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Leveraging constitutional review to combat retrogressive communication surveillance laws in Francophone Africa

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Summary: *An important feature of the revival of constitutionalism in Francophone African countries has been the establishment of constitutional courts with the power to review the constitutionality of laws and other norms before they are enacted or implemented. Constitutional review was intended not only to ensure the balance between the three traditional powers but also to protect hard-won constitutional rights and freedoms, particularly in countries where the pre-1990 judicial system was used to undermine individual rights and freedoms. With the growing interest in digital technologies and space as new platforms for democratic expression, several Francophone African states have devised new laws and mechanisms to stifle online and offline expression. While the adoption of these laws may be justified by the need to protect the government's legitimate purposes, they are mostly intrusive and*

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unlawful under constitutional and international human rights law. The question then arises as to whether constitutional review in French-speaking African countries is well equipped to prevent the enactment and implementation of retrogressive communications surveillance laws and, if so, whether it has been used successfully to that end. The article starts by providing an overview of communication surveillance legal norms in Francophone Africa before confronting them with emerging constitutional and international human rights standards. It then examines the potential for constitutional review to prevent the enactment or implementation of regressive communication surveillance acts and actions before it assesses the potential for mobilising against such laws through constitutional review. The article concludes by arguing that while constitutional review is well equipped to prevent the enactment of retrogressive communications surveillance laws, it has not been effectively used by judges and civil society groups in Francophone Africa. The judicial activism and culture of constitutional litigation that is commonplace in many English-speaking jurisdictions can be emulated to stop the descent into digital authoritarianism.

Key words: *communication surveillance; constitutional review; constitutional court; decentralised review; constitutional culture*

1 Introduction

Constitutional review and the creation of constitutional jurisdictions are some of the neoliberal hallmarks of the constitutional transformation Francophone African countries underwent following the post-1990s constitutional revival.[1] The main purpose of this constitutional 'revolution' was to guarantee the supremacy of the constitution, as the supreme law of the land, against attempts at circumventing its normative standards when laws and other legal acts inimical to constitutional standards are adopted.[2] These standards are diverse in form and scope but aim to achieve the ideal of constitutionalism, namely, the necessity that political and administrative powers should be exercised within the confines of the

1 TM Makunya *Between legal traditions and transformation: Constitutional interpretation of fundamental rights by the Constitutional Courts of Benin, the Democratic Republic of Congo, and South Africa* (forthcoming 2025) (see ch 2 in particular); HK Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 469. In this chapter, the concept 'Francophone African countries' is used to cover the legal systems of African French-speaking countries. It is not limited to former French colonies.

2 JK Sindani 'Improving constitutional adjudication in Francophone Africa through human rights treaties and case law: The Benin Constitutional Court' (2025) 69 *Journal of African Law* 2.

constitution and that the constitution must limit powers.[3] Lest we nurture 'constitutions without constitutionalism',[4] basic elements of constitutionalism must be entrenched in constitutions and observed in practice to 'tame executive authoritarianism'.[5] Constitutional jurisdictions in Francophone Africa are growing in number[6] and constitutional review, understood as the process by which courts evaluate the constitutionality of laws, is becoming a geopolitical tool,[7] the more so in multiracial and politically divided countries where the law (constitutional adjudication in this case) is increasingly being relied upon by racial and political minorities to generate socio-political transformation that they could otherwise not obtain through regular democratic channels.[8] The recent trends in West Africa also show the (mis)use of constitutional courts by military regimes to legitimise their military takeover of power when facing international discontent from regional and sub-regional organisations to hand over power to a civilian leadership.[9]

3 TM Makunya 'The nexus between constitutionalism, peace and security in the law and practice of the African Union' (2022) 25 *Recht in Afrika – Law in Africa – Droit en Afrique* 53, 57.

4 H Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African political paradox' in D Greenberg and others (eds) *Constitutionalism and democracy: Transitions in the contemporary world: The American Council of Learned Societies Comparative Constitutionalism Papers* (1993) 65-80.

5 CM Fombad 'Taming executive authoritarianism in Africa: Some reflections on current trends in horizontal and vertical accountability' (2020) 12 *Hague Journal on the Rule of Law* 63.

6 As of September 2025, the following 31 constitutional jurisdictions are members of the Association of Constitutional Courts with French as a Shared Language (ACCPUF): Constitutional Tribunal of Angola; Constitutional Court of Benin; Constitutional Council of Burkina Faso; Constitutional Court of Burundi; Constitutional Council of Cameroon; Constitutional Tribunal of Cape Verde; Supreme Court of the Comoros; Constitutional Court of the Congo; Constitutional Council of Côte d'Ivoire; Constitutional Council of Djibouti; Supreme Constitutional Court of Egypt; Constitutional Court of Gabon; Supreme Court of Guinea; Supreme Court of Justice of Guinea-Bissau; Constitutional Tribunal of Equatorial Guinea; High Constitutional Court of Madagascar; Constitutional Court of Mali; Constitutional Court of Algeria; Constitutional Court of Morocco; Supreme Court of Mauritius; Constitutional Council of Mauritania; Constitutional Council of Mozambique; Constitutional Court of Niger; Constitutional Court of the Central African Republic; Constitutional Court of the Democratic Republic of the Congo; Supreme Court of Rwanda; Constitutional Council of Senegal; Supreme Court of the Seychelles; Constitutional Council of Chad; Constitutional Court of Togo; Provisional Authority for the Review of the Constitutionality of Draft Legislation of Tunisia. See 'Nos cours members: Les cours constitutionnelles et institutions équivalentes membres', https://accf-francophonie.org/cours-membres/ (accessed 10 September 2025).

7 B Kanté 'La justice constitutionnelle face à l'épreuve de la transition démocratique' in O Narey (ed) *La justice constitutionnelle: Actes du colloque international de l'ANDC* (2016) 31.

8 N Ramalekana & JA Mavedzenge 'Courts as forum for safeguarding the right of opposition parties to participate in democratic processes: A comparative analysis of South Africa and Zimbabwe' (2024) 4 *World Comparative Law* 533-559; M le Roux & D Davis *Lawfare: Judging politics in South Africa* (2019); N Ally & L Boonzaier (eds) *Edwin Cameron: Influence and impact* (2025).

9 TM Makunya and others 'Selected developments in human rights and democratisation in Africa during 2020' (2021) *Global Campus Human Rights Journal* 188-189.

Despite the diversity of constitutional norms across Africa, constitutional adjudication of fundamental rights and freedoms has gained traction over the past three decades or so.[10] Regardless of this diversity, in several African countries, constitutional review and human rights have been instrumental in preventing retrogressive bills from being assented into law or repealing legislation that could curtail the prospect for a culture of constitutionalism to prevail on the African continent.[11] Owing to the emerging importance and indispensability of the internet and new communication and information technologies[12] and considering efforts by several Francophone African countries to adopt communication surveillance laws, the question arises as to whether and how constitutional review can be leveraged to prevent the enactment or implementation of these laws and measures. Expressed differently, is constitutional review a tool that can be used against communication surveillance laws which restrict the civic space and stifle political debates in Francophone African countries? If constitutional review aims to safeguard the supremacy of the constitution, has it been used to address retrogressive communication surveillance laws, understood here as those surveillance laws and measures that fail to meet the test of constitutionality?

Understanding the relevance of these questions requires some contextual information on how communication surveillance has recently been used in selected Francophone African countries to undermine citizen mobilisation against undemocratic projects. In Togo[13] political opposition parties claimed that their phones had been tapped and controlled using the Pegasus spyware.[14] Similarly, Moroccan authorities used the infamous Pegasus software to target human rights defenders and an academic and independent journalist

10 J Mavedzenge 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years' (2020) 20 *African Human Rights Law Journal* 181.

11 EN Youmbi *La justice constitutionnelle au Bénin: Logiques politique et sociale* (2016).

12 See generally MA Simiyu 'Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat' (2022) 22 *African Human Rights Law Journal* 76-107.

13 TV5 Monde 'Togo: Des opposants mis sous surveillance par le logiciel Pegasus' 4 August 2020, https://afrique.tv5monde.com/information/togo-des-opposants-mis-sous-surveillance-par-le-logiciel-pegasus (accessed 29 December 2022).

14 Pegasus is a sophisticated software programme sold to the states by an Israeli company called NSO Group. With a simple click on an innocuous message, the software installs itself invisibly in the phone. Pegasus then takes control of the data, messages and the camera or microphone of the phone. See J Cheminat 'Comment fonctionne le logiciel Pegasus' 21 July 2021, https://www.lemondeinformatique.fr/actualites/lire-comment-fonctionne-le-logiciel-espion-pegasus-83665.html (accessed 28 December 2022).

for their activities.[15] In Rwanda, Pegasus software was used by Rwandan authorities to spy on the daughter of an opposition leader.[16] Early in 2012, it was recorded that the government produced emails, phone calls and text messages from opposition activists in court as evidence in Rwanda to the complete surprise of their authors.[17] In the Democratic Republic of the Congo (DRC), following mass protests in 2015 against constitutional change, three political opposition members of parliament reported that their phone numbers had been blocked for more than four months.[18] Similar experiences can be found throughout Africa.[19]

To provide a general illustration of how litigants and other interested parties can use constitutional review to combat retrograde communications surveillance laws and actions, the analysis covers 11 countries: Algeria, Burundi, Chad, Congo (Republic of), DRC, Morocco, Niger, Rwanda, Senegal, Togo and Tunisia. These countries, apart from having constitutional jurisdictions in place, are selected for they have enacted communication surveillance laws that can potentially affect the exercise of human rights. Given that constitutional review in French-speaking African countries has been largely influenced by the French model of constitutional review, we hope that the comparative results obtained by studying the effectiveness of constitutional review in dealing with communications surveillance laws in selected countries can be applied, with slight adjustments, to countries sharing similar constitutional review systems. The article adopts an analytical approach to exploring how constitutional control can be used against retrogressive communication surveillance laws, a doctrinal-positivistic review of constitutions and communication surveillance or criminal laws and a comparative approach to constitutional adjudication in Africa.

In the next part we review the nature, content and scope of communication regulations where we briefly unpack the meaning of communication surveillance before providing examples of laws that facilitate communication surveillance. The part ends with an examination of whether these laws are consistent with international

15 Amnesty International *State of the world's human rights report (*2020/21) 63.
16 Amnesty International *La partie immergée de l'iceberg la responsabilité des états et du secteur privé dans la crise de la surveillance numérique* (2021) 16.
17 Freedom House *Rwanda Freedom on the net* (2013) 11.
18 E Wemba 'Téléphones bouchés : Vuemba, Babala et Diongo exigent une commission d'enquête parlementaire' 25 February 2015, https://7sur7.cd/telephones-bouches-vuemba-babala-et-diongo-exigent-une-commission-denquete-parlementaire (accessed 30 December 2022).
19 See details in T Ilori 'Rethinking policy interventions on communications surveillance in Africa – Windhoek Declaration 30th Anniversary', https://whk30.misa.org/rethinking-policy-interventions-on-communications-surveillance-in-africa/ (accessed 10 September 2025).

law and whether they are consistent with constitutional (digital) rights.[20] Part 3 examines the potential role of constitutional review in curbing retrogressive communication surveillance, while part 4 identifies possible ways in which mobilisations against communication surveillance laws can be rendered effective. In conclusion, we argue that while constitutional review is well equipped to prevent the enactment of retrogressive communication surveillance laws, it has not been effectively used both by judges and civil society groups to prevent the enactment of such laws. The judicial activism and culture of constitutional litigation that is commonplace in many common law African countries can be emulated to stop the descent towards digital authoritarianism.[21]

2 Meaning, nature and scope of communications surveillance laws in Francophone Africa

To meet their human rights obligations under international law, align their legislation to the evolving digital space and combat cybersecurity threats, several Francophone countries have adopted laws on new information and technologies that contain provisions on communication surveillance (communication surveillance laws). Communication surveillance laws seem to protect 'legitimate' governmental aims (national security and safety, health and the rights and freedoms of others). This is understandable given that both international and domestic human rights systems are cognisant of the non-absolute nature of some human rights. In most cases, however, communication surveillance laws have been criticised for their adverse effects on online freedom of internet users.[22] To determine the extent to which they are detrimental to the consolidation of democracy and the development of a culture of accountability, the first sub-part examines the meaning of communications surveillance before analysing communications surveillance laws in selected francophone countries. The last portion of this part assesses the treaty law and constitutional validity of communication surveillance laws.

20 Constitutional digital rights refer to fundamental rights and freedoms enshrined in the constitution, and which can be exercised online and through digital technologies.

21 On Anglo-activism against unconstitutional constitutional amendments, see M Simiyu & TM Makunya 'Citizens' collective action, constitutional changes, and constitutionalism: Lessons from the Building Bridges Initiative in Kenya' in CM Fombad & N Steytler (eds) *Constitutional change and constitutionalism in Africa* (2025) 380-384.

22 Freedom House *Freedom in the world* (2013).

2.1 Meaning of communication surveillance

Communication surveillance is an action that consists of accessing, lawfully or unlawfully, electronic communication irrespective of the reason for which it is conducted.[23] According to the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, it entails 'the monitoring, interception, collection, storage and retention of information communicated, relayed or generated by communications networks'.[24] Also, 'the monitoring, interception, collection, analysis, use, preservation and retention of, interference with, or access to information that includes, reflects, arises from or is about a person's communications in the past, present or future' all form part of communication surveillance.[25] This understanding makes communication surveillance broad and a double-edged sword in a democratic regime. While it can be used to preserve lives in exceptional circumstances, for example, to trace individuals who were infected during the COVID-19 pandemic,[26] it can be a tool that authoritarian regimes may quickly turn to their favour to consolidate their power and stifle democratic competition. It is perhaps for its adverse effects that under General Comment 16 adopted on 8 April 1988, the UN Human Rights Committee held that 'surveillance, by electronic or other means, interception of telephone, telegraph or other communications, eavesdropping and recording of conversations should be prohibited'.[27] Principle 41(1) of the African Commission on Human and Peoples' Rights (African Commission) Revised Declaration of Principles of Freedom of Expression and Access to Information in Africa (Freedom of Expression Declaration) adopted in 2019 provides that '[s]tates shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person's communications'.[28]

23 T Ilori 'Framing a human rights approach to communication surveillance laws through the African human rights system in Nigeria, South Africa and Uganda' (2021) 5 *African Human Rights Yearbook* 138.

24 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, United Nations Human Rights Council (17 April 2013), UN Doc A/HRC/23/40 (2013).

25 Necessary and Proportionate *International principles on the application of human rights to communications surveillance* (2014), necessaryandproportionatefinal.pdf (eff.org) (accessed 10 September 2025).

26 W Lim 'Assessing the implications of digital contact tracing for COVID-19 for human rights and the rule of law in South Africa' (2020) 20 *African Human Rights Law Journal* 540; J Klaaren & B Ray 'South Africa's technologies enhancing contact tracing for COVID-19: A human rights and techno-politics assessment' (2021) 37 *South African Journal on Human Rights* 535.

27 General Comment 16 of the UN Human Rights Committee (article 17 Right to privacy) para 8.

28 Principe 41 of the African Commission on Human and Peoples' Rights Revised Declaration of Principles of Freedom of Expression and Access to Information in Africa.

The strong protection against communication surveillance, while building on the right to privacy,[29] which is widely recognised under modern African constitutions,[30] rests on a combined reading of bills of rights and binding and non-binding international (human rights) instruments. As will be shown later, these normative standards serve as powerful and precise tools that courts with constitutional jurisdiction can use to prevent the enactment or implementation of communication surveillance laws that violate the constitution. It is for this reason that some Francophone African countries, as a matter of principle, have prohibited communication surveillance unless exceptional circumstances so require.[31] The Moroccan Constitution of 2011 is even more explicit to that effect by stating that '[p]rivate communications, in any form whatsoever, are secret. Only the judiciary can authorise, under the conditions and according to the forms provided for by the law, access to their content, their total or partial disclosure or their invocation against anyone.'[32]

However, the above provision is a mixed blessing.[33] On the one hand, it shows the awareness of the drafters of the Constitution of the harm that unnecessary surveillance can cause to individuals. The provision protects communications irrespective of the channel through which they are made. In that regard, this provision seems progressive because new technological developments have brought to the fore online platforms that have been instrumental in allowing people to express themselves. As a constitutional norm, the provision can readily be relied upon in the process of constitutional review. The provision also requires the involvement of judges as an authority tasked to permit lawful interception of communications. Some Francophone constitutions explicitly name judges as the 'protectors' or 'guardians' of fundamental rights and freedoms.[34] As a consequence, depending on the nature of the acts which unlawfully permit communication surveillance, individuals may approach

29 *Amabhungane Centre for Investigative Journalism NPC & Another v Minister of Justice and Correctional Services & Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC & Others* (2021) ZACC 3 CCT 278/19 & CCT 279/19 para 2.

30 C Heyns & W Kaguongo 'Constitutional human rights law in Africa: Current developments' (2006) 22 *South African Journal on Human Rights* 683.

31 Art 54 of the Law 44/2001 of 30 November 2001 organising telecommunications in Rwanda; art 127 of the Law 20-017 of 25 November 2020 on telecommunications and information and communication technologies in the DRC; art 89 of the Law 2012-018 of 17 December 2012 on electronic communications in Togo; art 34 of the Law 2017-20 of 13 June 2017 relative to the Benin Numeric Code.

32 Art 24 Morocco Constitution.

33 See also art 31 of the DRC Constitution.

34 Art 150(1) of the 2006 DRC Constitution; art 125 of the 1991 Burkina Faso Constitution; art 81(2) of the 1992 Mali Constitution; art 1(23)(3) of the 1991 Gabon Constitution.

administrative, judicial or, where permitted, constitutional judges to see to it that their right to privacy is respected. On the other hand, the downside of a provision such as article 24 of the Constitution of Morocco is the claw-back clause in which it is clothed. A similar clause can be found under article 31 of the DRC Constitution:

> All persons have the right to respect for their private life, for the confidentiality of their correspondence, telecommunications and any other form of communication. This right may only be interfered with in the cases provided for by the law.

While the Constitution is silent on the meaning of 'the law', it can be assumed that this includes laws of general application voted by Parliament and acts having the force of law.[35] The clause in both constitutions gives the possibility for the legislature and other normative authorities to adopt communication surveillance acts to protect a government's legitimate purpose.[36] The nature and extent of this purpose may vary depending on the nature of the political regime in place or the circumstance that led to the adoption of the act. Threats of espionage, terrorism and sabotage against the activities of agents of foreign powers all can constitute grounds for violating the right to privacy.[37]

2.2 An overview of communication surveillance laws in Francophone Africa

As alluded to earlier, some Francophone African countries have passed laws to enable and regulate the exercise of critical human rights online and offline.[38] However, some of these laws permit the interception of communications without ensuring that adequate, independent and robust mechanisms are in place to prevent the resort to unnecessary surveillance. The way in which laws are framed provides an opportunity for public authority to intercept communications. A survey of these laws in the following paragraph reiterates the positive role constitutional review could play if used to bring them in conformity with the constitution.

35 See art 153(4) of the 2006 DRC Constitution.
36 Report of the Special Rapporteur on the Right to Privacy, United Nations Human Rights Council (6 September 2017) UN Doc A/HRC/23/40 (2017).
37 See Title II of the 2001 USA Patriot Act.
38 Law 2012-018 of 17 December 2012 on electronic communications in Togo; Law 20-017 of 25 November 2020 on telecommunications and information and communication technologies in the DRC; Law 2017-20 of 13 June 2017 relative to the Benin numeric code; Law 9 of 2015 on Cybersecurity and Cybercrime in Chad.

Several national laws permit the interception of communications by the prosecutor as part of ongoing investigations to discover facts and other information that would otherwise be difficult to obtain by other investigative means. Considering the recklessness of prosecutors in most Francophone jurisdictions and their acquaintance with executive officials on whose authority they depend,[39] these provisions may be used to undermine the right to privacy primarily because no court order is required. In the DRC, article 127 of the ICT Act 2020 empowers the Prosecutor General of the Court of Cassation, the apex court in judicial matters, to order the interception, recording and transcription of telecommunications and information and communication technologies when necessary for the determination of truth in a case. The provision gives much discretion to the prosecutor by using vague and ambiguous language. In Burundi, article 69 of Act 1/09 of 11 May 2018, amending the Criminal Procedure Code, empowers the Public Prosecutor's Office, when the needs of the investigation so require, to order the interception, recording and transcription of telecommunication correspondence. In the Republic of Congo, article 157 of Act 9-2009 of 25 November 2009 regulating the electronic communications sector, although it prohibits the interception of private communications, grants an exemption to the prosecutor to carry out such interceptions when required to ensure the enforcement of criminal laws. As in the DRC situation, the Act does not obligate the prosecutor to seek a court order before they can proceed with their communication surveillance activities. In Senegal, article 12 of Act 2011-01 of 2011 on telecommunications provides that a judge or police officer, for prosecution or investigation, or the enforcement of a judicial decision, may require telecommunications operators and telecommunications network or service providers to make available relevant information stored in the computer systems they administer.

Other laws surveyed in this study empower officials other than the prosecutors to proceed with the interception of communications either with or without the permission of the prosecutor or the judge. In Chad, article 27 of Act 009 of 2015 on cybersecurity and cybercrime provides that judicial police officers and authorised agents of the National Agency for Computer Security and Electronic Certification (ANSICE) may use appropriate technical means to collect or record in real-time data relating to the content of electronic communications. This is a worse form of violation of the right to privacy provided for under article 17(2) of the Constitution of Chad given the discretion

39 H Adjolohoun & CM Fombad 'Separation of powers and the position of the public prosecutor in Francophone Africa' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 366-376.

provided to the authorities about when to resort to the surveillance or which means can they use to that effect. In Algeria, article 65(8) of Act 06-22 of 20 December 2006 on the Code of Criminal Procedure authorises the public prosecutor or a judicial police officer authorised by the public prosecutor, the investigating judge to ask any qualified agent of public or private service, unit or organisation in charge of telecommunications to assist them in the monitoring or interception of communications. However, a written authorisation is required and must include all the information needed to identify the communication to be intercepted, the places targeted, and the offence that justifies the use of these measures, as well as the duration of the interception.[40] Unlike provisions so far reviewed, article 65(8) of the Criminal Procedure Code of Algeria attempts to ensure that communication surveillance is conducted transparently. In Morocco, under article 108 of Act 22-01 of October 2002 on criminal procedure, as amended by the Anti-Terrorism Act of 2015, the investigating judge and the public prosecutor are authorised, under certain conditions, to initiate surveillance operations, including the interception, recording, copying and seizure of telephone calls and any other telecommunications.

The grounds for initiating communication surveillance are generally broad and vague. In Rwanda, Act 48/2008 of 9 September 2008 on the interception of communications in the interest of national security authorises the acts of listening, recording, storing, decrypting communications, or conducting any other type of surveillance on voice and communication data without the knowledge of the user and their explicit authorisation. The warrant for interception is given to the prosecutor at the request of the security services. In Togo, article 92 of Law 2012-018 of 17 December 2012 on electronic communications empowers the Prime Minister, and the ministers in charge of the economy and finance, defence, justice, security and civil protection, to initiate the interception of communications and electronic content to protect state security, public order, public health, morality, or fundamental rights and freedoms, safeguard Togo's scientific and economic interests, or prevent and fight against terrorism, drug trafficking, money laundering, crime, cybercrime and human trafficking.

The above normative standards on communication surveillance are compounded by the existence of data privacy regulators that lack the required independence to serve as bulwarks against unlawful

40 Art 65(9) of the 2006 Code of Criminal Procedure of Algeria.

communication surveillance. They seem to be all but transparent[41] and independent.[42] Article 13(6) of the 2020 DRC ICT Act empowers the *Autorité de Régulation des Postes, des Télécommunications et des technologies de l'Information et de la Communication* (ARPTIC) to 'regulate and control the protection of personal data' whilst placing ARPTIC under the tutelage of the Ministry of telecommunications and ICT.[43] As an institution supporting digital democracy,[44] its independence must be placed beyond reasonable doubt. The independence of its predecessor, the ARPTC, was problematic and despite criticisms about government manipulations of decisions by the ARPTC, the ICT Act seems to have disregarded both these domestic concerns and international standards on the independence of the regulatory body.[45] In Niger, the *Autorité de Régulation des Communications Électroniques et de la Poste* (ARCEP) can intercept personal data,[46] even though this body is placed under the administrative authority of the Prime Minister[47] who gets to call the shot on how it functions. In Tunisia, the 2013 Decree 2013-4506 on the creation of the *Agence Technique des Télécommunications* (ATT) is faulty when it comes to transparency of the ATT. While article 5 requires the submission of annual reports by the agency's director-general to the Ministry of ICT, there is no requirement that these reports be made public. Furthermore, the directors of the ATT are appointed and removed by the Minister of ICT,[48] under whose control the Agency operates.

The foregoing demonstrates the existence of normative and institutional legal standards that can be used to undermine the right to privacy and associated rights online and through digital technologies. There are three problems constitutional review, if effectively used, could address: the fact that several laws confer on

41 Necessary and Proportionate *International principles on the application of human rights to communications surveillance* (2014).
42 Principle 41(3)(f) Declaration of Principles on Freedom of Expression and Access to Information in Africa.
43 Art 12 of the 2020 ICT Act. Principle 17 of the African Commission Declaration of Principles on Freedom of Expression and Access to Information in Africa (10 November 2019).
44 P Contucci and others *The future of digital democracy: An interdisciplinary approach* (2018).
45 The process for the appointment to the ARPTC was controlled by the executive as the President of the Republic appointed the President and the Vice-President of the Regulatory College, whilst the five remaining members were appointed by the President of the Republic, two under the proposition of parliament and three proposed by the Minister of ICT.
46 Art 58(3) of Law 2018-45 of 12 July 2018 on the regulation of electronic communications in Niger.
47 Art 1 of Law 2018-47 of 12 July 2018 on the creation, organisation and operation of the Autorité de Régulation des Communications Électroniques et de la Poste (ARCEP).
48 Art 4 of the 2013 Tunisian Decree 2013-4506 on the creation of the *Agence Technique des Télécommunications.*

the prosecutor, judicial officers and other state agents unchecked powers that may be used to undermine the right to privacy; not only that the judge is disempowered to play their role as guarantor of human rights, but the prosecutor has the discretion to determine how they proceed with communication surveillance and the duration of such a process. It is suggested that the institutionalisation of court orders on communication surveillance would foster a culture of justification and accountability. The prosecutor and agents authorised to proceed with communication surveillance would have to provide substantial reasons justifying resorting to surveillance and whether less intrusive means could be envisaged.[49] The other problem is the absence of notification of the decision authorising communication surveillance to the person being controlled or, if this notification would defeat the purpose of the interception of communications, to be notified after surveillance has ended.[50] In a democratic setting, notification, whether pre- or post-surveillance, would serve the purpose of allowing the individual to approach judges against communication surveillance when founded on grounds that are not legal and eventually seek remedy. On post-surveillance notification, Madlanga J eloquently noted that it would 'go a long way towards eradicating the sense of impunity' and can result in the 'reduction in the numbers of unmeritorious intrusions into the privacy of individuals'.[51] The last problem pertains to the judge who should be established to provide permission to intercept communications and their functional and institutional independence given that most communication surveillance contravene human rights.

2.3 Inconsistency of communication surveillance laws with fundamental rights

Communication surveillance laws must be consistent with the constitution and international human rights treaties. When they are conducted, whether lawfully or unlawfully, interceptions of communications affect the exercise of the following rights that are widely recognised under modern African Francophone constitutions: the right to privacy and secrecy of correspondence;[52] the right to freedom of expression and opinion;[53] the rights to freedom of

49 See, eg, *Amabhungane* (n 29) para 41.
50 African Commission Revised Declaration on Freedom of Expression.
51 *Amabhungane* (n 29) para 45.
52 See, eg, art 31 of the 2006 DRC Constitution; art 22 of the 2003 Rwanda Constitution; art 6 of the 1992 Mali Constitution; art 21 of the 1991 Benin Constitution; art 46 of the 2016 Algeria Constitution.
53 See, eg, art 23 of the 2006 DRC Constitution; arts 33 & 34 of the 2003 Rwanda Constitution; art 4 of the 1992 Mali Constitution; art 23 of the 1991 Benin Constitution; art 42 of the 2016 Algeria Constitution.

assembly,[54] association,[55] conscience;[56] and the right to political participation.[57] Aspects of these rights have been developed by the African Commission through soft-law instruments based on the African Charter on Human and Peoples' Rights (African Charter), a treaty that all Francophone African countries except for Morocco have ratified. Given the monist approach to international law, Francophone African constitutions generally adopt the African Charter and its interpretative materials supplement the constitutional protection of the right to privacy and can readily be used either as normative standards or interpretive materials to assess the validity of communication surveillance actions. [58] The constitutional court can rely on these norms to decide over the constitutionality of a law or a regulation since, in several Francophone countries, they form part of the *bloc de constitutionnalité* (constitutional corpus).[59] The question that arises is whether the unchecked powers conferred on public authorities to proceed with communication surveillance, the absence of notification or the weak institutional arrangements established to protect personal data (regulators), as demonstrated in part 2.2 above, meet constitutional and international human rights standards for their lawfulness.

Human rights are not absolute. They can be limited when such a limitation is legal, necessary and proportionate and serves a legitimate governmental purpose. Principle 41 of the Declaration enjoins states to conduct targeted communications surveillance if authorised by law, which in turn must be consistent with international human rights law and standards and based on specific and reasonable suspicion that a serious crime has been or is being committed or for any other legitimate purpose.[60] In addition, states shall ensure that any law authorising targeted surveillance of communications provides adequate safeguards for the right to privacy, including prior authorisation by an independent and impartial judicial authority; due process guarantees; specific limitations on the duration, manner, location, and scope of the surveillance; notification of the decision

54 See, eg, art 25 of the 2006 DRC Constitution; art 36 of the 2003 Rwanda Constitution; art 5 of the 1992 Mali Constitution; art 10 of the 1991 Benin.
55 See, eg, art 27 of the 2006 DRC Constitution; art 35 of the 2003 Rwanda Constitution; art 39 of the 2016 Algeria Constitution.
56 See, eg, art 22 of the 2006 DRC Constitution; art 33 of the 2003 Rwanda Constitution; art 23 of the 1991 Benin Constitution; art 52 of the 2016 Algeria Constitution.
57 See, eg, art 5 of the 2006 DRC Constitution; art 45 of the 2003 Rwanda Constitution.
58 Sindani (n 2) 1-15.
59 JA Adeloui 'L'insertion des engagements internationaux en droit interne des Etats africains' (2011) 25 *RBSJA* 51-92.
60 African Commission 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2019) Principle 41(2).

authorising the surveillance within a reasonable period following the conclusion of the surveillance; proactive transparency on the nature and extent of its use; and effective monitoring and regular evaluation by an independent oversight mechanism.[61]

The African Commission's Resolution ACHPR/Res.573 (LXXVII) 2023 condemns mass surveillance and urges states to limit surveillance to targeted measures authorised by law, subject to prior authorisation by an independent and impartial judicial authority, necessity/proportionality tests, and independent oversight. It further calls on states not to weaken encryption and to ensure effective remedies for victims of arbitrary surveillance.[62] According to the International Principles on the Application of Human Rights to Communications Surveillance (Necessary and Proportionate Principles)[63] adopted in May 2024, communications surveillance law must meet, among others, the principle of necessity, which provides that 'communications surveillance must only be conducted when it is the only means of achieving a legitimate aim, or, when there are multiple means, it is the means least likely to infringe upon human rights'.[64] The principle of adequacy further requires that 'any instance of communications surveillance authorised by law must be appropriate to achieve the specific legitimate purpose identified'.[65] Communications surveillance laws that are not sufficiently clear and precise in that they do not specify the scope and limits of the powers of prosecutors and other authorities empowered to conduct communications surveillance fail to comply with the principles of necessity and adequacy. Communication surveillance laws discussed in part 2.2 above contravene basic principles of human rights law provided for under the constitution and international human rights norms which are an integral part of the constitution and must be observed by every person, including state organs.

From a constitutional perspective, it is relevant that a mechanism established to prevent the entry into force of laws that may violate the constitution or adjudicate over cases involving the violation of

61 African Commission 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2019) Principle 41(3).
62 African Commission Resolution on the Deployment of Mass and Unlawful Targeted Communication Surveillance and its Impact on Human Rights in Africa (2023).
63 These Principles were developed through a global consultation led by Access Now, Electronic Frontier Foundation and Privacy International. The first version was finalised on 10 July 2013 and was launched at the UN Human Rights Council in September 2013, https://necessaryandproportionate.org/principles// (accessed 26 August 2025).
64 Necessary and Proportionate International principles on the application of human rights to communications surveillance, 2014, Principle 3.
65 Necessary and Proportionate (n 64) Principle 4.

the constitution is used to prevent their entry into force or when they are in force, to prevent that they produce legal effects that will subsequently hamper the prospect for realising digital rights. Constitutional review, therefore, has the potential to prevent these retrogressive laws from leading to constitutionally unfriendly outcomes.

3 Preventive, corrective and mobilising role of constitutional review

Constitutional review or the control of the constitutionality of laws and acts having the force of law can effectively be utilised to prevent retrogressive communication surveillance laws due to the power conferred on constitutional jurisdictions to protect the constitutional order. From this perspective, constitutional review can act as a *preventive* tool when the bill has yet to be assented into law or a *corrective* tool when the law is already in force. Above all, constitutional review can serve as a *mobilising* democratic tool against surveillance by enabling civil society or organised citizens to exert pressure on those who wield political power so that the latter is not exercised in an 'unguided or unbridled way'.[66] As Mogoeng J aptly stated in the South African context,

> all presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations. Our President is never at large to exercise power that has not been duly assigned. Crucially, public power must always be exercised within constitutional bounds and in the best interests of all our people.[67]

From this perspective, any communication surveillance laws should be in the interests of the people. Constitutional review can help to ascertain whether these laws are fostering communal interests.

The types of constitutional review in Africa have been influenced by legal traditions inherited from colonialism.[68] Unlike most Anglophone African countries with a common law legal tradition

66 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] (ZACC) CCT 67/18, 3 [3].

67 As above.

68 See generally Makunya (n 1), in particular ch 6; CM Fombad 'An overview of contemporary models of constitutional review in Africa' in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 19-21; JK Sindani 'Legal traditions and the fragmentation of human rights in Africa' (2025) *Human Rights in Context*, https://www.humanrightsincontext.be/post/legal-traditions-and-the-fragmentation-of-human-rights-in-africa (accessed 8 September 2025).

that have opted for a decentralised model of constitutional review,[69] Francophone African countries with a civil law legal tradition have opted for a centralised model of constitutional review.[70] The latter, which is the focus of this article, is characterised by the unitary nature of the constitutional body.[71] The constitutional jurisdiction acts as the court of first and last instance and is generally placed outside the hierarchy of the judiciary.[72] While generally known as 'court', constitutional jurisdictions in the Francophone world have originally not been conceived as 'judicial bodies' where individuals would appear to defend their subjective rights. Rather, they have emerged as quasi-judicial, quasi-political bodies composed of judges and political actors to deal with the most pressing constitutional law issues, regarded then as highly political concerns. Although recent transformations brought about by the third wave of democratisation have also transformed the mandate of some of these jurisdictions in particular to deal with subjective human rights issues, the original conception of constitutional courts in the Francophone world as non-judicial organs tasked with dealing with politically contentious issues has affected how constitutional judges perceive their role within the polity and how citizens interact with constitutional courts.[73]

Modern Francophone African constitutions enshrine two types of review of constitutionality through which communication surveillance laws may be controlled, namely, *a priori* or *abstract* review and *a posteriori* or *concrete* review. Abstract review takes place before the promulgation of the law. It has a preventive role, which helps to filter out laws that are potentially contrary to the constitution before they are promulgated. The referral of a bill to the constitutional court by the competent authority suspends its promulgation until the court rules on the conformity of the law with the constitution.[74] If the provisions of the bill are inconsistent with the constitution, the law cannot be promulgated.

69 Fombad (n 68) 19-21. Not all Anglophone African countries have adopted the decentralised model in which all courts have the power to strike down a law if it violates the Constitution. In fact, four of these countries, Sierra Leone, South Sudan, Tanzania and Zambia, have adopted the centralised model. In the model, all courts have the power to strike down a law if it violates the Constitution.

70 For criticism of the models, see G Tusseau *Contre les modèles de justice constitutionnelle: essai de critique méthodologique* (2008).

71 Only one court, called the constitutional court or constitutional council, has the power to strike down a law as unconstitutional.

72 H Adjolohoun 'Centralised model of constitutional adjudication – The Constitutional Court of Benin' in Fombad (n 68) 53. The judicial branch is constituted by the so-called 'ordinary' courts, which have the function of applying the law to concrete disputes, while the constitutional court has a special and essential function of reviewing the validity of the law in relation to the constitution.

73 B Kanté 'Preface' in Makunya (n 1).

74 T Ondo 'Le contentieux constitutionnel au Gabon' (2022) *Revue de Recherche Juridique* 1213.

However, the nature of laws that can be subject to abstract review varies from country to country. While in some constitutions, abstract review is mandatory for all laws,[75] whether organic or ordinary laws,[76] or all acts having the force of law,[77] other constitutions make such a review optional for ordinary laws and other acts having the force of law.[78] An organic law differs from an ordinary law in that it defines modalities of application of constitutional provisions, while an ordinary law is passed by parliament and regulates one of the areas explicitly provided for under the constitution. The former is generally viewed as a constitution-implementing law. In other words, it is the constitution's extension. It is for this reason that most constitutions enjoin that organic laws undergo *abstract* constitutional review.

Making the review of organic laws mandatory and that of ordinary laws optional can lead to the enactment of laws that pave the way for unlawful communication surveillance when adopted in the form of ordinary bills like in Rwanda[79] or a decree (a regulation adopted by the government)[80] like in Tunisia. Better protection of fundamental rights from unlawful violations through surveillance may require that they are reviewed before they are assented into law irrespective of their nature. We are not arguing that only *abstract* review is well equipped to expunge these laws from the legal system because we are aware that other review mechanisms exist. Our main contention is that compulsory *abstract* review for both ordinary and organic laws, as is the case in Benin, minimises the potential for a law that can lead to human rights violations to be enacted.

Furthermore, *abstract* review is performed under strict constitutional deadlines which can leave little time for constitutional jurisdictions to conduct a thorough review of communication surveillance bills.

75 Art 117 of the 1991 Benin Constitution.

76 Simply stated, an organic law is a legislative act passed in Parliament that sets out the terms of application of constitutional provisions. In practice, these are laws that supplement (and in some cases, amend) the Constitution. In the hierarchy of norms, they are located above ordinary laws. By contrast, an ordinary law is a legislative Act passed by Parliament in accordance with the procedure established by the Constitution and in one of the areas expressly provided for in the Constitution.

77 Art 84 of Gabon Constitution; art 117 Benin Constitution; art 77 of the Côte d'Ivoire Constitution; art 86 of the Mali Constitution; art 120 of the Niger Constitution.

78 The wording is as follows: 'For the same purpose of examination of constitutionality, laws *may* be referred to the Constitutional Court.' The use of 'may' suggests that this is an option. See art 95(3) of the Côte d'Ivoire Constitution; art 160(2) of the DRC Constitution; art 155 of the Burkina Faso Constitution; art 85(2) of the Gabon Constitution; art 88(2) of the Mali Constitution.

79 Law 09/09/2008 on the interception of communications (Law 48/2008) in the interest of national security.

80 Decree 2013-4506, on the creation of the *Agence Technique des Télécommunications.*

To put this in context, once the bill has been referred to the court by the authorities empowered by the constitution to do so,[81] the constitutional court has either 30 days[82] or 15 days to decide.[83] Worse still, in case of an emergency, the timeline can be shortened to eight days at the government's request. The government can use these short deadlines to expedite the adoption of laws that violate human rights if the court fails to decide within the time limit. Article 139 of the DRC Constitution allows for a bill to be automatically seen as being constitutional if the court has not handed down its judgment within the allocated period. Constitutional review of laws is not the only mandate of constitutional courts and, at times, they can be swamped with many other petitions, for example on elections, and criminal accountability of prime ministers or heads of state.[84]

As *abstract* review is not open to everyone across Francophone constitutional jurisdictions, this limits its ability to serve as a bulwark against retrogressive communication surveillance laws given that political actors who are empowered to approach the court in this type of review may have little incentive to have laws, emanating from them in most cases, reviewed by the Constitutional Court unless such a review is made mandatory.

Concrete or *a posteriori* constitutional review can address some of the weaknesses of *abstract* review. The *a posteriori* constitutional review takes place after the promulgation and the entry into force of a law. While it can pertain to every law irrespective of whether it has previously been declared constitutional, Constitutional Courts tend to be reluctant to reverse provisions of laws they have already declared as being consistent with the Constitution. Be that as it may, in this type of review, the Constitutional Court can be approached directly or indirectly. Any citizen may directly approach the Constitutional Court against laws they believe to be unconstitutional. However, in some jurisdictions, the direct petition is possible six months following the enactment of the impugned law or provision.[85] The six-month period reduces the likelihood that constitutional review

81 Most often by the President of the Republic, or by the Prime Minister, or by the presidents of the Houses of Parliament or one-tenth of the members of each House, or by the presidents of the Court of Cassation, the Council of State and the Court of Auditors and, in certain constitutions, by any citizen or any legal entity aggrieved by the law.

82 Art 160(3) of the DRC Constitution; art 85(3) of the Gabon Constitution; art 89 of the Mali Constitution.

83 Art 120 of the Benin Constitution; art 77 of the Côte d'Ivoire Constitution.

84 Art 139 DRC Constitution.

85 Art 50(1) of Act 13/026 of 2015 Governing the Organisation and Functioning of the Constitutional Court. *Judgment R.Const 0007* of 29 January 2016 on the constitutional validity of the death penalty. The application was rejected on procedural grounds.

is used to expunge from the legal system laws that were enacted over six months. The direct petition is complemented by an indirect petition. The latter, also known as the certified question of constitutionality, occurs when a law about to be applied by judges other than constitutional judges, is believed to be unconstitutional by parties or the tribunal.[86] In this case, the tribunal approaches the Constitutional Court to check the validity of the law to determine whether it can be applied to ongoing proceedings. The question can be raised at any time of the procedure and the tribunal is obliged to stay proceedings. As will become clear later, this approach can be mobilised by activists to control communication surveillance laws that have not been the subject of a thorough *abstract* review.

Abstract and concrete review can thus be meaningfully mobilised to prevent the application of retrogressive surveillance laws and expunge them from the legal system. Relying on the constitution and norms with constitutional status, some Constitutional Courts in Francophone Africa have, over the years, struck down laws that violate human rights and protected human rights when invoked by individuals, thus positioning *abstract* and *concrete* constitutional review as mechanisms that protect both subjective human rights and objective constitutional norms.[87] Many cases before the Constitutional Courts of Benin and the DRC, among others, show that constitutional review is well equipped to react against retrogressive communication surveillance laws.[88] However, as Moseneke J made it clear,[89] unless individual victims of these laws bring cases before courts including constitutional jurisdictions, judges themselves cannot go out and look for them. Constitutional review can only be effective if individuals are aware of how and when they can mobilise against communication surveillance using courts and the constitution.

86 Benin Constitutional Court Decision DCC 22-272 of 28 July 2022 3.

87 H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: Le modèle béninois: A la lumière de la Charte africaine des droits de l'homme et des peuples* (2011).

88 Decision DCC 18-003 of January 22, 2018 declared unconstitutional art 20 of Law 2018-01 on the status of the judiciary in the Republic of Benin voted by the National Assembly on 4 January 2018 and which prohibited the right to strike of the magistrates. It then declared unconstitutional art 71 of Law 2017-42 on the status of the personnel of the Republican Police voted by the National Assembly on 28 December 2017 in that it states that the officials of the Republican Police 'may not exercise the right to strike'. Still, by *a priori* control, in R.Const. 238/TSR of 1 March 2015, the Supreme Court of Justice of the DRC, acting as the Constitutional Court, seized by the President of the Republic of a request to assess the conformity with the Constitution of the Organic Law modifying and completing the Organic Law 06/020 of 10 October 2006, declared this law to be in conformity with the Constitution, except for paras 5 and 6 of art 61, which were deemed to be contrary to the Constitution because they provided for the prohibition of any magistrate who is the object of a procedure of taking to task, from exercising his functions before having presented his means of defence.

89 D Moseneke *All rise: A judicial memoir* (2020) 261.

4 An assessment of the potential for mobilising against communication surveillance laws through constitutional review

A concept that has gained much attention, mainly in the South African constitutional discourse, concerning constitutional review is 'constitutional lawfare': the strategic use of the constitution and judicial institutions to further or hinder democratic ideals and constitutionalism. Narrowing down the concept to constitutional courts, Dent believes that constitutional lawfare encapsulates the notion by which political matters are judicialised and courts are called to 'uphold constitutional responsibilities (and) compensate(e) for institutional failures in the broader democratic space'. It also entails the use of legal process to 'escape accountability'.[90] Constitutional lawfare is a double-edged sword because it can be used by powerless minority groups to counter the majoritarian hegemony of other social and political groups as it can also be used by politicians to legitimise their actions.

In this article, we view constitutional lawfare as a liberating legal mechanism in the hands of civil society groups against regressive communication surveillance acts. Constitutional lawfare is critical to the understanding of possible mobilisation against retrogressive communication surveillance in most Francophone jurisdictions where these laws have reigned supreme without serious constitutional challenge. The lack of mobilisation from individual citizens, civil society organisations and pro-democracy groups means that these laws can hardly be challenged as political actors, in particular those in power, do not have sufficient incentive for those laws to be quashed. However, for constitutional review to be mobilised, several legal and practical conditions must be met before people can resort to existing means for mobilisation (constitutional review using the bill of rights as norms of reference). These two issues are dealt with in the subsequent parts.

4.1 Conditions for mobilising against retrogressive communication surveillance laws

Several conditions, both legal and socio-cultural, must be met in the Francophone world for serious mobilisations against retrogressive communication surveillance acts to take place. Legally, constitutions

90 K Dent *Lawfare and judicial legitimacy: The judicialisation of politics in the case of South Africa* (2023).

and laws organising procedures before constitutional jurisdictions should empower citizens to bring petitions before them irrespective of the nature of the constitutional litigation. Access to constitutional jurisdictions has been regulated differently across African Francophone constitutional jurisdictions based on whether it is a direct or an indirect petition.[91] While the Constitutions of Rwanda,[92] Burundi,[93] DRC,[94] the Republic of Congo[95] and Benin,[96] among others, allow for direct petitions against laws in addition to indirect petitions, in Niger,[97] Côte d'Ivoire[98] and Togo,[99] individuals may only approach the court indirectly when they are parties to judicial proceedings before lower courts where issues of constitutionality arise. The Côte d'Ivoire Constitutional Council Act, however, empowers human rights organisations to bring before the council laws that violate human rights.[100] The possibility for non-governmental organisations (NGOs) to approach constitutional jurisdictions in Burundi and Rwanda against regressive communication surveillance acts can be derived from the use of the concept 'moral persons' under the constitutions.[101] The Constitution of DRC is not explicit with regard to juristic persons, although the use of 'every person' that may approach the Constitutional Court under article 162(2) could also imply juristic persons.

The main problem that can constitute an obstacle to the emergence of constitutional lawfare in matters of communication surveillance acts is the obligation imposed on litigants to prove that they have a direct interest to protect,[102] public interest litigation being improbable before many Francophone African courts. Sections 38 and 167(6)(a) of the South African Constitution allow 'anyone acting in the public interest' to lodge complaints with courts.[103] As Currie and de Waal

91 See generally CM Fombad 'An overview of contemporary models of constitutional review in Africa' in CM Fombad (ed) *Constitutional adjudication and constitutionalism in Africa* (2017) 15.
92 Arts 53(2) & (3) Supreme Court Act.
93 Art 236(2) 2018 Burundi Constitution.
94 Art 162 2006 DRC Constitution.
95 Art 180 2015 Republic of Congo Constitution.
96 Art 122 1991 Benin Constitution.
97 Art 132 2010 Niger Constitution.
98 Art 96 2012 Côte d'Ivoire Constitution.
99 Art 104(8) 1992 Togo Constitution.
100 Art 23(4) Organic Law 2022-222 of 25 March 2022 on the organisation and functioning of the Constitutional Council.
101 Art 236(2) of the Constitution of Burundi and arts 53(2) & (3) of the Constitution of Rwanda.
102 Art 88 of the DRC Constitutional Court Act provides for specific constitutional petition requirements: the name of petitioner, capacity within which they are approaching the Court, their addresses, the object of their demands and constitutional provisions supporting them, as well as constitutional provisions the Court is required to interpret.
103 For examples with other common law jurisdiction, see E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in M Killander (ed)

argue, 'effective enforcement of the Bill of Rights demands a broader approach to standing'.[104] In practice, the Benin Constitutional Court allows petitions in the interest of justice to be adjudicated. It has also granted access to individuals whose petitions were inadmissible by arguing that, in cases of human rights violations, it could invoke its powers under article 121 of the Constitution to decide on allegations of human rights violations on its rights.

Mobilisation against retrogressive communication surveillance acts will also require a developed culture of litigation from individual petitioners, political actors, including those in power, and constitutional judges themselves.[105] By a culture of litigation or constitutional lawfare, we mean the propensity to resort to courts as appropriate fora to settle social, economic and political matters arising in a polity especially when democratic channels (including parliament) have shown their limitations to solving such problems, for example, because they have been hijacked by a ruling coalition which enjoys a majority in parliament. Contrary to several Anglophone jurisdictions where citizens do take up matters of national concern before courts, citizens in Francophone African countries have demonstrated their readiness to suffer in silence in order not to challenge the established political ordering. This passive behaviour can be illustrated in many ways, for example, the existence of unchallenged regressive communication surveillance acts or the fact that acts that violated human rights during COVID-19 remained unchallenged.[106] Political actors and judges must also be aware of their role in fostering democracy through courts. In instances of constitutional challenge, state organs, such as those in South Africa, should be able to appear and adduce their argument in court. Similarly, constitutional judges must be ready to deal with petitions submitted to them and not keep silent to avoid political controversies as the then Supreme Court of Justice acting as interim DRC Constitutional Court did concerning the review of the constitutionality of constitutional amendments in 2011.[107] Importantly, the judicial approach to assessing the constitutionality of laws, especially at the *abstract* review stage, should further an article-by-article analysis so that each article in the proposed bill is

International law and domestic human rights litigation in Africa (2010) 164-166.

104 I Currie and J de Waal *The Bill of Rights handbook* (2016) 73.

105 Makunya (n 1); see the discussion in ch 5, part 2.2 & ch 6, part 3.1.3.

106 CM Fombad & TM Makunya 'The struggle for constitutional identity in Francophone Africa' in CM Fombad & N Steytler (eds) *Constitutional identity and constitutionalism in Africa* (2024) 101.

107 'Révision de la constitution: Lisanga Bonganga saisit la Cour suprême' *Radio Okapi* 18 March 2011, https://www.radiookapi.net/emissions-2/linvite-du-jour/2011/03/18/revision-de-la-constitution-lisanga-bonganga-saisit-la-cour-supreme (accessed 18 April 2023).

confronted with relevant constitutional and international human rights norms and jurisprudence.

It is the combination of a culture of litigation from these three groups (citizens, political actors and judges) that can pave the way for constitutional lawfare in matters of communication surveillance. In Benin, several unconstitutional laws were annulled by the Constitutional Court at the instigation of citizens and political actors especially when the Court was composed of judges who understood both their mandate,[108] namely, to shore up the supremacy of the Constitution through constitutional review and their vocation, namely, to pacify political space and promote core values of fundamental rights.[109] The South African experience of constitutional litigation also shows that a combination of actions from civil society organisations, interest groups, institutions supporting democracy (chapter 9 institutions), the readiness of the state and its organs to defend their cases before courts (all of which we characterise as the demand of justice) and the ability of judges to uphold constitutional values and principles (which we characterise as the supply of justice) are what is needed for a culture of litigation to sink in. In other words, the dialectical relationship between the demand for constitutional justice and its supply must be leveraged for successful litigation against retrogressive communication surveillance laws. In most Francophone African countries, both the demand and supply of constitutional justice have remained very low, thus maintaining the *status quo ante,* chiefly, that laws inimical to constitutional values and principles can pass unchallenged. There are legal means by which citizens can mobilise against these laws before constitutional jurisdictions.

4.2 Legal means for mobilising against communication surveillance laws

The bill of rights and associated democratic values and principles, such as democracy, the rule of law and good governance, have become

108 TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen and others (eds) *A life interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2022) 484.

109 B Kanté 'Le juge constitutionnel dans les processus de sortie de crise et de transition en Afrique noire francophone' (2017) 8 Paper presented at the Colloque international sur le role des juridictions constitutionnelles dans la consolidation de l'Etat de droit, Bamako, Mali, 27 April 2017 (on file with the researcher); JLE Kangashe 'Du réalisme constitutionnel au réalisme en droit constitutionnel: Vers quel modèle de constitutionalisme en République démocratique du Congo' *La Constitution en Afrique* 4 December 2010, http://la-constitution-en-afrique.over-blog.com/article-du-realisme-constitutionnel-au-realisme-en-droit-constitutionnel-62347936.html (accessed 24 April 2023).

powerful legal arguments on which citizens can rely against laws and actions that they believe are inconsistent with the constitution. Some Francophone bills of rights are less detailed and contain fewer rights, numerically, than other bills of rights, but these shortcomings can be overcome by reading the bill of rights together with international human rights law norms and jurisprudence. The monist approach to international law most Francophone constitutions adopt provides, on paper, significant discretion to judges willing to adopt an interpretive approach that considers international law. As Chaskalson J submitted, and this is valid in the Francophone context, international human rights law provides normative and historical contexts within which several constitutional rights could be understood.[110]

Arguments based on international law may also progressively develop domestic constitutional law. Except for a few judges who still believe their domestic law is self-sufficient, looking at international law norms and jurisprudence, especially that of international human rights courts and bodies, could supplement the quality of domestic protection of human rights. The Constitution of Benin provides an additional means that can be mobilised alongside other constitutional provisions. The Benin Constitution explicitly constitutionalises rights and duties provided for under the African Charter,[111] making it possible for the latter to be utilised by and invoked before the Benin Constitutional Court to substantiate their claims. Relatedly, article 19 of the Constitution of Burundi provides that rights and duties enshrined in international human rights instruments, including the African Charter, form part of the Constitution. While in practice, the Benin Constitutional Court has been reluctant to enter into a jurisprudential dialogue with regional human rights/community law courts/bodies, it will be self-defeating not to consider progressive normative standards, for example, in the area of digital rights developed by the African Commission, as they have the potential to improve the quality of rights protection locally.

5 Conclusion

Constitutional review in Francophone African countries has not been utilised to prevent the enactment of retrogressive communication surveillance acts or to sanction actions and other decisions which grant unchecked powers to prosecutors and other agents to proceed with communication surveillance. Unlike most Anglophone constitutional systems, the Francophone constitutional review

110 *S v Makwanyane & Another* 1995 (3) SA 391 para 35.
111 Art 7 of the Benin Constitution.

system provides an opportunity to prevent the entry into force of several laws and standing orders of parliamentary chambers. This approach is important, for the law that would have harmed several individuals is annulled in advance and does not become part of the legal system. One would have expected that the process would be used to prevent the entry into force of regressive communication surveillance acts and actions. However, the mechanism is weak mainly because only designated political authorities can submit bills to constitutional jurisdictions for abstract review and, in many countries, only organic laws, not ordinary laws, can mandatorily be reviewed before they are assented into law. As most laws related to communication surveillance are ordinary laws, they are not subjected to abstract review, as was the case with the 2020 DRC ICT Act. Another weakness of abstract review that can negatively affect constitutional jurisdictions' ability to prevent retrogressive communication surveillance laws is the approach review judges use. Instead of an article-by-article analysis of the proposed bill by confronting it to each bill of rights provision, the approach to review is generally holistic. The shortcoming of abstract review could be cured by concrete review if several conditions for this to happen were met. Constitutional review, and constitutional courts in general, cannot serve the purpose for which they were established, to uphold the supremacy of the constitution, in the absence of an awakened citizenry that is ready to challenge any unconstitutional behaviours and of judges who are conscious of their mission and vocation in democracies. The South African culture of constitutional lawfare and the positive attitude of several constitutional judges, some of whom have acknowledged their status as 'activists', are clear evidence of what constitutional review can achieve if meaningfully utilised by both the demand and the supply side.