not stand against these guarantees. The sources at the basis of this opinion mainly come from foreign jurisdictions and, more specifically, from sentences that struck down subversion laws in their own territories. Consequently, making proper distinctions from case to case, the court heavily relies on Eswatini's *Thulah Maseko v. the Prime Minister of Swaziland*, Uganda's *Andrew Mujuni Mwenda v Attorney General*, Lesotho's *Peta v Minister of Law, Constitutional Affairs and Human Rights,* Nigeria's *State v Ivory Trumpet Publishing Co Ltd and Nwankwo v State* (regarding some publications against public governors) and Canada's *Boucher v. R.*[252] In all these cases sedition laws were seen as unjustified limitations on the right to express freely one's opinion. Moreover, Canada's *R. v. Oakes* was mentioned, as it elaborates on the principle of proportionality regarding limitations of rights.

[249] Ibidem.
[250] Ibidem.
[251] Ibidem.
[252] Ibidem.

In front of such a wide number of precedents, the Kenyan judges couldn't help building their decision on foreign sources. They, as their Ugandans and South African counterparts, seemed to be aware of the fact that the human rights discourse is indeed more efficiently applicable with an international perspective. According to the analysis of the above cases, processes of internationalization of constitutional adjudication could be helpful as they better equip constitutional courts with the tools to defend human rights and ensure their protection.

5.3.1 The case for queer rights: Botswana and Namibia

In this section we have grouped two decisions that regard a specific minority: queer people. By pairing them, we wanted to determine if the two rulings share some common elements and if they use similar arguments to justify the advancement, in one form or the other, of gay people's rights. Of course, we will still assess whether foreign law has been structurally used for constitutional interpretation and the role that it played in building the opinions.

The two judicial decisions concern the state of Botswana and the state of Namibia, with the respective decisions *Motshidiemang v. Attorney General*[253] and *Digashu and Other v. GRN and Others*[254]. In the first case, the Court of Appeal of Botswana finds two articles of the penal code (referred to as "sodomy laws") that criminalized same-sex conduct, to be unconstitutional. In the second ruling, Namibia's Supreme Court officially recognizes same-sex marriages concluded outside the territory of the state as valid and lawful.

Initially both courts engage in some considerations over the interpretation of the constitution. It is worth noting, in fact, that in the two jurisdictions there had been some relevant legal precedents reaffirming the validity of sodomy laws in one case (Botswana), and not recognizing same-sex marriages celebrated abroad (Namibia's Supreme Court ruling *Immigration Selection Board v. Frank*)[255]. The judges from Botswana justify a shift in interpretation adopting the "living constitution approach". Meaning that the "[…] *court*

[253] *Motshidiemang v. Attorney General*. MAHGB-000591-16, Gaborone. Accessed at: https://www.humandignitytrust.org/wp-content/uploads/resources/Motshidiemang-V-Attorney-General-Botswana-2019.pdf

[254] *Digashu and Another v. GRN and Others; Seiler-Lilles and Another v. GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023). Accessed at: https://namiblii.org/akn/na/judgment/nasc/2023/14/eng@2023-05-16

[255] Ibidem.

shall interpret the Constitution as a living dynamic charter of progressing human rights, serving the past, the here and now, as well as unborn constitutional subjects."[256] They also underline the importance of the fact that constitutional adjudication should be in line with international obligations, and that therefore courts should be able to change course of interpretation over time. The Namibian judges choose a more technical approach, one where foreign material, however, plays an essential role as well. Their argument is that precedents are binding as to what concerns their final decisions, not in what they say as extra-considerations: *"The binding authority of precedent is however confined to the ratio decidendi (rationale or basis of decision) – the binding basis – of a judgment and not what is subsidiary, termed obiter dicta – ('considered to be said along the wayside')."*[257] This line of reasoning is supported by a number of foreign case law, among which the South African case *JA in Pretoria City Council v. Levinson* and the UK's *Close v. Steel Company of Wales Ltd*.[258]

To delve deeper into the courts' arguments, Botswana and Namibia's rulings basically recognize rights that are not written in the constitution by using some already existing (and constitutionally protected) freedoms. In both cases, the right to dignity serves this purpose. Such provision is already included in the two constitutions, and the courts use it to affirm that, according to their interpretation, the right to dignity must also include the freedom to engage in intimate relationships. The elaboration of this passage is fundamentally aided by foreign law in both decisions. The Botswana Supreme Court makes reference to the Canadian ruling *Law v. Canada (Minister of Employment and Immigration)*, where dignity and free sexuality are seen as closely interrelated.[259] The Namibian court on its part cites the South African case *Dawood and Another v. Minister of Home Affairs and Others*, where the same concept is reiterated.[260]

The same method is used by the two judiciaries to express the fact that, in their constitutions, the word "sex" includes "sexual preferences". Indeed, both Botswana and Namibia's constitutions contain some provisions stating that no one should be discriminated on the basis of sex. The courts use once again foreign jurisprudence to

[256] *See supra* note n. 251.
[257] *See supra* note n. 252.
[258] Ibidem.
[259] *See supra* note n. 251.
[260] *See supra* note n. 252.

defend their judgment, according to which such constitutional articles protect gay people too from discrimination. Namibia refers to the UN Human Rights Committee's decision *Toonen v. Australia*, where the identification of sex with sexual orientation has been explicitly reaffirmed.[261] The same case is mentioned by Botswana as well, together with the ECHR ruling *Sutherland v. United Kingdom*, Canda's *Vriend v. Alberta*, South Africa's *City Council of Pretoria v. Walker* and Hong Kong's decision *Leung v. Secretary for Justice*.[262]

The two decisions also mention a number of foreign cases that are similar to their own. Botswana, for instance cites rulings where sodomy laws have been struck down and homosexuality decriminalized (like Ireland, Cyprus or Belize).[263] The Namibian case, on the other hand, mainly refers to the UK and the US.[264] But overall, as we have analysed thus far, the main arguments that are used are similar and they similarly rely on foreign sources for their elaboration. The main difference is that Botswana further elaborates on the right of privacy and the right to liberty, assessing that these freedoms as well should preclude interference from the state in matters of sexual conduct. Once again, the court derives justification for this reasoning from foreign case law. In particular, India's *Navtey Singh Johar v. Union of India*, South Africa's *National Coalition for Gay and Lesbian Equality v. Minister of Justice* and the US with *Griswold v. Connecticut, Lawrence v. Texas* and *Planned Parenthood of Southeastern PA v. Casey*.[265]

The high level of internationalization between the two rulings and the fact that decisions regarding similar rights and rights' recipients also share some common pivotal arguments, shows the impact that the use of foreign law has and is having[266] on the recognition of new individual rights and therefore on the solidity and resilience of pluralistic democratic societies.

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[261] Ibidem.
[262] *See supra* note n. 251.
[263] Ibidem.
[264] *See supra* note n. 252.
[265] *See supra* note n. 251.
[266] LGBT discriminatory laws continue to be published in Africa (as wherever in the world). The role that African constitutional courts can play is relevant to say the least, as this present section tried to demonstrate. The last example of the sort involves Ghana's supreme court, which is called to judge the constitutionality of a bill criminalizing homosexuality in the country: the judgement is expected by the end of the year (2024): https://www.bbc.com/news/world-africa-68477878

5.4 Concluding remarks

At this point of the research, it is important to acknowledge and recognize the inherent limits of this work. The analysis above has been conducted with the utmost meticulousness as to provide valuable, objective conclusions to our dissertation. However, the study's scope and means limitations cannot lead to a comprehensive investigation into the matters at interest. Nor they allow to draw conclusions that aspire to be definite or irrefutable. Our aim was to delineate a trend and to look for observable tendencies that could potentially substantiate our research question: is the use of foreign material in cases of constitutional adjudication in Africa enhancing the resilience of democratic systems against authoritarian retrogressions?

Thus far, the research has confirmed that there is a significant correlation between the use of foreign law for constitutional interpretation and the tendency to repeal undemocratic legislations. As anticipated, the analysis has been divided in different sections, each one tackling a specific aspect that is considered to be foundational to democratic systems of government. In all the considered areas, African constitutional courts made use of foreign case law as an authoritative source for the interpretation of the constitution, defending and ensuring human rights, overseeing the regularities of elections and the system of checks and balances between the powers of the state. The rulings that have been considered for examination didn't just incorporate international material as an additional parameter of evaluation. They based most of their arguments on these sources of law. To the extent that one might assume that the judgement's outcome could have been significantly different without the use foreign law. These findings seem to give credit to our research question. At least concerning the ability of constitutional courts to struck down undemocratic pieces of legislation. A further analysis over the general state of democracy in Africa will be undertaken in the next chapter, as to unfold new meaningful correlations and better explain the phenomenon.

It is worth noting that there are some exceptions to this general tendency. Meaning that some recent African constitutional decisions succeeded in defending democracy (by way of annulling non-democratic laws) without making reference to international and foreign sources. Still, as far as the material we analysed showed, these cases represent a minority.

More significantly, they mostly involve the South African Supreme Court.[267] It might be that, since the court is renowned for its activism, the judges have available a significant number of domestic precedents. So much so that they don't need to apply foreign law as extensively, especially regarding more technical and local cases. Whatever the reasons, their number and their confinement to one specific state do not seem to question the general findings of this chapter.

[267] *See* for instance *Hoffmann v. South African Airways* (on discriminations against HIV positive people) and *Economic Freedom Fighters v. Speaker of the National Assembly* (over the president's illicit use of public money and the parliament's inactivity): https://www.saflii.org/

CHAPTER VI

SOME CONSIDERATIONS OVER LEGAL SYSTEMS' ASYMMETRIES

This section is dedicated to some further considerations, largely deduced from the analysis presented in the previous chapter. By bringing these new arguments into the discussion, we intend to reinforce the thesis' main assertion, ultimately arguing that the internationalization of constitutional adjudication can potentially strengthen democracies in the African continent. It is important to note that the hypothesis this chapter will elaborate on are the result of approximate causative associations based on the limited research this work was able to advance. As such, they do not aspire to be either methodically accurate or comprehensive. Still, the forthcoming deductions highlight a general trend that, in our opinion, relevantly contributes to the research question, bolstering its underlying argument.

The present one being the last chapter of the thesis, it might be useful to go over and briefly reconsider the structure and content of the work so far. Firstly, the process of internationalization of constitutional law was introduced, by way of describing its main features and most essential components. We then applied the concept to the African continent. More specifically, we analysed and classified African constitutions according to their level of internationalization and their overall incorporation of international law. Attention has been consequently paid to the description of instances of judicial cross-fertilization, and the ways judges may use foreign sources for constitutional adjudication. At this point, the notion of democratic decay has been introduced, underlining the ways in which democracies may suffer from different kinds of setbacks. Once the research question had been illustrated, Chapter V pursued an analysis of African constitutional case law, with the aim of correlating the use of foreign sources for constitutional interpretation to a higher chance of courts annulling undemocratic legislations.

Given that the thesis has succeeded in bringing a valid argument for the use of cross-judicial deference and its positive effects on democracies, one cannot abstain from noticing a remarkable characteristic of the countries that have been selected for the aforementioned analysis. Indeed, the African states which case law has been considered

in the previous chapter are all, with no-exception, English speaking countries. This outcome is not the product of a predetermined selection, but the result of a research that tried to be as comprehensive and diverse as possible. Our only concern in collecting primary judicial sources was to choose rulings that revolved around specific democratic principles, looking for the systemic use of foreign decisions for interpretation. The fact that the product of said research was homogenous, with every state under consideration belonging to the Commonwealth, has surely something to say about the nature of internationalized judicial interpretation. Is it true that African countries that have suffered from French colonization are less susceptible to the use of foreign case law for constitutional interpretation? Does this narrower adjudicative behaviour affect the state of democracy in these countries? Is there something peculiar about the French constitutional model that restrains trends of internationalization of constitutional interpretation? The present section will try to answer these questions and to offer a new perspective on the matter at interest.

6.1 Anglophone and Francophone systems: differences and peculiarities

Regarding the adoption and direct integration of international treaties and human rights provisions, French and Portuguese speaking countries in Africa generally assume a rather monist approach, with some systems implementing direct applicability of rights-related treaties. English speaking nations, on the other hand, commonly lean towards a more dualist conduct.[268] Many academics, however, are of the opinion that such systemic differences are becoming more and more irrelevant. The universal consensus over foundational human rights documents and the mainstreaming of the human rights discourse have rendered these categories mostly inadequate to describe the phenomenon. For instance, regarding international customary law it is safe to assume that *"even anglophone African countries are monist in the sense that a well-established and recognized rule of customary international law is usually considered in most countries an integral part of national law. As a result, the failure or refusal of a government to sign and ratify an international instrument does not prevent any principles contained in that*

[268] *See supra*, note n. 143.

instrument from forming part of the national constitutional law provided these principles have crystallized into customary international law".[269]

This levelling-out of differences regarding the reception of international law into national systems does indeed reflect the categorization we made of African constitutions in Chapter II (see fig.1). In fact, both anglophone and francophone countries are included in the category that groups constitutions providing for full assimilation of international or customary law. Quite remarkably, however, only constitutions coming from English speaking territories belong to the category that mandatory prescribes the use of foreign and international material for constitutional interpretation. Such correlation, coupled with the findings highlighted by our research (see Chapter V), seems to point out that relevant differences between the two systems do not pertain to the integration of international features, but rather to the use of foreign materials for constitutional evaluation.

Judicial interpretation, on its part, is shaped by a multitude of diversified impulses, taking into account cultural tendencies, historical precedents, political beliefs, external influences and present power dynamics. Amid all these elements, the institutional framework adopted by the two different systems (including the role and function of constitutional courts) could potentially have a decisive impact on interpretative tendencies. Both France and the United Kingdom have strongly influenced the basic political and judicial structures of their former colonies. Post-independence constitutions were at least partially imposed by European colonizers to over-exploited countries and under-experienced political elites. The French, however, were more reluctant to release the grip on African territories and concede *de facto* political and economic independence. As Filip Rejntyens notes: *"More than other former colonial powers, France has retained intimate relations with Africa and has not hesitated in the past to make or unmake governments".*[270]

This delayed influence and covert control of France in Africa shaped the constitutional structure of most of its former colonies, including the ways judicial review had to be carried out. In the wake of the new constituent impulse experienced by the continent after

[269] Ibidem.

[270] Filip Reyntjens, The Winds of Change. Political and Constitutional Evolution in Francophone Africa, 1990–1991, Journal of African Law / Volume 35 / Issue 1-2 / March 1991, pp 44 – 55.

the end of the Cold War, many francophone countries looked at the French fifth republic as a source of authoritative inspiration, to the point of modelling most of their institutional features on the French constitution. In this sense, the executive power usually mirrors the so-called "Orleanist" type, being shared between a popularly chosen president and a parliament elected prime minister. Oftentimes this bicephalous configuration leads to conflicts between president and prime minister, reflecting power dynamics between the head of state, which is not bound to any vote of confidence, and parliament's majorities. The legislative branch is composed by a single chamber, and it reflects the electoral outcome in a proportional way, leading to a relatively high number of parties and less favourable conditions for the creation of solid and durable majorities (Reyntjens, 1991).

The 1990s wave of constitutional reform also introduced the creation of a constitutional court in many francophone African states. The configuration of such counter majoritarian body has been widely influenced by the French *Conseil Constitutionnel*. This model of judicial review significantly differs from the one adopted by common law countries. English speaking African nations rely on judicial decisions as a primary source of domestic law, whilst civil law systems give prominence to the legislature, and they are fundamentally based on statutes and ordinary legislations rather than judicial outcome. Moreover, the role and importance of courts' precedents and the doctrine of *stare decisis* (fundamental principles of common law countries) are less relevant when it comes to civil law. As for the scope of this research, however, the present section is not interested in listing the differences between the two legal systems. Our aim is to find possible structural reasons for former French colonies to rely less on foreign decisions for constitutional interpretation. It therefore suffices to say that the model of judicial review that francophone African countries follow, which is based on the French constitutional example, is intrinsically different from the one adopted by English Africa.

As anticipated, constitutional adjudication in francophone territories (especially after the 1990s) adheres more or less strictly the French *Conseil*. Constitutional justices are not appointed by the president, but rather elected by the legislative chamber. Still, the presidency has the power to select the judge who will bear the functions of chief justice. In this way the judiciary is still heavily influenced by political majorities, but its most prominent office (oftentimes decisive in stalemate decisions) is of the president to decide: *"As this position comes with a critical tie-breaking authority, the risk of political pressure*

that may potentially undermine independence and impartiality in deadlocked, sensitive cases becomes serious".[271] Access to the court, initially reserved to political officials, has been significantly extended, enhancing human and constitutional rights' protection. The competences of the body precisely mimic those invested by the French *Conseil*. Besides overseeing the regularity of elections and deciding upon cases of disputes involving state's institutions, the court must see the conformity of promulgated legislations with the constitutional text (Ngenge, 2013).

And yet, neither the institutional asset of French speaking African countries, nor the composition and function of their constitutional courts seem to explain the reasons why constitutional adjudication in these states does not rely on foreign sources for interpretative inspiration. Or at least not as much as it happens in former English colonies. Of course, some constitutional features may appear more or less functional than others. But in the end constitutional design, as internationalized as it can be, is drawn upon and tailored for the historical, cultural, legal and political traditions of the territory it must be applied to. Presidentialism is not a flawed form of government as such; it may become so under certain circumstances. It is true that experts tend to prefer the Kelsenian-European model of judicial review[272], but some democratic societies have been allowed to flourish under common law systems of decentralized or not specialized constitutional interpretation.

The absence of a tradition for judicial deference and cross-fertilization in constitutional cases in French Africa can't be attributed to these constitutional peculiarities per se. It is rather the fact that these countries rely too much on the prescribed French constitutional model. The cause behind the lack of judicial internationalization is to be found in the narrow viewpoint that drafters adopt when writing the constitution, legislators use to reform it and judges apply to interpret it. In all these circumstances reference is mainly made to the French fifth republic. Little or no inspiration is taken from other constitutional traditions. Such inherent limitation (that surely derives from the tight control France obstinately held over these territories even after independence) impoverishes

[271] Yuhniwo Ngenge, *International Influences and the Design of Judicial Review Institutions in Francophone Africa*, The American Journal of Comparative Law, vol. 61, no. 2, 2013, pp. 433–60. Available at: https://www.jstor.org/stable/43668159

[272] *See supra,* note n. 15.

constitutional interpretation, giving it fewer tools and authoritative examples to uphold constitutional articles and, eventually, to protect fundamental democratic features.

The same conclusions are drawn by Fombad (2011), that counterbalances the restrictedness of French speaking African countries judicial review with the English model, more open to instances of judicial fertilization:

"Anglophone countries have approached constitutional reforms with more openness and have looked far beyond England for inspiration and guidance. Not only have constitutional review commissions included foreign experts from different constitutional systems, but members of these commissions have usually travelled to Europe, North America, Asia and India to learn more about modern constitutional developments. By contrast, many francophone African constitutional draftsmen have continued to rely almost slavishly on what they perceive as the most reliable and unassailable model; the Gaullist Fifth Republic and the timid amendments that have been made to it in the last fifty years".[273]

To provide additional insight to this line of reasoning, reciprocal constitutional and judicial fertilization might be favoured not only by enlightened drafters or international experts' commissions. Popular participation may have a role in this too. Murray and Kirkby (2015) found that the involvement of a state's population in constitutional matters is a prominent feature of most anglophone African countries. First of all, when the larger public is involved in the drafting or the amending of a constitution the final text gains legitimacy. Indeed, the state is made of its citizens and, as such, enhanced participation in the design of its fundamental law results in wider acceptance of the document. The overall involvement of the public, Murray and Kirkby go on saying[274], usually prompts a higher consensus, as well as it educates citizens on their civil duties and constitutional rights. A more aware public may serve as the best guardian against constitutional infringements and democratic regressions. Moreover, popular involvement in processes of democratization can potentially contribute to the enrichment of the constitution itself, by way of enhancing the number of rights and of protections against violations (including,

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[273] *See supra*, note n. 192.

[274] Christina Murray, *Constitution Making in Anglophone Africa: We the People?* (co-author Coel Kirkby), May 2015. Available at: https://www.researchgate.net/publication/277009337_Constitution-Making_in_Anglophone_Africa_We_the_People_co-author_Coel_Kirkby

for instance, standing rules before the constitutional court and its competences). The involvement of marginalised groups and minorities could also expand the reach of constitutional provisions, for example regarding democratic representation. In this sense, the role of women has been widely valued as a fundamental component in democratization processes: *"In Uganda, for example, women and women's groups played a key mobilizing and educational role in the decade-long process. If a constitution's legitimacy is a function of popular input, then it is necessary to ensure that women have a proportional influence on the process.* […] *women may enrich the constitution, as would other groups formerly excluded on the base of race or "tribe".*[275]

This claim seems to be backed up by numbers. Indeed, a brief analysis of African constitutional texts reveals quite blatantly that anglophone constitutions are, on average, significantly longer than their French speaking correspondents. Of course, the number of words and the overall extent of a document does not necessarily reflect the amount of rights protected and guaranteed by the state. However, the difference in length of constitutions belonging to the two systems is striking. To the point of giving rise to the claim that anglophone countries, by way of favouring public involvement in constitutional matters, succeeded in drafting more comprehensive documents, both regarding the rights they recognize and the protection of democratic features.

Let's consider some numbers, in order to give an idea of the disparities between the two approaches. Constitutions belonging to English speaking African countries are made of, on average, roughly 37,000 words[276]. With the exception of Cameroon (8,444 words) and Rwanda (16,940 words), no document is shorter than 24,000 words. Record-breaking Nigeria has a constitution of 66,263 words, followed by Ghana with 53,985. On the contrary, the average length of French speaking African constitutions is approximately around 12,000 words. With Sudan and South Sudan being the longest (26,644 and 27,191 words respectively), the majority of constitutions in French Africa is composed by less than 15,000 words. Remarkably, Equatorial Guinea has a constitution of 5,575 words, followed by Djibouti with 6,666 and Eritrea of 6,753 words. Curiously, the overall length

[275] Ibidem.

[276] This and the following numbers are taken from the constitutional ranking statistics surveyed by the Comparative Constitutions Project, available at: https://comparativeconstitutionsproject.org/ccp-rankings/

is roughly mirrored by the number of rights each constitution recognizes.[277] Equatorial Guinea, the shortest constitution we considered, includes 33 rights. Djibouti does worst, with the lowest number in the continent: only 26 rights are articulated in its constitution. For the most part, the length asymmetry between civil law and common law Africa seems to reflect the number of rights guaranteed by domestic legislation. Anglophone countries, on average, include about 55 rights, whilst francophone states typically identify around 48 constitutional rights.

These numbers may support the assertion that English speaking African nations are both more willing to involve the public in constitution making processes and less tied to a fixed model of constitutional reference. Their judicial bodies would therefore be predisposed to use foreign material and international law for constitutional adjudication. Such conclusions would confirm the findings of Chapter V of the thesis, in which solely anglophone judiciaries halted democratic setbacks in the light of alien case law.

6.2 Evidence for democratic resilience

So far, our considerations over democratic resilience have been based on the case law we analysed in the previous chapter. Since judicial decisions that used foreign jurisprudence to halt undemocratic legislative drives came exclusively from anglophone countries, we established that the inherent nature of English Africa constitutional tradition favoured judicial cross-fertilization, therefore making democracy in those countries stronger. But the prosperity and the protection of democratic institutions surely cannot be entirely attributed to instances of judicial review. Talking about democratic decay in Chapter IV, we already stated that there hardly is a univocal definition of democracy itself. The endurance of such a delicate form of government is owed to a wide number of factors, including historical traditions, cultural awareness, exogenous influences and so on. Mindful of this, we emphasise once again the fact that the correlations that have been advanced over constitutional adjudication and the state of democracy do not aspire to be comprehensive. They are rather a partial component of a much complex phenomenon. A

[277] Ibidem.

component that, however, we deem valuable as it contributes to the description of a general trend of constitutional internationalization.

Having said that, it is undisputed that judicial review constitutes one of the main features of modern democratic constitutionalism. Watchdog judicial bodies, especially from the second half of the last century, have been pivotal actors on the frontline of democratic protection and stability. Therefore, their role in preventing democratic decay, especially in the form of constitutional retrogression, is undeniable. Proof is the fact that constitutional courts are among the first institutions that incumbents with authoritarian aspirations seek to reform and weaken. It then stands to reason that the fact that anglophone jurisdictions in Africa have more tools to interpret constitutions less restrictively (thus enhancing the reach of the document) must produce consequences over the state of democracy in the continent.

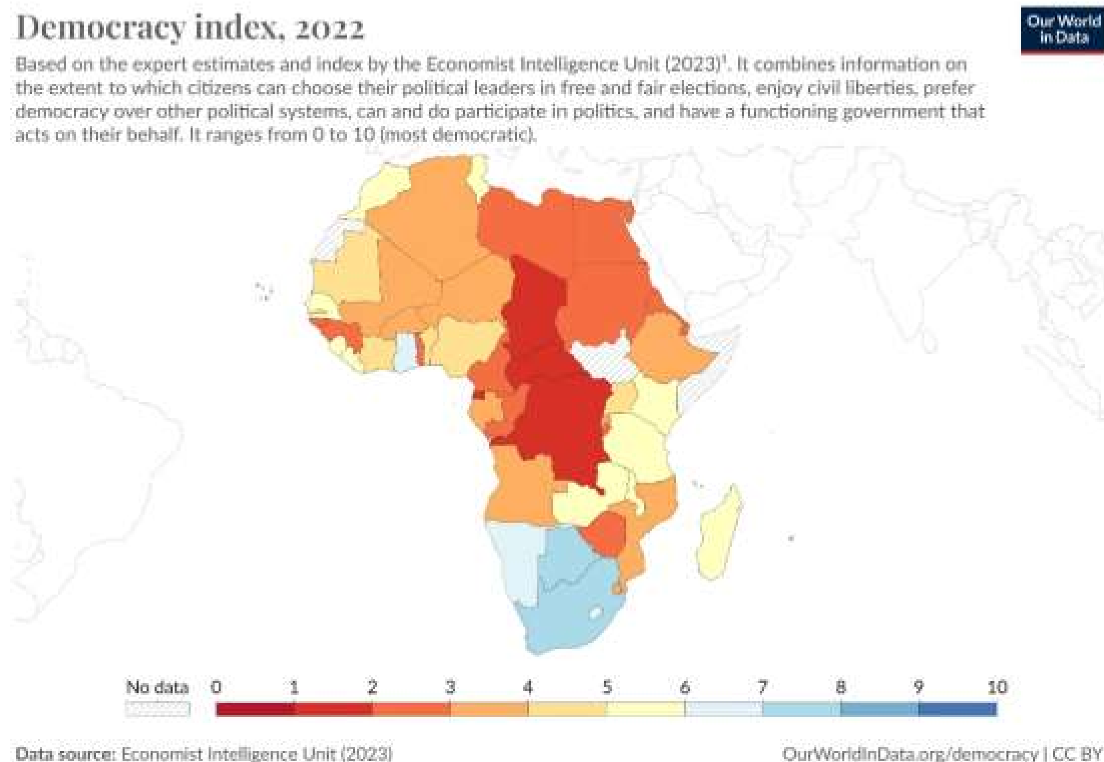
But how can one measure democracy? Fair and regular elections are one fundamental indicator of a county's democratic condition. But, as we previously said, the popular vote is an insufficient criterion for democratic assessment. A democracy, in order to be defined as such, needs proactive participation of its citizens, a vibrant democratic and egalitarian culture, the respect and promotion of civil, political, cultural and economic rights, majority rule, the respect and protection of minorities, equality before the law, fair process and many other aspects pertaining to different areas of public interest. The complexity of the phenomenon has led to the creation of specific measurements that refuse to catalogue nations following a dichotomic fashion. Instead, states have been placed on a spectrum made of different democratic features, each one interrelated but distinct from the other.

In this sense, one of the most authoritative instruments measuring democracy through yearly reports is *The Economist Intelligence Unit measure*. This index seems to be one of the most comprehensive and broad-based at present. It is composed taking into consideration five main aspects that define democratic societies: *"electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture"*.[278] The index evaluates these categories mainly through public opinion

[278] The Economist Intelligence Unit (EIU), *Democracy Index 2022: Frontline democracy and the battle for Ukraine*, The Economist, London 2023. Available at: https://www.eiu.com/n/campaigns/democracy-index-2023/

surveys, placing each state under scrutiny on a scale that goes from full democracy to authoritarian regime. Said classification, applied to the African continent for the year 2022, is translated into the following map:

Fig.2



Visually, the correspondence between those countries that perform best in the continent and areas that come from British rule and common law legal tradition is striking. Of course, there is not an exact juxtaposition but, on the whole, anglophone Africa is attributed a significantly higher democratic score. We have spent enough time reminding the complexity of the phenomenon, and the fact that the correlation we are trying to make here does not aspire to be an extensive and detailed explanation of the above observation.

Nonetheless, it is once again undeniable that judicial review (and the overall independence of the judiciary) is an essential component of modern democratic societies. Anglophone constitutional courts, for reasons that have been attributed to peculiarities of common law systems, frequently use foreign jurisprudence for constitutional

adjudication. Francophone countries, on the other hand, due to French post-independence rooted dominion and to over-reliance on its constitutional model, have usually refrained from using external sources for the interpretation of domestic law. As the internationalization of constitutional adjudication is deemed to enhance the scope and extent of constitutions, it may well have played a role in halting and annulling legislations that, once approved, would have undermined the state of democracy. Therefore, our final claim is that the use of foreign jurisprudence and international material for constitutional adjudication in Africa has had a significant impact on the preservation, the protection and the overall resilience of democratic societies against instances of democratic decay in the form of constitutional retrogressions.

CONCLUSIONS

The above research, and the empirical evidence it may have gathered, examines the complex interplay between two distinct characteristics of modern constitutionalism: the internationalization of judicial review and the deterioration of democracies through acts of constitutional retrogression. Upon examining such mutually influential interrelation, it has been deemed useful to elaborate said categories by going from general definitions to particular applications. Accordingly, the ongoing trend of internationalization of constitutional law has been initially described. In order to offer a thorough perspective, we have methodically considered the two main components contributing to processes of constitutional internationalization. Through the use of specific case studies, Chapter I has illustrated how constitutions are increasingly incorporating features of international and regional law, and how mechanisms of judicial review are following this internationalizing impulse by interpreting constitutions in light of foreign material. The research indicates that, at present, the national-international divide is gradually but evidently blurring. Constituent efforts must acknowledge international elements, while judicial dialogue has evolved to become a prominent feature of constitutional adjudication.

These considerations have subsequently been applied to the African continent. After demonstrating the major influence of regional organizations like the African Union in setting a unified and shared standard for African constitutionalism (specifically concerning human rights provisions), the research turned to a detailed examination of African constitutional incorporation. Chapter II's categorization served as an empirical evidence for the integration of external elements into African constitutional frameworks. Indeed, the majority of the continent's charters exhibited varying degrees of international influence, with some specifically prescribing international law for constitutional evaluation. African judicial review is not exempted from this internationalizing trend. Chapter III showed that dialogue and cross-reference among constitutional courts is very much common practice for the most part of the continent. Most importantly, it is not contingent upon the level of internationalization of the constitution it is applied to.

Having provided a comprehensive depiction of processes of constitutional internationalization in Africa, the research introduced the definition of democratic decay.

Above all, our argument benefited from the description of processes of constitutional retrogression. Literature showed that democratic setbacks typically occur not through abrupt and coercive changes of government, but rather through gradual constitutionally legitimate acts. In this sense, the assessment of the most common trends of constitutional retrogression has been valuable for the comparative research advanced in Chapter V.

Indeed, we have selected a number of African judicial decisions in which democratic constitutional principles were threatened either by ordinary legislations or constitutional amendments. These rulings encompassed overseeing the regularity of elections, maintaining the proper distribution of powers through checks and balances, and guaranteeing human rights promotion and protection. Upon examining a significant amount of decisions, we found that, with the exception of a few isolated cases, the constitutional rulings under scrutiny made extensive use of foreign material. Alien jurisprudence was not only used as an additional source of legitimization. It provided for the argumentative framework these decisions were built on. A systematic analysis of each constitutional sentence contributed to the formulation of the thesis' conclusions: in matters related to democratic principles and human rights, the use of foreign jurisprudence as an authoritative reference for constitutional interpretation offers additional and decisive resources to counter undemocratic efforts.

In its final section the research was dedicated to the study of systemic differences between common law and civil law Africa. Chapter VI found that inherent peculiarities of former French colonies (mainly the over-reliance on the French constitutional model), hindered judicial review from employing foreign jurisprudence for constitutional adjudication. On the contrary, anglophone African countries looked far beyond the UK to build their constitutional tradition. On average, this tendency manifested in an enhanced inclination towards internationalized judicial interpretation. Our claim is that, given the findings gathered in Chapter V's comparative analysis, said judicial predisposition has left francophone countries with fewer tools to counteract authoritarian setbacks, thus making democracy in those territories weaker.

Once again, the present work didn't have the means nor the capacity to offer comprehensive and extensive conclusions. The number of rulings that have been analysed is limited, and the correlations that have been presented may not fully account for various

exogenous factors. However, the research wanted to demonstrate a general trend through the use of empirically valuable observations and insights. Undoubtedly, there is a strong correspondence between judicial review and the state of democracy. The evidence we have gathered shows that a more internationalized approach to constitutional adjudication in Africa may facilitate the protection of democratic principles towards acts of constitutional retrogression.

Further studies could be interested in expanding the scale of the research, increasing the number of assessed countries and the type of democratic provisions under constitutional scrutiny. Assuming a global perspective on the matter could help highlighting widespread patterns and common developments of judicial review, and the role its internationalization plays in enhancing democratic resilience.

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