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RESEARCH ARTICLE

Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa

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Abstract

A body of jurisprudence is emerging in Africa's most active regional courts on the independence of national judiciaries. This article reveals that while regional case law relevantly echoes efforts by municipal courts to safeguard themselves, circumstances demonstrate that such case law requires greater contextualization across systems. In this regard, the traditional paradigm of linking independence to executive appointments does not empirically stand the test of the multiplicity of independence factors, executive-free regimes have not proved effective in safeguarding independence, and legal traditions or judicial systems have increasingly become irrelevant to the effectiveness of any independence regime. Factors that transcend the traditional determinants of executive control include the nature and functions of the court involved, and the history and background of the judicial structure of the country or region. Notably, the discussion also reveals the need to strike a critical balance between individual rights to a fair trial and inter-state directive policy towards judicial independence as set out in the African Charter.

Keywords: Judicial independence; rule of law; regional courts in Africa; judicial oversight bodies; vertical judicial dialogue

Introduction

Judges guard the law, but who guards judges? That is, who ensures that they enjoy much-needed sanctity in discharging their critical mandate of upholding the rule of law? This question has been debated largely through the dual prism of the independence and the accountability of judges.[1] In jurisdictions from all legal traditions, courts and judges are vested with the paramount mission of upholding the rule of law, that is, to ensure that all abide by the law. While the rule of law binds judges themselves, the distribution of powers in constitutional democracies has placed courts at the mercy of external interference, mainly from the executive branch of government.[2] The recent worrying so-called "democracy crisis" appears to have only increased attacks against courts and the independence of judges.[3]

In Africa's nascent democracies, judges themselves have come to the rescue of the judiciary, mainly in its arm-wrestling with the executive. The most emblematic illustrations include *Adrian*

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1 N Garupa and T Ginsburg "Guarding the guardians: Judicial councils and judicial independence" (John M Olin Programme in Law and Economics Working Paper no 444, 2008) 1.

2 See generally A Adéloui "L'indépendance des juges suprêmes au Bénin" (2018) 5 *Librairie Africaine d'Etudes Juridiques* 15; WK Ochieng "Judicial-executive relations in Kenya post-2010: The emergence of judicial supremacy?" in CM Fombad (ed) *Separation of Powers in African Constitutionalism* (2016, Oxford University Press) 286; H Adjolohoun and CM Fombad "Separation of powers and the position of the public prosecutor in francophone Africa" in id, 359.

3 See generally S Sarsar and R Datta (eds) *Democracy in Crisis around the World* (2020, Lexington Books); MA Graber, S Levinson and M Tushnet (eds) *Constitutional Democracy in Crisis?* (2018, Oxford University Press).

Kamotho Njenga v Attorney General; Judicial Service Commission and Others, where the High Court of Kenya found that the president of the republic is constitutionally bound by the recommendation of the Judicial Service Commission (JSC) in respect of the list of nominees to be appointed as judges.[4] The matter arose from the refusal of the president to appoint judges who had been duly selected by the JSC. Similarly, the High Court of Malawi decided, in *HRDC and Others v President of Malawi and Others*, that attempts by the country's president to get rid of the Chief Justice and other senior judges by placing them on enforced leave pending retirement were illegal and unconstitutional.[5] Notably, the High Court held that the executive had no constitutional or legal basis upon which to make such a decision, as issues of judicial administration and human resources management remain the preserve of the judiciary; thus the executive intervention breached the separation of powers. The executive was ordered to reverse the decision on the forced retirement and reinstate the judges concerned.[6] A similar trend is observed in the most progressive civil law constitutional court in Africa, the Constitutional Court of Benin,[7] which in its Review of the Decree on Appointment and Promotion of Judges held that decrees from the Minister of Justice which omitted to mention the proposed posts were in breach of the independence of the judiciary, namely the principle of the immovability of judges. The court therefore declared the posting of the judicial officers concerned without their prior consent as unconstitutional.[8]

Safeguarding judicial independence has transcended the domestic realm to become an international concern. In its 2020 judgment in *Martínez Esquivia v Colombia*, the Inter-American Court of Human Rights found that the respondent state breached judicial independence due to the unsubstantiated removal of the applicant, who worked as deputy prosecutor for 12 years.[9] The same year, in the no less evocative *Laura Codruța Kövesi v Romania*, the European Court of Human Rights (ECHR) unanimously ruled that the dismissal of the applicant, a chief prosecutor of the National Anti-Corruption Directorate, on grounds of poor performance breached judicial independence, as the applicant's rights to a fair trial and freedom of expression had not been upheld.[10] The applicant had opposed the government's amendments to three basic laws that were widely perceived as weakening the judicial system, and the judiciary's oversight body did not approve the removal.

Africa also witnesses regional efforts in support of judicial independence. The normative and institutional armada deployed by African states to protect judicial independence is on two levels. Under the umbrella of the African Union (AU), articles 7(1) and 26 of the African Charter on Human and Peoples' Rights (the African Charter) unequivocally guarantee the rule of law and judicial independence of member states' courts.[11] The same principles are set out in articles 2(5) and 15 (2) of the African Charter on Democracy, Elections and Governance (the Democracy Charter).[12]

4 *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission and Others* (Interested Parties) [2020] eKLR Petition 369 of 2019 (6 February 2020).

5 *State obo HRDC and Others v President of Malawi and Others* (Judicial Review Case Number 33 of 2020) [2020] MWHC 26 (27 August 2020).

6 Id, paras 74–75.

7 SH Adjolohoun "Centralized model of constitutional adjudication: The Constitutional Court of Benin" in CM Fombad (ed) *Constitutional Adjudication in Africa* (2017, Oxford University Press) 51 at 51–52.

8 Decision of the Constitutional Court (DCC) of Benin, DCC 97-033 of 10 June 1997; see also DCC 06-063 of 20 June 2006.

9 IACHR, Report no 109/18, Case 12.840, merits. See also *Casa Nina v Peru*, IACHR Series C no 59, judgment of 17 November 1999.

10 Application no 3594/19, judgment of 5 May 2020.

11 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.

12 African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entry into force 15 February 2012), available at: <http://www.au.int/en/sites/default/files/treaties/7790-sl-charter_on_democracy_and_governance.pdf> (last accessed 14 September 2022).

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Within sub-regional spheres, article 1(a) of the Protocol on Democracy and Good Governance of the Economic Community of West African States (ECOWAS), article 6(d) of the Treaty Establishing the East African Community (EAC) and article 4(c) of the Treaty Establishing the Southern African Development Community (SADC) offer guarantees for the independence of national judiciaries, either expressly or through pledges to the rule of law.[13] In order to enforce the normative framework thus set, African states have established (quasi-)judicial bodies within the above-stated intergovernmental organizations. Two main such institutions are the African Commission on Human and Peoples' Rights (ACmHPR), and the African Court on Human and Peoples' Rights (ACtHPR).[14] Similarly, at the sub-regional level, the ECOWAS Court of Justice (ECCJ), the East African Court of Justice (EACJ) and the SADC Tribunal have been in operation at least for the past two decades.[15] The ACmHPR, ACtHPR and ECCJ have upheld the independence of municipal courts by enforcing rights and duties contained in articles 7(1) and 26 of the African Charter.[16] The EACJ, for its part, has performed the same function by enforcing the rule of law as a fundamental principle of the EAC.[17]

This article undertakes an analytical review of the growing body of regional jurisprudence on judicial independence and investigates the extent to which regional courts in Africa are forging armour for judges against external interference. The methodology of the discussion focuses on issues that are relevant to the main standards for assessing judicial independence, especially from the executive, while stressing how and why contextualization matters. In terms of institutional scope, only the ACmHPR, ACtHPR, EACJ and ECCJ are covered, as they represent the most active regional (quasi-)judicial bodies with significant rulings on the issues at stake. Analyses also draw on the general perception that challenges to judicial independence are more serious in countries with a civil law tradition or background due to the significant involvement of the executive in the recruitment, appointment, career management and operation of the oversight body, as opposed to what obtains in common law countries.[18] In the first substantive section, the article recalls the main elements of judicial independence as drawn from doctrine and international case law. In the following section, the discussion covers occurrences that may be construed as a sanitization of the institutional framework pertaining to the protection of judicial independence, namely through the composition and operation of oversight bodies. The three subsequent sections are devoted to interventions of the most active regional courts aimed at strengthening or supervising the enforcement of legal

13 ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 21 December 2001, entry into force 20 February 2008), available at: <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/ECOWASProtocol.aspx> (last accessed 14 September 2022); Treaty Establishing the East African Community (adopted 30 November 1999, entry into force 7 July 2000) 2144 UNTS 255; Treaty Establishing the Southern African Development Community (adopted 17 August 1992, entry into force 30 September 1993), available at: <https://www.sadc.int/documents-publications/sadc-treaty/> (last accessed 14 September 2022).

14 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entry into force 25 January 2004), available at: <http://www.refworld.org/docid/3f4b19c14.html> (last accessed 14 September 2022). The African Commission was established under art 30 of the African Charter and started its operations in 1987.

15 ECCJ: Protocol A/Pl/7/91 on the Community Court of Justice (adopted and entry into force provisionally 6 July 1991, definitely 5 November 1996); SADC Tribunal: Protocol on the Tribunal in the Southern African Development Community (adopted 7 August 2000, entry into force 14 August 2011). The SADC Tribunal was disbanded in 2010 and reconstituted in 2014 after states adopted a new protocol which limits its jurisdiction to inter-state complaints. The EACJ was established under art 9 of the EAC Treaty and started its operation on 30 November 2001.

16 Art 7(1) provides for the rights to a fair trial, including the right to have one's cause heard, access competent courts and be tried by a competent court within a reasonable time, while art 26 obligates state parties to guarantee the independence of courts.

17 See arts 6(d) and 7(2) of the EAC Treaty.

18 See generally Adjolohoun and Fombad "Separation of powers", above at note 2 at 359.

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guarantees for the independent operation of municipal courts. Cases dealing with the appointment and removal of judges and the enforcement of court orders are discussed. A closing query, which is offered to future investigative commentators, is whether regional independence activism remains alert to the very current necessity of preserving judicial dialogue. This concluding part also raises institutional implications and the structural impact of what could be termed the regionalization of judicial independence.

Understanding the doctrine of judicial independence

The independence of the judiciary is often discussed intimately with its twin concept, impartiality. The ECHR has frequently stressed this reality by referring to the maxim that "justice must not only be done, it must also be seen to be done".[19] In this context, independence is understood as a presupposition of impartiality.[20] Yet the two concepts cannot be conflated; while impartiality is more about the attitude of judges towards the parties or in adjudicating specific matters, independence describes functional and structural safeguards against external intrusion into the administration of justice.[21] As such, judicial independence is intrinsically assessed within the framework of the rule of law and the separation of powers. It is also logically framed by the particular statutes of each country, although common requirements are expected for any given system to be deemed independent or otherwise. There have been attempts to formalize these requirements through international regulations, such as the United Nations Basic Principles on Independence of the Judiciary (1985), the Bangalore Principles of Judicial Conduct (2006), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1997) and the Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

Two main approaches to judicial independence emerge: functional independence, which excludes interference from non-judicial organs with the performance of judicial functions, and institutional independence, which requires that judicial institutions are not made up of members sitting in other branches of government and that the judiciary enjoys a certain institutional autonomy in the administration of court-related matters.[22] Generally, courts are believed to enjoy functional independence when judges do not receive direct instructions from other branches of government in the course of proceedings, when courts orders are not ignored, and when legislation is not adopted to change the course of pending cases.[23] Institutional or organizational independence, for its part, is assessed in light of three main components: the appointment of judges, the composition of courts and security of tenure.

Regarding the appointment of judges, it is usually agreed that the process should be established by law, and there should be no appointment for certain cases or benches that might influence an outcome. The determinant is less the nomination procedure itself but rather whether or not the selected judges enjoy functional independence from the person or body that nominated them.[24] Notably, the main internationally recognized standard setters cited earlier, such as the Bangalore

19 See for example *Delcourt v Belgium*, ECHR Ser A no 11, para 31.

20 See R Feehily "Neutrality, independence and impartiality in international commercial arbitration: A fine balance in the quest for arbitral justice" (2019) 7/1 *Penn State Journal of Law & International Affairs* 88 at 90–97.

21 V Jackson "Judicial independence: Structure, context, attitude" in A Seibert-Fohr (ed) *Judicial Independence in Transition* (2012, Heidelberg) 19 at 19–21.

22 See G Helmkel and F Rosenbluth "Regimes and the rule of law: Judicial independence in comparative perspective" (2019) 12 *Annual Review of Political Science* 345 at 349–51; CHJ Powell "Judicial independence and the Office of the Chief Justice" (2019) 9 *Constitutional Court Review* 497 at 500–504.

23 See L Pech and S Platon "Judicial independence under threat" (2018) 55 *Common Market Law Review* 1827 at 1849; ECHR *Benthem v Netherlands*, Ser A no 97, para 38; and ECHR *Van de Hurk v Netherlands*, Ser A no 288, para 28.

24 P Rädler "Independence and impartiality of judges", available at: <http://hrlibrary.umn.edu/fairtrial/wrft-rae.htm#N_35_> (last accessed 14 September 2022).

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Principles, do not include a provision on nomination procedures, and the ECHR for instance has concluded in *Sutter v Switzerland* that even a nomination solely by the government does not in itself affect the independence of the court.[25] The position of international human rights bodies has been that executive appointments are not the issue as such. The problem is rather that independence would, for instance, be seriously impacted if the executive could annul the inauguration of judges by way of a simple *contrarius actus* – meaning that an authority with power to make an act is assumed to have the power to annul the same act.[26]

As for the composition of courts, the aim is to avoid members of the executive and legislature being appointed as judges. More importantly, there is a paramount need to ensure that courts do not administer justice under the influence of superior authorities who are members of the two other branches, not just that the latter are excluded from appointing judges. On this point, the ECHR has held in *Sramek v Austria* that a bench composed of a majority of civil servants does not necessarily affect independence, as long as the government is not a party to the case and that no one on the bench is a subordinate to a civil servant representing the government.[27] Similarly, the ACmHPR has concluded in *The Constitutional Rights Project v Nigeria* that special criminal courts cannot be seen to be impartial when members of the executive branch sitting as judges outnumber the regular judges on the bench.[28]

Finally, security of tenure comes into play to cater for circumstances where judges may fear disciplinary or other consequences due to the exercise of their judicial functions. As a matter of principle, the requirement is not that judges are necessarily appointed for life or enjoy statutory irremovability but rather that stability of tenure is guaranteed for the duration of their term. Comparative approaches reveal, for instance, that while the duration of the term of office does not in itself impact independence, the transfer of judges to other courts or functions and the dismissal of judges from their office implies a considerable risk to judicial independence.[29] There is case law in support of this standard, as exemplified by *Campbell and Fell v UK*, where the ECHR considered the irremovability of judges "a necessary corollary of their independence".[30] It appears that the removal of judges is governed by practices that vary depending on the country, legal tradition and history. They include removal by a resolution of parliament (the UK and Canada), binding decisions of judicial service commissions (France and Uganda) or court orders (Germany and Denmark). Although irremovability is a strict requirement of institutional independence, the ECHR has held that failure to meet this condition may not in itself imply a violation of the human right to an independent tribunal.[31]

Another unavoidable standard setter in assessing judicial independence is whether any given judiciary involves an oversight body, what the composition of such a body is and how it operates.[32] In Africa, oversight bodies are generally known as Judicial Service Commissions or Councils (JSC) in common law countries, whereas the civil law sphere has borrowed the French tradition of the

25 See *Sutter v Switzerland* [1984] ECHR 2, 8209/78 (decision and reports) 16, 173: *Campbell and Fell v UK* ECHR Application no 7819/77, judgment of 28 June 1984 (merits and just satisfaction), para 79; *Langborger v Sweden*, Ser A no 155, paras 30, 32.

26 ECHR *Zand v Austria* Application no 7360/76, decision of 16 May 1977, 83; Inter-American Commission on Human Rights, Report no 28/94 (Case 10.026, Panama), Annual Report 1994, 67.

27 *Sramek v Austria* Ser A no 84, para 42.

28 *The Constitutional Rights Project (in respect of Wahab Akamu, G Adega and Others) v Nigeria* (Communication 60/91).

29 LM Singhvi "The administration of justice and the human rights of detainees: Study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", UN Doc E/CN 4/Sub 2/1985/18, available at: <https://digitallibrary.un.org/record/108406?ln=fr> (last accessed 14 September 2022).

30 *Campbell*, above at note 25, para 80.

31 Ibid.

32 See AM Saba "The constitutional role of Judicial Service Commission in protecting independence of the judiciary" (2019) 6 *KAS African Law Study Library* 105 at 105–18; MJ Nkhata "Safeguarding the integrity of judicial appointments in Malawi: A proposed reform agenda" (2018) 62/3 *Journal of African Law* 377 at 383.

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Conseil supérieur de la magistrature (CSM). Some key parameters can affect the effectiveness of such commissions. Firstly, their entrenchment in the constitution may guarantee that they are insulated from political pressure. Secondly, their composition should not be dominated by political appointees, who may tend to be guided by loyalty in performing their duties. Finally, their procedures should be led by openness and accountability in order to avoid appointments and other career management functions being performed in a manner that does not promote judicial independence.[33] Commentators have also suggested that some main principles should guide the operation of JSCs: appointments should be merit-based, the process should be led by the desire to preserve judicial independence, and nominations should reflect social diversity and should preserve accountability through transparency.[34]

Notwithstanding the merits of these innovative proposals towards such composition and operation, there is no international norm or doctrinal position that suggests that these standards would guarantee judicial independence. In fact, experiences reveal that fully or partly executive-free JSCs, as known in most common law countries, including in Africa, still grapple with challenges to judicial independence in respect of the operation of the oversight body.[35] Overall, there is a suggestion that a pertinent approach to assessing judicial independence should be multifold and pluridimensional.[36] One of these dimensions may be understood by asking whether and to what extent a determinant control of the judiciary's oversight body holds the potential to inhibit independence.

Determinant control of the oversight body inhibits independence

Traditionally, JSCs are headed and run largely if not exclusively by professional judges themselves, while CSMs are headed and run by the president of the republic or cabinet members, although judges have the largest membership and prominent substantive roles on the body. The recurring issue is therefore, especially when it comes to civil law countries, whether and to what extent involvement of the executive in the operation of the oversight body inhibits judicial independence. In the following cases, regional adjudicatory bodies have grappled with the question. The analysis seeks to demonstrate that determination of actual bias requires evidentiary investigation, and executive membership of oversight bodies cannot in itself establish the required dependence nexus.

The factual nexus is key in determining bias

In *Samuel Mack Kit v Cameroon* (*Mack Kit*), the ACmHPR considered the complainants' claim that courts of the respondent state granted the use of a disputed name and emblem to the opposition political party because the courts operated under the influence of the executive, as the president of the republic is the guarantor of judicial independence, appoints judges and presides over the CSM.[37] The issue set out for determination was whether impartiality was not observed where three different domestic courts dismissed the applicants' request to regain the use of the name and emblem of their political party on the same ground, ie lack of jurisdiction. The ACmHPR undertook an examination of the matter with a particular emphasis on whether and why the role of the executive in the operation of the CSM impacted on judicial independence. It may be relevant at this juncture to note that in its case law on judicial independence, the ACmHPR had set out that independence should be assessed against the absence of pressure or interference, mainly from

33 See generally ÉG Nonnou "Le Conseil supérieur de la magistrature et l'indépendance du pouvoir judiciaire dans les états francophones d'Afrique" (2018) 4 *Les Cahiers de la Justice* 717 at 721–32.

34 See S Evans and J Williams "Appointing Australian judges: A new model" (2008) 20 *Sydney Law Review* 295 at 299–303.

35 See for instance Nkhata "Safeguarding", above at note 32 at 387–401.

36 See generally Association des Cours Constitutionelles Francophones "L'indépendance des juges et des juridictions" (2005) *Bulletin no 7*, available at: <https://accf-francophonie.org/publication/bulletin-n7/#avant-propos> (last accessed 14 September 2022).

37 Communication 423/12, adopted on 18 February 2016, 19th Extraordinary Session, 16–25 February 2016.

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the executive.[38] Some specific criteria considered include appointment, security of tenure, protection from external interference, perception of independence and the CSM being headed by the president of the republic, assisted among others by the Minister of Justice.[39]

In considering the complainants' allegation of partiality in *Mack Kit*, the ACmHPR first set out a factual basis drawn from the manner in which domestic courts handled the original case.[40] The first court dismissed the case for lack of merit, namely in respect of the counterclaim seeking the protected use of the disputed name and emblem being declared illegal. The same court also failed to make any ruling on its jurisdiction to hear the counterclaim. The second court ruled only on the jurisdiction of the first court but not on the counterclaim. Furthermore, the latter court reversed the sentencing of one of the applicants for illegal use of the name and emblem yet declined to rule on the applicants' request to nullify the protected use of the emblem by the opposing party. Finally, in adjudicating a subsequent suit filed by the applicants, a third court arrived at the same conclusion as the second court.

Based on this factual setting, the ACmHPR found that there was ground for legitimate suspicion of bias. The Commission relied on the traditional subjective versus objective approach to impartiality using mainly the public perception of dependence – generally vis-à-vis the executive branch – as the rationale.[41] It found that, given complexities inherent in the concept of impartiality and the difficulty of proving bias, public perception remains the most reliable assessment parameter.[42] It took the view that, in the case at hand, public perception was drawn from constitutional provisions assigning the president to guarantee judicial independence and preside over the CSM, which appoints judges, manages their careers and oversees the operation of the judiciary.[43] The ACmHPR therefore concluded there had been a breach of the applicants' right to be tried by an impartial tribunal protected under article 7(1)(d) of the Charter and called on the respondent state to take all the necessary legislative measures with a view to removing all mechanisms through which other branches of government may interfere with the operation of the judiciary and administration of justice. The respondent state was specifically directed to bring relevant provisions of its constitution in line with articles 7(1)(d) and 26 of the Charter.[44]

Understanding this case requires contextualized analysis. Firstly, the ACmHPR relied on the consistent common finding of all three domestic courts to establish reasonable suspicion of partiality. The courts' finding may not necessarily mean there was bias, given that the trend of upper courts upholding the first-instance ruling should be the norm. As a matter of course, consistency in decisions should affirm good law-making across the system, although it would be rather curious if three courts that are all competent by their statutes would decline to exercise jurisdiction in respect of the same matter. It might have therefore been more judicious for the Commission's reasoning to rely heavily on the inconsistencies in the findings of the respective domestic courts but also on the political context of the case. The latter factor is determinant given that the applicants were known as decade-long opponents to the ruling party which was largely in control of the executive. It is worth recalling that the dispute involved the protected use of the name and emblem of the leading opposition group by what was purported to be a faction of the ruling party.

38 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* Communication 294/04 (2009) AHRLR 268 (ACHPR 2009), para 122; *Wetsh'okonda Koso and Others v DRC* Communication 281/03 (2008) AHRLR 93 (ACHPR 2008), para 79.

39 Ibid.

40 *Mack Kit*, above at note 37, paras 76–78.

41 Id, para 79.

42 Id, para 80.

43 Id, para 83.

44 Pursuant to art 26 of the Charter, "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

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Secondly, the Commission was called to settle an issue which is systemic to the operation of the judiciary's oversight body in French-speaking or civil law Africa, ie the CSM. A decisive question may be: Does the mere and sole fact that the president of the republic chairs the CSM form sufficient ground for reasonable suspicion of control and bias? The ACmHPR's answer was that the role of the president is actually so central that it provides the executive with a determinant control over the CSM in a manner that impedes the independent functioning of the judiciary as a whole – hence the recommendation that the Constitution be amended to remove the operational and oversight control of the CSM from the executive. It may be argued that in the circumstances of *Mack Kit*, a joint appraisal of the executive's presence and the particular manner in which domestic courts validly settled a specific case led to the Commission's findings. The hypothesis here is that nexus or causality is key in determining bias.

However, the question that arises about this second leg of the ACmHPR's finding is whether, considered in isolation, the executive oversight factor would systematically lead to a perceived control by the latter branch that induces bias on the part of the judiciary in discharging its duties. In dealing with the scenario of isolated executive oversight, the Commission's outstanding answer seems to be affirmative. In *Kevin Gunme and Others v Cameroon* (*Gunme*), involving the same respondent state, the Commission found a breach of judicial independence under article 26 of the Charter, on the grounds that the Cameroon CSM being chaired by the president of the republic and the Minister of Justice "is manifest proof that the judiciary is not independent".[45] Knowledgeable commentators may find such a conclusion rather hasty and simplistic, if only for the need to account for the very plausible hypothesis that a bold judiciary could well assert strong independence from the bench. The differentiating factor between *Mack Kit* and *Gunme* is that the former involves both executive oversight (by the president and members of cabinet) and direct, perceived involvement or interference, while the latter does not. The distinguishing factor is the *Mack Kit* context in which three domestic courts with different jurisdictions dismissed the complainants' claim in a political battle involving the ruling coalition and an opposition party. Besides, in *Gunme*, pertinent evidence examined by the Commission in assessing the right to be tried by an impartial court could have been used to buttress allegations of judicial bias. These include the complainants' allegations that anglophones facing criminal charges were transferred to the francophone jurisdictions of the country for trial under the Napoleonic Code, thus adversely affecting their civil rights; the common law presumption of innocence upon arrest was not recognized under the civil law tradition, since guilt is presumed upon arrest and detention; the courts conducted the trial in the French language without interpreters; Southern Cameroon court decisions were ignored by the respondent state; and military courts tried civilians.[46] Even if the complainants made a general allegation with regard to the state's duty to guarantee judicial independence under article 26 of the Charter, the ACmHPR was availed of the full facts of the case to contextualize its finding on judicial independence.[47]

The point is not that the format in which most CSMs operate in civil law Africa may not lead to judicial dependence. Rather, making a determination in that regard, especially in an adjudicatory framework that seeks to be protective of judicial independence, should be faultless from a law-making standpoint given the paramount importance of the issue at stake. As a matter of fact, illustrations abound of causality between executive-chaired judicial oversight bodies and challenges to judicial independence in Africa, whether in so-called civil or common law countries.[48] It is

45 *Gunme and Others v Cameroon* Communication 266/03 (2009) AHRLR 9 (ACHPR 2009), para 211, and see paras 209–12.

46 Id, paras 12, 121–31.

47 Id, para 19(2).

48 Id, paras 209–12.

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interesting in this respect to explore the approach taken by the ACtHPR in one of the most recent regional rulings on the issue.

Executive presence alone does not establish a dependence nexus

The judgment rendered on the merits and reparations in *Sébastien Germain Ajavon v Benin* (*Ajavon*) can be seen as the most emblematic ruling of the ACtHPR in respect of judicial independence assessed by the operation of the CSM. The application covers a wide spectrum of claims relating mainly to certain legal reforms implemented by the Benin government, including on the holding of the 2019 parliamentary elections and the amendment of the Constitution. The present discussion focuses on the applicant's allegation that the composition of Benin's CSM, which, in addition to the president of the republic as the chair, includes the ministers of justice, economy and public service and one member appointed by the president, breaches the separation of powers and judicial independence.[49] The respondent state averred that the Constitution guarantees judicial independence, including through immovability of judges, and the Constitutional Court had declared executive actions unconstitutional in that respect. It was the respondent's submission that the appointment of the concerned ministers to the CSM, including the disciplinary section, was justified by the functions they performed in respect of the remuneration of judges as well as their promotion, career management and retirement.[50]

In finding that the composition of the CSM breached judicial independence as prescribed under article 26 of the Charter, the court sought to establish dependence by functionality. It stressed that the fact that the CSM had been vested with a role to "assist" the president of the republic in chairing necessarily places the oversight body below and therefore in dependence on the executive.[51] In the ACtHPR's view, such dependence is only amplified by the fact that the executive holds ex officio membership of the CSM while other members are appointed by presidential decree. The court then held that "the membership of the President as the CSM Chairperson and that of the minister of justice is glaring evidence that the judiciary is not independent".[52] It finally held that appointees that belong to none of the government branches should have been picked by no organ other than the judiciary.[53]

The ACtHPR ordered the respondent state to "take all necessary measures to guarantee judicial independence". There surely is some rationale for the framing of the order, even if it does not seem to clearly emerge from either the reasoning or the operative section of the judgment. As the case may be, the matter involved a very specific issue of regional relevance; that is, whether and how the role played by executives in the operation of judiciary oversight bodies affects judicial independence. It would thus have been more purposive law-making, in light of the regional cross-cutting nature of the matter, to provide clearer guidance as to what action is to be taken to reshape the CSM in a way that meets the expected standards.

There is no dispute that the ACtHPR's pronouncement sends a strong signal on the role of the executive in the CSM in Benin, and also to about 15 civil law countries across the continent which adopt similar judicial oversight apparatus. The question may be whether, given the crucial importance of the issue, there could have been a more purposive approach to the adjudicatory solution. Critical sections of the reasoning on the merits, however, help understand the solution. It must first be noted that the applicant's claim, as restated by the ACtHPR, is that the decision of the Constitutional Court to introduce a certificate of conformity as a new requirement for candidature

49 ACtHPR, Application no 062/2019, judgment of 4 December 2020 (merits and reparations), paras 301–305.
50 Id, paras 306–308.
51 Id, paras 319–20.
52 Id, para 322.
53 Id, para 323.

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breached his right to participate in the election.[54] This poses a jurisdictional question, which is how a determination by the Constitutional Court, a tribunal that is out of the judicial structure in civil law countries such as Benin, would form material ground for a claim on causality between executive presence on the CSM and the judicial independence of the Supreme Court and lower courts as prescribed under article 26 of the Charter. I advance that the jurisdictional question is paramount because it has the potential of setting the ambit and efficacy of the adjudicatory solution. A literal reading suggests that individual challenges to judicial independence are regulated under the subjective right to have one's cause heard by an impartial tribunal, protected under article 7(1)(d) of the Charter. Conversely, article 26 prescribes a duty which would apply to judicial independence as an objective and systemic inter-state requirement involving institutions such as the CSM or national electoral commissions. The bottom line is that adjudication of the individual claim under the general ambit of the systemic issue of judicial independence did not provide the most essential ingredient of the context and history of the issue being examined. The fact that the operative reparation order on judicial independence does not seem to apply to the applicant supports such a conclusion.

Similarly, consider for instance the soundness of the systematic finding of a breach of judicial independence solely based on the presence, number and role of executive members on the CSM. Most obviously, from a practical standpoint, an executive presence could have the effect of leading to bias, and thus both realities warrant investigation before one is elected and duly substantiated in context. As a matter of fact, the fully or partly executive-free model of the JSC has not preserved common law judiciaries from interference and dependence.[55] Conversely, illustrations exist of judiciaries in civil law countries having asserted strong independence despite executive omnipresence in the operation of the CSM.[56] A comparative perspective from common law spheres shows that two such appointees – members of the public – are picked by the president of the republic in Kenya to sit on the JSC.[57] In Malawi, the president even designates representatives of the judiciary as members of the JSC, although "in consultation" with the Chief Justice.[58]

In *Ajavon*, the background check called for a more thorough scrutiny of factors such as immovability of judges, consistent constitutional case law on enforcement of judicial independence, efficacy sought by the involvement of finance and public service ministries, and lack of legislative oversight such as is done in common law countries. Finally, the potentially far-reaching outcome in this case confirms the need for purposive adjudication. Indeed, the pronouncement applies, with insignificant caveats, to many other CSMs across Africa. It remains to be seen if implementation of the judgment will provide the regional impetus that should be expected from such a ruling.

54 Id, para 48.

55 As opposed to civil law jurisdictions, JSCs in common law seldom include the president of the republic or head of the executive as an active member or chair. In instances where the executive is represented, it does not outnumber members from the judiciary, and its decision-making prerogatives are limited in respect of appointment processes and disciplinary procedures. See generally T Masengu "The vulnerability of judges in contemporary Africa: Alarming trends" (Summer 2017) 63/4 *Africa Today* 3; H Adjolohoun "'Made in courts' democracies': Constitutional adjudication and politics in African constitutionalism" in Fombad (ed) *Constitutional Adjudication*, above at note 7 at 247; C Rickard "Judicial independence infringed when Uganda's Chief Justice has to 'plead' for funds – Constitutional Court", available at: <https://africanlii.org/article/20200318/judicial-independence-infringed-when-ugandas-chief-justice-has-plead-funds> (last accessed 14 September 2022).

56 See generally F Hourquebie "L'indépendance de la justice dans les pays francophones" (2012) 2/2 *Les Cahiers de la justice* 41; Adjolohoun and Fombad "Separation of powers", above at note 2 at 371–72.

57 The Kenya JSC is composed of the Chief Justice, who is its chairperson, one Supreme Court judge, one Court of Appeal judge, one High Court judge and one magistrate, elected by their peers; the Attorney General, two advocates elected by the Law Society, one person nominated by the Public Service Commission and, lastly, two members of the public, appointed by the president with the approval of the National Assembly.

58 The Malawi JSC is composed of the Chief Justice, who is also the chair; the chairman of the Civil Service Commission or his / her designate; a justice of appeal or a judge designated by the president in consultation with the Chief Justice; a legal practitioner; and a magistrate designated by the president in consultation with the Chief Justice.

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Executive-free operation of oversight bodies does not guarantee independence

As discussed earlier, the executive may use the doctrine of *contrarius actus* to circumvent its duty of non-interference with the operation of the JSC or CSM. One manifestation of a breach of judicial independence is through abuse of appointment or revocation powers, even when applicable regulations exclude the executive from the oversight body. The decision made by the ACmHPR in *José Alidor Kabambi Beya Ushiye and 35 Others v DRC* (*Kabambi*) provides an engaging instance to debate this question.[59] The matter arose from the removal by presidential decrees of 96 judges, including the 36 complainants. The decrees were issued without the judges being heard by the competent body, the Disciplinary Committee of the CSM. Besides, the decision to dismiss was not made after a proposal of the CSM, as prescribed by the DRC Constitution, the Judges Act and the CSM Act, and the dismissal was based on a ruling of the Supreme Court finding the complainants guilty of bias subsequent to a trial prompted by the Minister of Justice.[60] According to the complainants, the bias trial, being a civil suit, could not lead to a criminal ruling that could have justified the dismissal. It is therefore not surprising that, arguably, in a bid to cover the wrong, the cabinet tabled before parliament a bill seeking to make the bias trial a criminal proceeding.[61]

Prior to setting out the issues arising, the ACmHPR recalled the criteria for assessing judicial independence under article 26 of the Charter in light of its previous decisions. The ACmHPR restated the criteria as being: i) pressure or interference mainly from the executive, ii) security of tenure, and iii) the role of the executive in the operation of the oversight body.[62] In a notable departure from its case law, the ACmHPR expounded on the role of the executive in the functioning of the judiciary as one of ensuring the smooth running of the judicial service. Such a role, it stated, requires that the executive performs certain functions, including the appointment of judges, which cannot be viewed or used as a means of interference with the performance of judicial functions. Guarantees that come into play to ensure this separation of functions are known to be: i) predetermined rules for disciplinary procedures in cases of removal, ii) immovability, and iii) consultation prior to appointment or transfer.[63] The ACmHPR consequently found that, in *Kabambi*, judicial independence was breached mainly on the ground that the dismissal decrees were issued by the executive without the request of the CSM.[64]

It appears that the ACmHPR rejected the respondent's argument that, by parallelism of forms, appointment powers vested the executive with the unilateral prerogative of dismissal. It must be noted that, prior to *Kabambi*, the DRC had amended its Constitution to restrict direct executive involvement in the operation of the CSM while retaining nomination and dismissal powers subject to certain requirements. The dismissal decrees therefore constituted an attempt to circumvent the constitutional reform.[65]

The *Kabambi* decision warrants some observations. The measure directed at the respondent state mirrors the orders in the *Ajavon* judgment. The Commission recommended that the DRC should "take all legislative or other measures to guarantee judicial independence".[66] This measure might be understandable in the context of *Kabambi*, given that under municipal law, the executive had already been removed from the operation of the CSM, unlike in *Ajavon*. Therefore, it might have been more purposive to direct that independence be guaranteed in accordance with domestic law and articles 7 and 26 of the Charter. Be that as it may be, *Kabambi* fails the doctrine of a systematic

59 Communication 408/11, 40th Activity Report, 2016.
60 Id, paras 1–8.
61 Id, para 8.
62 Id, paras 81–82.
63 Id, paras 84–85.
64 Id, para 86.
65 See SH Adjolohoun "The making and remaking of national constitutions in African regional courts" (2018) 1 *Africa Journal of Comparative Constitutional Law* 35 at 56–57.
66 Communication 408/11, above at note 59, para 115(v).

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causal link between executive presence on the CSM and interference or dependence, as suggested in *Ajavon*. In the former instance, the executive still (ab)used formalistic appointment powers to tamper with judicial independence in bypassing the CSM. Analogy would allow a reference to *Gerald Karuhanga v Attorney General* (*Karuhanga*), where the Constitutional Court of Uganda found the president's decision to appoint a retired Chief Justice to succeed himself, in disregard of the recommendation of the JSC, to be in violation of the Constitution.[67] *Karuhanga* offers a counter-scenario to the executive presence doctrine, as Uganda adopts the common law regime to the operation of the JSC by which the president of the republic is confined to the formal role of rubber-stamping processes of the oversight body, including appointment and dismissal. Again, as earlier discussed, the executive-free model of oversight may not prove of absolute relevance in context, considering the DRC *Kabambi* illustration.

It is worth restating that *Kabambi* occurred in a civil law jurisdiction where reforms had been conducted towards the fully executive-free model applied in common law Africa.[68] A comparison within the same French-speaking sphere shows that the Senegalese CSM is overwhelmingly composed of judicial officers elected by their peers,[69] while Ivory Coast adopts a mixed model excluding executive membership.[70] As alluded to in the introduction to this article, Kenya and Malawi have faced similar challenges as in *Kabambi*, despite having JSCs which exclude executive membership.

Appraising appointments to civil law constitutional courts

Determination of independence yielded from the oversight body should be multifold

Recent developments in the case law of the ACtHPR corroborate a trend of judicial protection of the rule of law and judicial independence in regional forums. In *Ajavon*, the Court found that the discretionary powers of the president of the republic to appoint constitutional court judges are not consonant with the duty to guarantee their independence as prescribed under article 26 of the African Charter. According to the applicant, the Constitutional Court was not independent, as its sitting president was the personal lawyer and adviser to the president of the republic for 15 years, presided over the court's proceedings that found the Strike Bill constitutional after holding public views on the right to strike while he was Minister of Justice and Legislation, and participated actively in the drafting and tabling of the Strike and Penal Code Bills.[71] The respondent state rebutted these submissions by asserting that independence should be assessed against statutory and appointment criteria; that there should be a distinction between the personal views of a judge and whether the statutory framework provided sufficient guarantees of independence; and that the Constitutional Court is a collegial body whose partiality has not been proven.[72]

In determining this issue, in the same judgment in which it ruled on the CSM, the ACtHPR set out a broader range of factors for assessing judicial independence. In respect of the institutional aspect, these include a lack of external unjustified interference, a lack of relationship between the executive and legislature, exclusive judicial competence, administrative functional independence and adequate resources for an effective operation. From an individual's perspective, the court singled out the appointment scheme, security of tenure (in particular, transparent criteria for

67 [2014] UGGC 13.

68 Pursuant to art 152(2) of the 2006 Constitution of the DRC, the CSM is headed by the president of the Constitutional Court and is composed of 18 members, all judicial officers, representing the heads of upper and lower ordinary and military courts and state prosecution.

69 The 19 members of the CSM include only the president of the republic and the Minister of Justice, who are, however, the chair and vice-chair of the Commission. See arts 1, 2 and 3 of Loi organique n° 2017-11 du 17 janvier 2017 portant organisation et fonctionnement du Conseil supérieur de la Magistrature.

70 The Ivorian CSM is headed by a senior judicial officer appointed by the president of the republic, and is largely composed of judicial officers. See art 145 of the 2016 Constitution.

71 *Ajavon*, above at note 49, paras 267–69.

72 Id, paras 270–73.

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selection, appointment and duration of term), adequate guarantees against external pressure, and immovability, namely at the discretion of the executive.[73]

In assessing the above criteria, the ACtHPR found that the Constitutional Court met the institutional standards of independence as "in countries of Francophone tradition, located out of the judiciary branch", the Constitution and Organic Law on the Court includes provisions that guarantee the court's administrative and financial autonomy.[74] The ACtHPR stressed that "neither the Constitution nor the Organic Law provides that the Constitutional Court can be subjected to direct or indirect interferences or is subordinated to one or more authorities in discharging its jurisdictional mandate".[75] The ACtHPR consequently concluded that the independence of the Constitutional Court is guaranteed.[76] Conversely, with respect to the individual aspect of independence, the ACtHPR preliminarily found that such independence is secured given that the Constitution provides for the immovability of judges of the Constitutional Court, guarantees them immunity from unjustified prosecution and sets out predetermined professional qualification and deontology requirements for appointees.[77] The ACtHPR concluded, however, that the same cannot be said of security of tenure, especially regarding the renewable term in office of the judges, four of whom are appointed by the Bureau of the National Assembly and three by the president of the republic for a five-year term which is renewable once.[78] It found that independence was breached within the meaning of article 26 of the Charter because the criteria for renewal of terms were not provided for in the law; the executive and legislature retain discretionary appointment powers; and the president of the republic can initiative review before the Constitutional Court.[79] Most emphatically, the ACtHPR held that the "renewable nature of the terms of Judges of the Constitutional Court is such that it can weaken their independence in particular for Judges who seek reappointment. In this respect, it is important to note that perception [of independence] is as important as the actual independence of the judiciary."[80] The Court thus concluded that the renewal of term does not guarantee independence.[81]

The *Ajavon* ruling can be hailed for its greater elaboration in the reasoning on independence criteria and method of assessment, as compared to the determination on independence in light of the operation of the CSM in the same case. Having said that, as a standard setter on judicial independence at the regional level, the determination on such independence in respect of the operation of the Constitutional Court might have required a more contextualized approach to adjudication. A first point to make in this respect is that the appointment of a Constitutional Court judge does not raise an issue of the independence of the judiciary as strictly as does the operation of the CSM. One factor to consider might be that the Benin Constitutional Court judges are appointed for only two five-year terms, while their counterparts in the ordinary judicial system, ie the lower courts and the Supreme Court, are appointed once and cease their functions only upon the age of retirement. Furthermore, the latter are career judicial officers to whom security of tenure and other office guarantees are more relevant than they are for the Constitutional Court judges.

A subsequent issue of interest is whether the individual versus system questions of judicial independence under article 26 of the Charter might have affected evidencing and purposive law-making in the determination of this matter. As earlier proffered, the Charter should be read as providing access to an independent and impartial judiciary as an individual subjective right under article 7

73 Id, paras 276–80.
74 Id, paras 281–82.
75 Id, para 283.
76 Id, para 284.
77 Id, para 286.
78 Id, paras 285–87.
79 Id, para 287.
80 Id, para 288.
81 Id, para 289.

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(1)(d) while prescribing judicial independence as a directive principle of state policy under article 26. As a matter of fact, under article 26, judicial independence is framed as a duty and not the subjective right guaranteed under article 7(1)(d). The crux of the argument is that an individual averment of breach of judicial independence under article 26 would face the evidentiary hurdle of establishing the necessary causal link between the victim and the reprehensible act or breach. A claim of and adjudication on a breach of judicial independence would therefore have a firmer foundation in a joint application of both the abovementioned provisions of the Charter, with article 7(1)(d) taking the lead. It may not be an exaggeration to say that the linking parameter might not have fully emerged in the *Ajavon* determination.

Testament to the missing parameter is found not far away within the *Ajavon* judgment where the ACtHPR examined judicial independence from the personal standpoint. The ACtHPR found that judicial independence was not breached, as the applicant failed to prove that the whole Constitutional Court bench was influenced by its president while reviewing certain bills which the applicant claimed affected his rights.[82] As per the facts of the case, prior to sitting on the Constitutional Court, its president had, as Minister of Justice, defended the same bills at public events and before parliament, which the applicant alleged constituted bias.[83] Notably, the ACtHPR found "of great concern and emblematic of a disregard to principles of good administration of justice" the attitude of the president of the Constitutional Court, who did not recuse himself after he had played an active role and aired public views about matters on which the latter court adjudicated after he became president.[84]

Ultimately, going by the overall ruling on judicial independence, it would appear that the ACtHPR considered that the systemic parameter of the renewable nature of the term of judges superseded the specific parameter of evidenced perception of bias of the president. Would it then be considered that the impartiality or independence of a judge would be more contingent on the mere fact that his or her term could potentially be renewed by the same authority that held discretionary and exclusive prerogative to make the initial appointment? Another factor worthy of interest is that in civil law Africa, where the executive's obsession with their majority in parliament is a main feature of constitutional democracies, the appointment of constitutional court judges in almost equal shares by the president of the republic and the Bureau of the National Assembly – in some cases by the Speaker or the National Assembly – ultimately results in an exclusive, controlled executive designation. The argument is that, in light of the perception-centred approach taken by the ACtHPR towards breaches of independence, adjudication could have been more context-oriented by checking the weight of the renewable terms against the many other factors, such as direct initial appointment, budget allocation and dispatching, and deliberation by consensus and lack of dissenting opinion, which are all applicable in the case of the Constitutional Court of Benin.

In this discussion, it is relevant to seek comparative guidance from another judgment of the ACtHPR, in *Alfred Agbesi Woyome v Ghana* (*Woyome*).[85] In this case, the court held that comments made by a single Supreme Court judge, in his concurring opinion to the ruling of the Ordinary Bench composed of eight judges, were not sufficient to conclude a violation of the right to be heard by an impartial court.[86] The ACtHPR further found that the applicant failed to prove how these remarks subsequently tainted the ruling of the 11-judge Review Bench of the Supreme Court in the same matter.[87] It is notable that, in arriving at this conclusion, the ACtHPR agreed that the statements made were "regrettable and beyond appropriate judicial

82 Id, para 299.
83 Id, para 295.
84 Id, para 297.
85 *Alfred Agbesi Woyome v Ghana* (merits and reparations) [2019] 3 AfCLR 235.
86 Id, paras 124–32.
87 Id, para 131.

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comments",[88] yet it did not consider them as determinant: i) to the role of the concerned judge in the Ordinary Bench proceedings, ii) to the fact that the matter was still pending before the Supreme Court and that he drafted the lead judgment of the Review Bench, iii) to the fact that the impugned statements in the concurring opinion did not aim at expressing the legal position of the judge but rather were factual and subjective about the applicant, and finally iv) to the fact that the key to impartiality determination is perception or reasonable doubt. The dissenting opinions of Justices Niyungeko and Ben Achour unequivocally suggest that the majority could have conducted a better context-oriented impartiality test.

It could also be said that *Ajavon* is a context-blind *stare decisis* (sticking to precedent) of *Woyome*. Judicial independence as prescribed under article 26 of the Charter might equally fall within the political question doctrine. Is judicial independence a legal quandary or rather a political or policy one? Can the law ever adequately frame winning modalities to guarantee such independence? Authors suggest that whatever rules are set, independence is unrealistic when the judges involved lack personal character and technical competence. Recourse has been made to sociology, psychology or even idiosyncrasy to determine the independence of judges or courts.[89] Voices from within courts have advanced the extremes of life terms or longest non-renewable terms as the most effective guarantee of judicial independence.[90] Doctrinal views have, however, equally shown that such judges might also expect subsequent appointment in government or state parastatals or even private companies.[91] Similarly, independence has been solely interrogated from the standpoint of which judges are involved. As Melton and Ginsburg have rightly argued, "[a] local court may be quite independent of local government but beholden to senior judges who control promotions", "[a] supreme court might be subject to no political influence or pressure yet be so ideologically in line with government that it never rules against it in salient cases", and "[t]he supreme court may be independent but local courts corrupt".[92]

In the wake of these considerations, the *Ajavon* ruling should have perhaps tightened up the independence feature by appreciating the very sui generis nature and history of the origins of constitutional courts, especially in light of the nature of their mandate,[93] and the centralized constitutional adjudication in civil law jurisdictions[94] – factors that inform the political nature of the appointment of judges, instead of election or recruitment as applies to judges of ordinary courts in the same jurisdictions, but also the term- instead of career-based appointment.[95] The discomfort in addressing a systemic issue governed by article 26 of the Charter through an individualized litigation that should have come under the purview of article 7(1)(d) is more perceptible in the operative declarations. After concluding on the systemic question of the initial and subsequent appointments of constitutional courts that applies to civil law Africa at large, the ACtHPR in the operative section ordered that the respondent state should "take appropriate measures that guarantee such independence". The measure does not necessarily speak to the individual situation of the

88 Id, para 129.

89 See generally CM Oldfather "Judges as humans: Interdisciplinary research and the problems of institutional design" (2007) 36 *Hofstra Law Review* 125; B Pokol *A Sociology of Constitutional Adjudication* (2015, Schenk Verlag).

90 G Tusseau *Contentieux constitutionnel comparé: une introduction critique au droit processuel constitutionnel* (2021, Librairie Générale de Droit et de Jurisprudence) at 553–59.

91 Ibid.

92 J Melton and T Ginsburg "Does de jure judicial independence really matter? A reevaluation of explanations for judicial independence" (Fall 2014) 2/2 *Journal of Law and Courts* 187 at 190–91.

93 See generally M Böckenförde et al (eds) *Les juridictions constitutionnelles en Afrique de l'Ouest: analyse comparée* (2016, Institut pour la Démocratie et l'Assistance Electorale); AS Ould Bouboutt "Les juridictions constitutionnelles en Afrique: évolutions et enjeux" (1997) 13 *Annuaire International de Justice Constitutionnelle* 31.

94 See generally P Massina "Le juge constitutionnel africain francophone: entre politique et droit" (2017) 3 *Revue Française de Droit Constitutionnel* 641; M Diakhate "Les ambiguïtés de la juridiction constitutionnelle dans les états de l'Afrique noire francophone" (2015) 3 *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 785.

95 Tusseau, *Contentieux constitutionnel*, above at note 90.

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application, given the above arguments. Furthermore, given the systemic nature of the issue, more specific measures that take into account the multifold legal and historical context might have served a greater regional-interest adjudication.[96]

Separation of powers demands contextualization in determining interference

It can only be a reinforcing argument to put into jurisprudential perspective the exclusive approach to appointment as decisive for control and dependence. This could be relevantly done by taking a leaf from the EACJ, which is arguably the leading rule-of-law regional adjudicator in Africa.[97] The following illustration is based on the largely agreed link between the rule of law and judicial independence. Reliance on the EACJ's decision in *Simon Peter Ochieng and Another v Uganda* (*Ochieng*) seeks to show how the appointment factor can prove limiting when observed in common law jurisdictions, which are seen as applying the greatest severance of executive interference in appointment processes. *Ochieng* was concerned mainly with whether the alleged refusal of the president to appoint judges of the Supreme Court, the Court of Appeal and the High Court of Uganda violated the rule of law and good governance as prescribed in EAC law. Although the EACJ did not make an operative finding on this specific issue, it took the view "by passing" that the decision to increase the number of High Court judges only upon a recommendation of parliament and not by statute violated the law that Uganda set itself and must obey.[98]

However, when it considered the actual issue agreed among the parties as arising from the case, the EACJ took a very flexible approach to the rule of law and the separation of powers. The court posited that although the executive cannot make rules to negate statutory obligations, such a principle is tempered by executive prerogative to formulate regulations to effect a smooth functioning of the central administrative structure.[99] In fact, the issue hinged on the practice of certificates of financial implication, with respect to which the court found that there is no utility for the executive to effect judicial appointments and then fail to provide the funds required for such appointments.[100] In the court's view, the practice of certificates is an exception to the rule of law.[101]

In response to the applicant's submission that, by not acting within the recommendations of the Judicial Service Commission as ordered by the Constitutional Court of Uganda in *Karuhanga*, the executive failed to observe separation of powers, the EACJ similarly disfavoured an absolutist approach. It found that "the interdependence of each branch of government for the internal functioning of the State does not negate the doctrine of separation of powers but is, on the contrary, important for the manifestation of the rule of law".[102] The following excerpts of the EACJ's judgment are worth replicating for ease of analysis:

> "In our considered view, the question that must occupy a constitutional lawyer (and by extension a constitutional court) is whether and to what extent such a separation actually exists in any given constitution. A purposive interpretation that obliterates the possibility of absurdity is of paramount importance. This position is in part informed by the existence of a school of

96 Application no 010/2020, judgment of 27 November 2020 (merits and reparations).

97 As opposed to other courts in the region, the EACJ's jurisdiction expressly extends, among other things, to enforcing the rule of law as a fundamental community principle under arts 6(d) and 7(2) of the EAC Treaty. A significant number of the EACJ's rulings involve failure of member states to abide by the rule of law; this is not the case in other similar courts which deal occasionally and only implicitly with rule of law-related questions. On the jurisdiction of the EACJ and its relevant case law, see generally A Possi "Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice" (2015) 15 *African Human Rights Law Journal* 192.

98 See *Simon Peter Ochieng and Another v Attorney General of Uganda* Reference no 11 of 2013 [55].

99 Id, para 56.

100 Id, para 59.

101 Id, para 60.

102 Id, para 63.

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thought that defines the Executive branch of government to include all state or public officials who are neither legislators nor judges. By implication this would extend to the composition of a Judicial Service Commission such as that in Uganda, which performs a public function."[103]

As alluded to earlier, *Ochieng* in the EACJ had a domestic counterpart. In *Karuhanga*, the Constitutional Court of Uganda was called to decide whether the appointment by the president of a retired Chief Justice to succeed himself was consistent with the relevant provisions of the Constitution. The court found that a Chief Justice who has vacated office by reason of having attained the mandatory age of retirement is not eligible for reappointment because such an appointment violates the relevant provisions of the Constitution. The court's finding was also rooted in the refusal of the president to consider the recommendation of the Judicial Service Commission.[104] Having the *Ajavon* standards in mind, *Ochieng* shows that the appointment factor is only a minimal investigative tool in apprehending the much broader independence quandary. This factor therefore requires thorough and multifold contextualization for enlightened determination.

The need for a nexus and contextualization in assessing the presence of non-judicial branches of government is confirmed by the ECCJ in *Jérôme Bougouma and Others v Burkina Faso* involving the composition of the Haute Cour de justice, which is a special court largely adopted in civil law Africa with jurisdiction to try the president and ministers for certain predetermined offences, including treason.[105] The ECCJ held that the mixed membership of the Haute Cour, composed of judicial officers and members of parliament, as well as budgetary allocation subsidiary to that of parliament, cannot be said to violate separation of powers and judicial independence for lack of direct instructions from the appointment authority.[106] As the ECCJ also held in *Sawadogo Paul and Others v Burkina Faso*, the fact that the investigating trial judge of the military tribunal was a senior military officer and the Minister of Defence set the prosecution in motion does not suffice to establish dependence.[107] The court buttressed that the prosecution order is not a judicial order, and appointment of members of the judiciary by executive does not automatically suggest interference because courts are subject only to the authority of the law.[108] An active nexus was further stressed when the ECCJ held in *Counsellor Muhammad Kabine Ja'neh v Liberia and Another* that the applicant, a Supreme Court judge who underwent impeachment proceedings before the Senate, did not prove that the Chief Justice presiding over the trial was biased.[109] As the ECCJ found, the Chief Justice was a single judicial officer who ensured abidance with the law, while other members were senators and triers of facts; his previous judicial roles in respect of the case had negligible bearing on the Senate proceedings; and the applicant failed to raise legitimate doubt in the observer's mind in respect of the Chief Justice's previous roles.[110]

Attempts to prevent enforcement of court orders negate justice

Circumstances where the executive undertakes to stand in the way of court orders also constitute a breach of judicial independence. Court orders ought to be obeyed by all, including government, for the sake of the rule of law. There lies the principle that the EACJ was called to uphold in the well-publicized *James Katabazi and Others v Uganda* (*Katabazi*), where it held that the intervention of state-armed agents who surrounded the High Court premises to prevent the issuance of bail

103 Id, para 66.
104 See *Karuhanga*, above at note 67.
105 ECW/CCJ/JUD/08/18, judgment of 19 February 2018.
106 Id, 4–6.
107 ECW/CCJ/JUD/07/20, judgment of 24 June 2020.
108 Id, paras 49–57.
109 ECW/CCJ/JUD/28/20, judgment of 10 November 2020.
110 Id, paras 130 and 137.

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documents and the release of the applicants constituted a violation of the rule of law.[111] While the matter did not involve a direct attack on judges or courts, it is well admitted that the rule of law is critical to judicial independence. Therefore, in instances where the outcome of court processes encounters hurdles to enforcement, the public develops distrust in the justice system and judicial independence is frustrated. Arguably, active or passive acts of the executive to prevent implementation of court orders obviously constitute interference from outside the judiciary and therefore impact on judicial independence.

In *Katabazi*, the originating events occurred in 2004, when the applicants were charged with treason and misprision of treason and consequently remanded in custody. However, on 16 November 2006, the High Court granted bail to 14 of them. Immediately thereafter the High Court was surrounded by security personnel, who interfered with the preparation of bail documents; the 14 were rearrested and taken back to jail. On 24 November 2006, all the claimants were taken before a general court martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All claimants were again remanded in prison by the general court martial. The Uganda Law Society went to the Constitutional Court of Uganda challenging the interference in the court process by the security personnel and also the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Constitutional Court ruled that the interference was unconstitutional. Despite that decision, the complainants were not released, which led to the application before the EACJ.

Again, while the main issue before the EACJ was not directly whether the acts complained of violated the principle of judicial independence, the rule of law involves separation of powers, hence interference is proscribed. The EACJ's finding should therefore be read through a determination of the rule of law as a channel to the realization of respect for the powers vested in the judiciary to administer justice without interference, namely from the executive. It is of interest to note that, in arriving at its finding in *Katabazi*, the EACJ employed jurisprudential dialogue as it leant significantly on the views of the ACmHPR in *Constitutional Rights Project and Civil Liberties v Nigeria*, which stated that government refusal to release the victim despite an order of the Court of Appeal constitutes a violation of article 26 of the African Charter, which obliges states to guarantee the independence of the judiciary.[112] By leaning on such an approach to judicial independence as grounded in the rule of law, it is not surprising that the EACJ concluded that preventing the release of Katabazi and others as ordered by the courts of law was in breach of the EAC Treaty. The regional court stressed that "abiding by the court decision is the cornerstone of the independence of the judiciary which is one of the principles of the observation of the rule of law".[113]

Conclusion

This article undertakes a critical assessment of the extent to which Africa's most active regional courts have been guarding the rule of law by protecting the independence of their national counterparts in a context of fragile democracies and hyper-presidentialism. The analysis reveals with certainty that, based on the existing legal framework and mandate granted to them, the regional courts examined have undoubtedly begun to build harbours in support of the independence of national judiciaries. A question for further investigation is whether these efforts can nurture hope for the formation of the much-debated advent of an international rule of law in Africa.

As alluded to, this regional activism in favour of judicial independence has implications. Firstly, it is relevant to bear in mind that judicial independence can be adequately comprehended in the

111 *James Katabazi and 21 Others v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda*, Reference no 01/2007, EALS Law Digest 29.

112 [2000] AHRLR 235 (ACHPR 1999) Communication 143/95; 150/96, para 30.

113 *Katabazi*, above at note 111, para 57.

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light of the judicial history and legal systems adopted in the continent. Issues pertaining to executive appointment and presence on oversight bodies exemplify such a need. Secondly, recent developments should not be overlooked, such as the shortcomings of reforms in Ivory Coast, DRC and Senegal aimed at expunging executive presence or interference. Thirdly, while it indisputably strengthens judicial independence in Africa, regional jurisprudence should seek to factor in differences between common law and civil law spheres more adequately. The aim is to avoid eroding the understanding and observance of judicial independence while trying to enforce it.

Further observations arise from the analysis. Critical erosions of judicial independence cannot be discussed without considering the global trend towards some kind of "democracy crisis". The outcome of adjudication on judicial independence in Africa should therefore serve as a foundation for regional intergovernmental organizations, such as the African Union, ECOWAS, EAC and SADC, to contextualize the debate on their top-down approach to constitutional democracy. There may be a need for convergence, full or partial, given that the current trend of enforcement is simultaneously continental and sub-regional. One ancillary question is whether guaranteeing judicial independence from above will prove effective with municipal systems that are prone to alarming regression regarding most tenets of constitutional democracy. It would seem that, for regional independence harbours to be effective, minimum vetting improvements are needed within national justice systems.

Institutional implications and structural impact should also be considered. Regionalization of judicial independence surely comes with issues of relationship, dialogue and coordination between regional courts and their national counterparts. As regional courts already face the challenge of state-led resistance, it is critical that efforts to strengthen judicial independence are preserved by ensuring a vertical judicial dialogue free from unnecessary antagonism.[114]

Competing interests. The author is Ag Head of Legal Division and Principal Legal Officer at the African Court on Human and Peoples' Rights. The views expressed in this article are exclusively those of the author and do not in any manner represent the views of the African Court on Human and Peoples' Rights.

114 See generally M Wiebush et al "Backlash against international courts: Explaining the forms and patterns of resistance to international courts" (2018) 14 *International Journal of Law in Context* 197; X Soley and S Steininger "Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights" (2018) 14 *International Journal of Law in Context* 237; and SH Adjolohoun "A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights" (2020) 20 *African Human Rights Law Journal* 1.

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