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## **Diffusion versus Strategic Action? The Creation of West African Constitutional Courts Revisited**

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# Diffusion versus Strategic Action? The Creation of West African Constitutional Courts Revisited

## Abstract

The creation of constitutional courts is a political affair because the judicial review of laws and competences potentially curb the power of the elected branches. This paper seeks to refine the explanations for both the spread of constitutional courts and the extent of their formal independence. Our comparison of nine former French colonies in West Africa that have all introduced constitutional courts since 1990 is built on (a) the combination of the two competing theories of international diffusion and domestic strategic action and (b) a new, theoretically and arithmetically refined index of formal independence. The empirical analysis in this area of similar political context supports the argument that global trends and “natural” foreign reference models (namely, France) set a minimum standard and that interests in political insurance determine the deviations from (in this case Gallic) institutional diffusion. As Francophone West Africa is one of the most dynamic arenas of third wave democratic experiments, these findings offer not only insight into a largely neglected geographic area but also a better general understanding of the political role of constitutional courts in new democracies with a colonial past.

Keywords: judicial politics, constitutional courts, diffusion theory, strategic action, Francophone West Africa

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# Diffusion versus Strategic Action? The Creation of West African Constitutional Courts Revisited

Alexander Stroh and Charlotte Heyl

## Article Outline

- 1 Introduction
- 2 Integrating Two Theories: Diffusion and Strategic Action
- 3 The French Model and African Innovations
- 4 Explaining the Differences
- 5 Conclusion

## 1 Introduction<sup>1</sup>

The global proliferation of constitutional review bodies is largely intertwined with the global spread of democracy.<sup>2</sup> It is hence clearly a political affair. West Africa has been a fascinating area of diverse democratic experiments for more than two decades. Although these democratic experiments have certainly not all been successful, most of the states in this region

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1 Research for this paper was part of the project on “Judicial Independence in New Democracies” funded under the Joint Initiative for Research and Innovation and headed by Mariana Llanos at the GIGA German Institute of Global and Area Studies. Mariana and Cordula Tibi Weber, our fourth team member, deal primarily with Latin American cases in this cross-regional comparative work. We are grateful to Mariana, Cordula and Björn Dressel, to all participants in the Courts and Politics panel at the 5th European Conference on African Studies in Lisbon and, in particular, to Siri Gloppen for their much appreciated comments. Sina Schlimmer and Julia Held provided excellent research assistance. All errors are ours.

2 See, inter alia, Bruce Ackerman, “The Rise of World Constitutionalism,” *Virginia Law Review* 83, no. 4 (1997): 771–797; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); Filip Reyntjens, “The Winds of Change: Political and Constitutional Evolution in Francophone Africa, 1990–1991,” *Journal of African Law* 35, no. 1–2 (1991): 44–55; Donald L. Horowitz, “Constitutional Courts: A Primer for Decision Makers,” *Journal of Democracy* 17, no. 4 (2006): 125–137; Gretchen Helmke and Julio Rios-Figueroa, *Courts in Latin America* (Cambridge: Cambridge University Press, 2011).

passed liberal constitutions in the early 1990s. Among them, all nine countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea, Mali, Mauritania, Niger, Senegal and Togo) that formerly belonged to French West Africa (AOF) nowadays operate multiparty systems and hold elections. Former AOF countries share historical and socioeconomic similarities that provide important advantages for the comparative study of various aspects of democratization. One aspect is the growing importance of constitutional courts.

Though being a major arena of democratic experiments in the post-Cold War era, the political role of such courts in West Africa has been largely neglected in comparative political research. When these countries underwent political change, all nine introduced separate constitutional review bodies – presumably to provide their new liberal constitutions with special protection.<sup>3</sup> This paper seeks to contribute to the growing body of comparative studies on constitutional courts by refining the explanations for both the spread of constitutional courts and the extent of their formal independence. Why did all these countries opt for such courts and why did some countries create courts more independent and more powerful than other countries? Thus, what are the origins and limits of constitutional review designs in Francophone West Africa?<sup>4</sup>

One of the most discussed general explanations for constitutional convergence is institutional diffusion.<sup>5</sup> Meanwhile, strategic action and risk anticipation are often used to explain the creation of strong constitutional jurisdictions.<sup>6</sup> This paper argues that a combination of both theories improves the explanation of the formal features of constitutional courts in one particular historical setting. The West African public discourse holds that the institutional designs in former French colonies have mainly been copied from France. Authors have spoken of a “French constitutional mythology,”<sup>7</sup> intensely discussed institutional mimicry,<sup>8</sup> or simply

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3 Guinea was the latest case where a constitutional court has been included in the constitution of 2010 but is yet to have been created in reality due to the prolonged political transition.

4 We limit the study to West Africa only for pragmatic reasons. The depth of the qualitative comparison was given priority over the inclusion of more cases, particularly Francophone Central Africa.

5 Daniel Brinks and Michael Coppedge, “Diffusion Is No Illusion: Neighbor Emulation in the Third Wave of Democracy,” *Comparative Political Studies* 39, no. 4 (2006): 463–489; Zachary Elkins and Beth Simmons, “On Waves, Clusters, and Diffusion: A Conceptual Framework,” *The ANNALS of the American Academy of Political and Social Science* 598, no. 1 (2005): 33–51; Kristian Skrede Gleditsch and Michael D. Ward, “Diffusion and the International Context of Democratization,” *International Organization* 60, no. 04 (2006): 911–933; Julian Go, “A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000,” *International Sociology* 18, no. 1 (2003): 71–95.

6 J. Mark Ramseyer, “The Puzzling (In)Dependence of Courts: A Comparative Approach,” *Journal of Legal Studies* 23 (1994): 721–747; Ginsburg, *Judicial Review in New Democracies*; Jodi Finkel, *Judicial Reform as Political Insurance* (South Bend: University of Notre Dame Press, 2007); Mary L. Volcansek, “Bargaining Constitutional Design in Italy: Judicial Review as Political Insurance,” *West European Politics* 33, no. 2 (2010): 280–296.

7 Victor T. Le Vine, “The Fall and Rise of Constitutionalism in West Africa,” *The Journal of Modern African Studies* 35, no. 2 (1997): 199.

8 Jean du Bois de Gaudusson, “Les nouvelles constitutions africaines et le mimétisme,” in *La création du droit en Afrique*, ed. Dominique Darbon and Jean du Bois de Gaudusson (Paris: Karthala, 1997), 309–316; Jean du Bois de Gaudusson, “Le mimétisme postcolonial, et après ?,” *Pouvoirs* n° 129, no. 2 (2009): 45–55; André Cabanis

declared that “constitution draftsmen have again [a second time after the first independence constitutions] sought their inspiration in what they perceive as a reliable and unsuspected democratic model: that of France.”<sup>9</sup> This perspective has become and remained so dominant that we cannot neglect it. Indeed, following Most and Starr’s<sup>10</sup> invitation, we put forward a particular integration of diffusion and strategy arguments.

Essentially, we argue that the French constitutional setting serves as the “natural” or “baseline” reference point for Francophone West Africa and that deviations from this model are to be explained by domestic factors. That is, in a situation of extensive domestic neglect of the design of constitutional courts, international diffusion will still provoke the introduction of the easiest solution with the lowest innovation costs: the well-known Gallic model. In comparative terms, the French constitutional review body is a formally weak point of reference.<sup>11</sup> This implies

- a) that deviation from this model should most often result in more powerful courts and
- b) that big incentives are needed to produce strong courts in this region.

Any more powerful “natural” point of reference would imply that courts obtain a generally stronger formal design. Consequently, less domestic interest in a forceful court should suffice to result in the same (or an even higher) level of de jure independence.

In the next section, we detail our theoretical approach. After that, we present the framework employed for the comparison of formal independence.<sup>12</sup> This framework offers both a cautious quantification that can be used for further cross-regional comparative purposes and a qualitative assessment of important similarities and differences in court designs across West Africa. A new form of graphical representation should facilitate the comparison of various institutional dimensions. Striking similarities with France prevail but they are unequally distributed across the dimensions of formal independence; we ultimately explain these deviations with historical political competition data. The findings strongly support our arguments for combining the approaches of “Gallic diffusion” and strategic interests in political insurance.

and Michel Louis Martin, *Les constitutions d’Afrique francophone: Évolutions récentes* (Paris: Karthala, 1999), 189–191; Dominique Darbon, “À quoi profite le mime? Le mimétisme institutionnel confronté à ses représentations en Afrique,” in *Les politiques de mimétisme institutionnel*, ed. Yves Mény (Paris: Harmattan, 1993), 113–137; Charles Manga Fombad, “Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism,” in *The Resolution of African Conflicts*, ed. Alfred Nhema and Paul Tiyambe Zaleza (Oxford: James Currey, 2008), 179–199.

9 Reyntjens, “The Winds of Change: Political and Constitutional Evolution in Francophone Africa, 1990–1991,” 51.

10 Benjamin A. Most and Harvey Starr, “Theoretical and Logical Issues in the Study of International Diffusion,” *Journal of Theoretical Politics* 2, no. 4 (1990): 408.

11 Sylvain Brouard, “The Constitutional Council: The Rising Regulator of French Politics,” in *The French Fifth Republic at Fifty: Beyond Stereo Types* (New York: Palgrave Macmillan, 2009), 99–117.

12 This framework has been developed in the context of the above-mentioned research project (see note 1). Information on the index beyond Annex 1 can be obtained from the authors.

## 2 Integrating Two Theories: Diffusion and Strategic Action

The theoretical approach of this paper is based on the literature on

- a) international diffusion theory, which highlights exogenous influences on institutional choices;
- b) insurance theory, the most prominent strategic action theory in the realm of judicial politics; and
- c) institutional mimicry theory, primarily developed by (Francophone) constitutionalists with regard to the Francophone world.

We deem mimicry theory to be a subfield of broader diffusion theory although they have rarely been explicitly connected – most probably due to limited communication between diffusion theorists in Anglophone political science and mimicry theorists in Francophone constitutional studies. We hypothesize that the mimicry type of diffusion appeared in Francophone West Africa when there was either no strategic attention to the issue of constitutional courts or a dominant strategic interest in the least innovation possible. Consequentially, all and only deviation from the Gallic model must be explained by domestic strategic action in accordance with insurance theory.

### 2.1 Diffusion

Gleditsch and Ward define diffusion as the mechanism whereby “linkages to external actors and events influence the relative power and the likely strategies and choices of relevant groups in struggles over political institutions and outcomes.”<sup>13</sup> They thus assume that actors deliberately adapt or react to the international environment and find strong evidence of the importance of (mainly subtle) regional and international effects on democratization. However, diffusion is not a unitary phenomenon. It comes in various forms, operates on different levels and uses diverse mechanisms.<sup>14</sup>

Three sorts of diffusion contribute to democratization.<sup>15</sup> Adaptation pressure can evolve in a

- a) relatively highly democratized neighborhood,
- b) through super power linkages, or
- c) world trends.

Hence, proximate geographic diffusion is only one form of diffusion,<sup>16</sup> albeit maybe the most intuitive. Brinks and Coppedge suggest testing for further forms of diffusion – economic or

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13 Gleditsch and Ward, “Diffusion and the International Context of Democratization,” 918.

14 Most and Starr, “Theoretical and Logical Issues”; Elkins and Simmons, “On Waves, Clusters, and Diffusion”; Zachary Elkins, “Constitutional Networks,” in *Networked Politics: Agency, Power, Governance*, ed. Miles Kahler (Ithaca: Cornell UP, 2009).

15 Brinks and Coppedge, “Diffusion Is No Illusion: Neighbor Emulation in the Third Wave of Democracy.”

16 *Ibid.*, 466.

cultural networks, *inter alia*.<sup>17</sup> The authors associate economical networks with trading partners and cultural ones with such things as common languages or colonial histories.

Over time, the influence of previous colonial powers on the shape of a country's constitution tends to decline but in no way to vanish.<sup>18</sup> While the first independence constitutions "were largely influenced by sub-global circuits [such as] empire, religion and ideology," late twentieth-century postcolonial constitutions have "converged on certain points" but diversified on others.<sup>19</sup>

Elkins and Simmons have greatly contributed to a systematization of the concept.<sup>20</sup> They distinguish three forms of clustered decision making and reserve "diffusion" for the process of uncoordinated interdependence.<sup>21</sup> They define diffusion as the process in which domestic actors "make their own decisions without cooperation or coercion but interdependent in the sense that they factor in the choices of other governments." They emphasize the procedural quality of diffusion, which they see as "not an outcome but the flagship term for a large class of mechanisms and processes associated with a likely outcome." A minimal requirement for diffusion is "an exchange of some sort between actors."<sup>22</sup> That said, they propose two main classes of diffusion: "adaptation" and "learning." The authors attribute a higher degree of constitution makers' commitment to learning processes than to reactive adaptation. Without going into the details of the three mechanisms that they subsume under each class, we should praise the authors' theoretical advance for its ideal-typical offering. With regard to this paper, we find two explicit references to the type of diffusion in which we are interested. First, the authors explicitly cite "mimicry" as one of the terms earlier used to describe a process of diffusion. Second, they include institutional inspirations from former colonial powers under the diffusion mechanism "learning from reference groups."<sup>23</sup>

The term "inspirations" describes the process as neutral as possible. In other words, we neither adopt Elkins and Simmons's tendency to convey a rather optimistic view of the colonial paradigm (they confidently refer to committed learners) nor discuss institutional similarities solely from the perspective of ill-conceived blueprint solutions as the Francophone debate about "mimicry" (French: *mimétisme*) tends to imply. We agree that decision making in Francophone Africa was often complex (e.g., Du Bois de Gaudusson;<sup>24</sup> Ngege<sup>25</sup> or Diallo<sup>26</sup>).

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17 *Ibid.*, 484.

18 Go, "A Globalizing Constitutionalism?"

19 *Ibid.*, 90.

20 Elkins and Simmons, "On Waves, Clusters, and Diffusion."

21 This is different from coincident decisions, which represent "similar responses to similar conditions" and from coordinated decision making, which covers – in their view – explicit cooperation and external coercion.

22 Elkins and Simmons, "On Waves, Clusters, and Diffusion," 34–37.

23 *Ibid.*, 45.

24 Du Bois de Gaudusson, "Les nouvelles constitutions africaines et le mimétisme"; "Le mimétisme postcolonial, et après?"



However, the existing work fails to explain the differences between Francophone African countries. We argue that to clarify this variation is to avoid treating Francophone Africa as a bloc and overemphasizing the deliberate decision-making process in some countries.

## 2.2 Strategic Action

The main competing explanation for the institutional innovations is strategic action based on domestic interests. Authors from this perspective point out that political actors who introduce or strengthen institutions, such as constitutional review, constrain themselves. Therefore, such actors need strong incentives that go beyond international adaptation or committed learning in order to create a special court for the protection of constitutional rules; they seek political insurance.

Accordingly, insurance theory basically argues that under conditions of electoral uncertainty, political actors including incumbents are strategically interested in reducing their risk by protecting their constitutional rights.<sup>27</sup> In other words, the more competitive the political landscape in a given country, the more probable it becomes that the incumbent rulers will support strong constitutional review. Uncertainty is generally higher in regime transitions, in which constitutions are often drafted or reformed before the first elections take place. Thus, the electoral outcome can only be anticipated based on limited information. In a nutshell, conjectural or real political competition increases the chances of a strong constitutional court.

On the global scale, Ginsburg and Versteeg identify insurance theory as the strongest approach for explaining why countries formally adopt constitutional review.<sup>28</sup> Using a large global dataset, the authors do not find significant empirical evidence for the diffusion of constitutional review. This contradicts the general argument discussed above that international diffusion must not be neglected when explaining institutional innovation in the context of democratization.

On the individual country level, studies have also supported insurance theory. Volcansek, for instance, dismisses the high impact of diffusion with regard to constitutional court design in Italy.<sup>29</sup> She too prefers insurance theory but goes beyond Ginsburg's question of whether constitutional review has been introduced at all.<sup>30</sup> Instead, she points to different

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25 Yuhniwo Ngege, "International Influences and the Design of Judicial Review Institutions in Francophone Africa," *American Journal of Comparative Law* 61, no. 2 (2013): 433–460.

26 Ibrahima Diallo, "À la recherche d'un modèle africain de justice constitutionnelle," *Annuaire international de justice constitutionnelle* 20 (2004): 93–120.

27 Ramseyer, "Puzzling (In)Dependence of Courts"; Ginsburg, *Judicial Review in New Democracies*.

28 Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?," article manuscript, July 2012, online: <[https://www.utexas.edu/law/academics/centers/clbe/wp/wp-content/uploads/centers/clbe/versteeg\\_why\\_do\\_countries\\_adopt.pdf](https://www.utexas.edu/law/academics/centers/clbe/wp/wp-content/uploads/centers/clbe/versteeg_why_do_countries_adopt.pdf)>.

29 Volcansek, "Bargaining Constitutional Design in Italy."

30 Ginsburg, *Judicial Review in New Democracies*.

degrees of constitutional review. In other words, the more competitive the political situation at the crucial moment of institutional engineering (i.e., the smaller the winner's margin), the stronger the judicial review:

If a single dominant party controls the writing of the constitution, judicial review will probably be weak. On the other hand, when constitutional drafters are in political deadlock, they will choose strong, accessible judicial review as insurance in case they lose the next election.<sup>31</sup>

Similar strategic mechanisms explain different forms of constitutional review in Argentina, Peru and Mexico<sup>32</sup> – though a caveat should be introduced. A political context in which authoritarian incumbents feel threatened by competition but have the will and power to control institutional engineering may prompt the incumbents to prefer a weak and more accountable judiciary to strong independent courts.<sup>33</sup> Accordingly, we ought to consider the political context of competition when analyzing differences in the strength of constitutional jurisdiction bodies.

### 2.3 An Integrated Approach for the West African Context

Employing a dichotomous theoretical alternative in the empirical world usually ends in the finding that neither the one nor the other theory explains the outcome, but rather a mix of both. Not only Italy proves that intervening factors such as ideological positions strongly affect the insurance mechanism.<sup>34</sup> Furthermore, most renowned theorists have called for an integration of diffusion- and nondiffusion-related arguments.<sup>35</sup> With regard to Francophone Africa, Elgie finds “a mix of endogenous and exogenous preferences” in constitutional choices.<sup>36</sup> Although he had no special interest in constitutional courts, Elgie's quantitative analysis provides sound initial evidence for the combination of diffusion and insurance elements into one theoretical approach to examine former French colonies on African soil.

We propose that diffusion in the sense of mimicry has a strong impact on constitutional court design in Francophone Africa, but only when domestic conditions incite institutional change and only as a basic reference point. How far actors go beyond the Gallic model is again determined by domestic conditions. In more theoretical terms, we construct a three-phase model. In phase one, we assume that an amalgam of domestic, regional and global fac-

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31 Volcansek, “Bargaining Constitutional Design in Italy,” 283.

32 Finkel, *Judicial Reform as Political Insurance*.

33 Maria Popova, “Political Competition as an Obstacle to Judicial Independence: Evidence From Russia and Ukraine,” *Comparative Political Studies* 43, no. 10 (Oktober 2010): 1202–1229.

34 Volcansek, “Bargaining Constitutional Design in Italy.”

35 Most and Starr, “Theoretical and Logical Issues,” 408.

36 Robert Elgie, “Exogenous Political Institutions? Constitutional Choice in Postindependence Francophone Sub-Saharan Africa,” *Political Research Quarterly* 65, no. 4 (2012): 780.

tors drives countries into critical junctures of institutional change – though we will not further investigate this first phase. In phase two, constitution drafters need to set priorities, collect information and review options once the window of opportunity has presented itself. Historical experience tells us that this second phase usually involves external influences. Europe’s constitutionalization was shaped by diffusion two centuries ago, and African constitutions were also certainly not drafted from scratch.<sup>37</sup> Hence, it is not a question of whether diffusion appeared, but rather to what extent and along which lines. We assume that constitution drafters with different priorities or a lack of information resources stick to the easiest solution, which is the well-known reference group. Despite the increase in regional influences and the diversification of educational sources of influence, France remained the single most important point of reference for state affairs in Francophone West Africa.<sup>38</sup> While the non-commitment of constitution drafters appears to be the major reason for Gallic diffusion, more innovative solutions may have been eliminated in phase three, in which political actors chose from the menu of constitutional options reviewed in phase two. According to insurance theory, domestic strategic action determines the final institutional design in this third phase. In other words, political competition drives constitutions away from the French model.

Of course, the phases are fully sequential only in theory. In the real world, one phase rarely terminates before the other phase starts. For our purposes, it is particularly important to consider the fact that

- a) actors’ preferences for particular solutions (possibly dating back to well before phase one) may infiltrate the decision-making process and that
- b) phase-two actors may anticipate strategic action in phase three.

Priorities and information collection depends on the anticipated commitment of decision makers in phase three. Knowing about the reluctance of actors to go beyond a particular or well-known design naturally limits the commitment to collecting extensive information. This is particularly true if phases two and three are dominated by the same individuals. However, the ideal-typical phasing in which we frame our theoretical approach here should facilitate an analysis of how diffusion and insurance combine in the creation of constitutional courts in a late postcolonial context.

Our approach resembles Brinks and Blass’s recent approach on diffusion and domestic politics in Latin America. However, they found no strong evidence for diffusion.<sup>39</sup> Notwithstanding their partial criticism of insurance theory, they are generally in line with other stud-

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37 Zachary Elkins, “Diffusion and the Constitutionalization of Europe,” *Comparative Political Studies* 43, no. 8/9 (2010): 969–999.

38 Sory Balde, *La convergence des modèles constitutionnels* (Paris: Publibook, 2011), 447–554; André Cabanis and Michel Louis Martin, *Les constitutions d’Afrique francophone: Évolutions récentes* (Paris: Karthala, 1999), 189–191.

39 Daniel Brinks and Abby Blass, “Diffusion and Domestic Politics: Designing Courts for Governance,” *SSRN eLibrary* (October 15, 2011), online: <<http://ssrn.com/paper=1449045>>.

ies that largely support strategic action approaches.<sup>40</sup> However, all of these studies see diffusion and strategy as conflicting rather than complementary approaches; although it is still true that we observe a global trend toward more constitutional review in the world. If only the critical final decision for the adoption of constitutional review appears to be more influenced by domestic politics than the global environment, we should more precisely investigate when, why and to what extent domestic politics do indeed outperform diffusion effects. We are well advised to keep in check any early optimism about the rise of world constitutionalism based purely on judicial commitment.<sup>41</sup> The details of a court's institutional design are more important for judicial independence than the fact that constitutional review exists. Certainly, *de jure* independence does not make a court independent. If we understand independence as the absence of political interference, this means we need to consider the *de facto* performance of courts. Nonetheless, formal institutions shape the conditions under which courts operate<sup>42</sup> by extending or constraining the court's capability to resist political interference. It is not necessary to preclude or suppress constitutional jurisdiction bodies in order to have a weak judiciary. On the one hand, there are plenty of institutional details (ranging from appointment rules to accountability measures) that politicians can use to constrain constitutional review effectively. On the other hand, noncommitted copying of blueprints from natural reference groups should not be mistaken for the effective and legitimate result of strategic action. As a result, details of both the process and the institutional outcome matter. We should therefore be interested in the origin of constitutional details that shape the *de jure* potential for judicial independence and political interference, respectively.

### 3 The French Model and African Innovations

We assume that the French Constitutional Council has been the natural point of reference for any constitutional jurisdiction body created in Francophone West Africa over the last two decades. De Gaulle's Fifth French Republic – established in 1958 – created a comparatively weak constitutional review body that has often been perceived as more of a political body than an independent guardian of constitutional rules.<sup>43</sup> For instance, the constitution makers constrained the Constitutional Council by

- a) only allowing for *a priori* abstract reviews,
- b) excluding the access of ordinary citizens, and
- c) political appointments that do not require broad consensus.<sup>44</sup>

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40 In particular, Ginsburg and Versteeg, "Why Do Countries Adopt Constitutional Review?".

41 Ackerman, "The Rise of World Constitutionalism."

42 Helmke and Rios-Figueroa, *Courts in Latin America*.

43 Brouard, "The Constitutional Council: The Rising Regulator of French Politics."

44 The appointment of councilors is the privilege of the three highest-ranking state officials: the head of state and the presidents of the Senate and the National Assembly, respectively.

At independence, most Francophone African countries adopted constitutions that were based on the French Constitution.<sup>45</sup> They created particularly strong executive presidents, weak parliaments and weak judiciaries.<sup>46</sup> In fact, at the time, these countries did not adopt constitutional courts in the form of separate constitutional councils. Most often, the constitutional chambers were formally included in supreme courts; many were inactive for decades. With regard to an independent judiciary, they were thus even more parsimonious than the Gallic model. The creation of separate constitutional review bodies only started in West Africa with the third wave of democratization. Since the early 1990s, all former AOF countries have designed separate courts.<sup>47</sup>

### 3.1 The Challenge of Measurement

No two courts are perfectly equal. Indeed, neither the wording nor the detailed construction of the courts is ever one hundred percent Gallic diffusion. But is this important? On the one hand, it is difficult to prove whether or not copying from France represents a “determined and volitional” choice.<sup>48</sup> On the other hand, those scholarly contributions that provide valuable descriptions of the variety of international influences have not yet developed the necessary framework to assess the theoretical value of specific institutional decisions.<sup>49</sup> To identify the theoretically important aspects of judicial design, we use a general abstract measurement of de jure independence of constitutional review bodies. This measure is based on the most relevant recent works and designed for universal use.<sup>50</sup> In other words, we do not consider all deviations equal but emphasize the theoretical meaning of particular decisions. As with plagiarism in other realms, we should not expect any constitution to be copied verbatim. However, renaming or rephrasing another aspect does not represent a renunciation of diffusion.

The problem in identifying “important” deviations lies in the current plurality of measurement proposals. This comes as no surprise considering the recent dynamism in the field of judicial politics. We consulted four of the major proposals for their multidimensional and detailed character in order to create a list of the important institutional concerns that are

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45 Fombad, “Post-1990 Constitutional Reforms in Africa: A Preliminary Assessment of the Prospects for Constitutional Governance and Constitutionalism,” 183.

46 Charles Manga Fombad and Enyinna Nwauche, “Africa’s Imperial Presidents: Immunity, Impunity and Accountability,” *African Journal of Legal Studies* 5, no. 1 (2012): 93–97.

47 Some countries took the original French name “Conseil Constitutionnel” while others opted for the name “Cour Constitutionnelle.” In essence, either version denominates separate constitutional jurisdiction bodies.

48 Du Bois de Gaudusson, “Les nouvelles constitutions africaines et le mimétisme,” 315.

49 Babacar Kanté, “Models of the Constitutional Jurisdiction in Francophone West Africa,” *Journal of Comparative Law* 3, no. 2 (2008): 158–173; Ngenge, “International Influences and the Design of Judicial Review Institutions in Francophone Africa.”

50 Details of the measurement have not yet been published but are available from the authors upon request. Annex 1 presents the indicators and the method of calculation.

thought to determine any constitutional court's level of de jure independence.<sup>51</sup> They are as follows:

- 1) Broad access to the court or decentralized constitutional review
- 2) High quantity and political significance of court powers
- 3) Diversification of actors involved in the judges' appointment
- 4) Supermajorities to force a consensual selection of judges
- 5) Adequate professional requirements for the judges
- 6) Ample nonrenewable term lengths
- 7) Protection of the judges against political removals
- 8) Constitutional protection of the court's competences and structure
- 9) Material security of the judges with adequate salaries
- 10) Protection against easy amendment of the text that stipulates the court's rights
- 11) Ample legal reach of court rulings

We integrated these abstract concerns into a new index. We sought to avoid logical doubling and to aggregate existing indicators for these items in a theoretically sound manner. We ended up with 28 indicators clustered in five dimensions (see Annex 1). Most indicators take zero or one as they simply denote whether or not a legal feature exists, whereas some range from zero to one. The aggregated index of formal independence (IFI) starts at zero and scores two at the theoretical maximum for perfect de jure independence. The five dimensions refer to well-established categories in judicial politics research. The first evaluates the accessibility of the court (item 1 on the above list). The power dimension evaluates the competences of the court (item 2). The third and fourth dimensions build constraints on the decision-making process in cases where the court is competent. On the one hand, appointment rules influence ex ante the autonomy of the court (items 3–5). On the other hand, job security and features of structural protection determine the formal ex post accountability of judges (items 6–10). Finally, only decisions that have considerable legal reach really matter (item 11). Thus, reach is the fifth dimension.

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51 Daniel Brinks and Abby Blass, "The Conceptualization and Measurement of Formal Judicial Power," *SSRN eLibrary* (20 August 2011), online: <<http://ssrn.com/paper=1901124>>; Lars P. Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators," *European Journal of Political Economy* 19, no. 3 (2003): 497–527; Horowitz, "Constitutional Courts: A Primer for Decision Makers"; Julio Ríos-Figueroa, "Institutions for Constitutional Justice in Latin America," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Ríos-Figueroa (Cambridge University Press, 2011), 27–54. Horowitz has not explicitly proposed a measurement but gives institutional recommendations for the construction of an independent and effective constitutional review body. We read Horowitz's recommendations as criteria. Brinks and Blass' proposal was declaredly preliminary when presented as a conference paper, but Brinks' "A Tale of Two Cities: The Judiciary and the Rule of Law in Latin America," in *Routledge Handbook of Latin American Politics*, ed. Peter R. Kingstone and Deborah J. Yashar (New York: Routledge, 2012), 73, refers to the same index in a recent publication.

Since others have found that the correlation between judicial independence measurements is quite low, we expect some deviation of our measurement from alternative measures.<sup>52</sup> Binary correlations of index values for former AOF countries plus France show that our index comes empirically close ( $r=0.84$ ) to Brinks and Blass's<sup>53</sup> complex proposal but is largely different ( $r=0.58$ ) from Feld and Voigt's<sup>54</sup> measurement – though the general concerns of all three proposals are similar. Clearly, aggregation matters a great deal.

### 3.2 Gallic Diffusion

We consider the aggregated index value to be crucial for the comparative assessment of the courts' de jure independence. However, similar aggregated values do not necessarily imply that two systems are institutionally similar. In fact, the index measures the degree of formal independence against theoretical standards with regard to 28 indicators. Different indicator combinations can lead to similar index results. Thus, African courts can deviate from the French model with regard to each indicator in a way that either features the theoretical expectation of greater independence (i.e., positive deviation from the model) or lesser independence (i.e., negative deviation from the model). When the indicators are aggregated, positive deviations from the French model in one aspect may level out negative deviations in another aspect, thus making the two systems appear less different than they actually are. Index deviations are nevertheless important as only they allow us to assess whether the degree of deviation is meaningful in theoretical terms.

Accordingly, it was necessary to control the aggregated results for indicator congruence (i.e., check how many of the 28 indicators conform with the French model). Indicator congruence does not mean identical wording but rather matching content that leads to the same indicator value. However, not only did we find a regional average of 76 percent concordance with France, we discovered the phrasing to often be strikingly similar. With regard to the individual African cases, the highest degree of deviation can be found in Benin (57 percent concordance), whereas Mauritania (89 percent concordance) provides the strongest evidence of mimicry. Table 1 summarizes the data for all nine countries, calculates the distance to France in terms of the IFI and contrasts this with the degree of indicator congruence. On the one hand, differences in the two measures underline that theory-guided aggregation is crucial as not all indicators are equally important. On the other hand, only the generally high degree of indicator congruence systematically supports the Gallic diffusion approach.<sup>55</sup>

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52 Julio Ríos-Figueroa and Jeffrey K. Staton, "Unpacking the Rule of Law: A Review of Judicial Independence Measures," *SSRN eLibrary* (2009), online: <<http://ssrn.com/paper=1434234>>.

53 Brinks and Blass, "The Conceptualization and Measurement of Formal Judicial Power"; Brinks, "A Tale of Two Cities: The Judiciary and the Rule of Law in Latin America," 73.

54 Feld and Voigt, "Economic Growth and Judicial Independence."

55 This holds also true if we compare the concordance with France to another popular European model, the German Constitutional Court. Overall, indicator congruence with the German model is at 58 percent, which is

**Table 1: Index Values, Deviations from France, and Indicator Congruence**

	<i>Benin</i>	<i>Burkina Faso</i>	<i>Côte d'Ivoire</i>	<i>Guinea</i>	<i>Mali</i>	<i>Mauritania</i>	<i>Niger</i>	<i>Senegal</i>	<i>Togo</i>
Index IFI	0.72	0.31	0.54	0.93	0.31	0.14	0.76	0.24	0.63
Deviation $\Delta$ from France	+0.56	+0.15	+0.38	+0.77	+0.15	-0.02	+0.60	+0.08	+0.47
Indicator congruence with France	57%	86%	82%	71%	75%	89%	75%	75%	75%

Note: IFI (France) = 0.16; aggregation method in Annex 1.

Source: Authors' data and calculations.

Guinea is the most distant case from France on the aggregated index level but still shares more than two-thirds of the index's characteristics with the French model. Niger is the second most distant case ( $\Delta +0.6$ ). It shares the same degree of indicator congruence with Mali, but the latter designed a constitutional court with an IFI much closer to that of France. There are two possible explanations for this difference: First, Mali has created innovations that increase and others that decrease the aggregated IFI compared to France's, while Niger has created innovations that are more beneficial in terms of the index. Second, the characteristics in which Mali deviates from France are theoretically less important than Niger's deviations from the Gallic model. Both Mali and Niger deviate from France with regard to seven indicators. However, Mali differs from France in theoretically deleterious ways, whereas Niger's innovations add more theoretically beneficial features. More precisely, Mali drops behind French standards with regard to appointment criteria for constitutional judges. Theorists of judicial independence usually think of staggered appointments and nonrenewable terms as beneficial for a court's autonomy and, thus, for one important dimension of judicial independence. Malian judges are all appointed simultaneously and their terms can be renewed once. In contrast, Niger not only adopted staggered and nonrenewable appointments but also allowed actors external to the branches of government to be involved in the appointment process. This is another element usually considered to be beneficial for judicial independence. Only two out of seven Nigerien judges are appointed by the political branches – more precisely, by the head of state and the executive committee of Parliament.

More generally, we observe on both the indicator level and the aggregated index level that Gallic diffusion is not evenly distributed across the dimensions of judicial independence. We count 10 (out of 28) indicators that never deviate from France and 6 that only deviate in one single country; all the other countries conform with France. Differences mainly concern the index dimensions of accessibility, competences and appointment rules. More specifically,

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much lower than the French reference of 76 percent. Moreover, most African indicators conforming with Germany refer to items that are equal in Germany and France. However, in the Francophone West African cases, only 28 percent of those indicators showing a difference between Germany and France correspond to the German model, while 66 percent correspond to the French model. Beyond numbers, colonial history obviously supports Gallic over "Teutonic" and any other form of intercontinental diffusion.



most West African constitutions adopted a posteriori concrete constitutional reviews. This major deviation from the French constitutional text at that time directly affects the accessibility dimension as lower courts, if not private individuals, gain the additional right to file suits in the constitutional courts. Only Mauritania and Mali do not allow any form of concrete review.

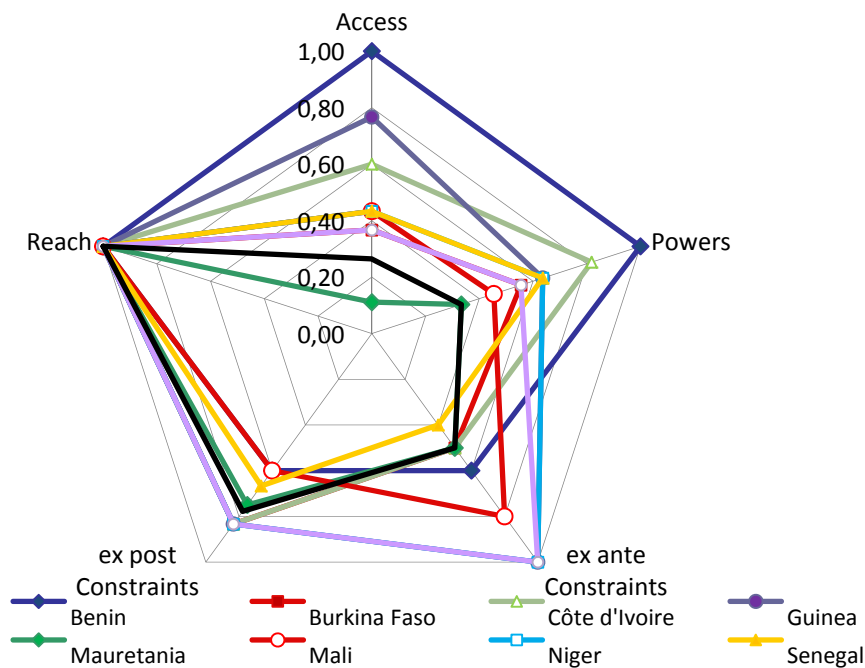
However, concrete constitutional review was not an African innovation. In 1989/1990, the Mitterrand administration introduced a bill on the so-called exception of unconstitutionality into the French Parliament.<sup>56</sup> Even though the bill failed in the opposition-dominated Senate, it was exactly this form of concrete constitutional review that was adopted shortly afterward by most of the West African states in this study. Law professors from Senegal confirmed that the early adoption of concrete review in 1992 was nothing but diffusion of the failed French attempt<sup>57</sup> – a claim further supported by multiple contemporary facts (e.g., Socialist Party governments in both countries, strong politico-economic relations with the former colonizer of AOF [“Françafrique”], and particularly evolved educational networks). Other countries may have learned from both points of reference (i.e., Senegal and France), which would explain the proliferation of the exception of unconstitutionality in the region. With regard to appointments, the picture is more complex.

All in all, there is strong support for the thesis of Gallic diffusion – which views France as the basic reference model for African constitutional courts. Three quarters of all criteria considered important in theoretical terms mirror the French model. Deviations must be explained with the help of complementary (not competing) theories. Figure 1 and Table 2 demonstrate both the relative weakness of the French model and the unequally distributed deviations across countries and index dimensions.

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56 Robert Badinter, L'exception française de trop, *Le Monde*, 012, online: <[www.lemonde.fr/idees/article/2012/05/19/l-exception-francaise-de-trop\\_1704190\\_3232.html](http://www.lemonde.fr/idees/article/2012/05/19/l-exception-francaise-de-trop_1704190_3232.html)> (19 May 2012).

57 Interview (code JIND-SEN-RT) by the authors, Dakar, January 2012.

**Figure 1: Index Dimensions (All Countries Compared)**

Note: The full index does not represent an average of the dimensions. Aggregation method detailed in Annex 1.

Source: Authors' data and representation.

**Table 2: Index Dimensions (All Countries Compared)**

	Access	Powers	Ex Ante Constraints	Ex Post Constraints	Reach	Index IFI
Benin	1.00	1.00	0.60	0.60	1.00	0.72
Burkina Faso	0.37	0.56	0.50	0.83	1.00	0.32
Côte d'Ivoire	0.60	0.82	0.50	0.83	1.00	0.55
Guinea	0.77	0.64	1.00	0.83	1.00	0.94
Mauretania	0.11	0.33	0.50	0.75	1.00	0.14
Mali	0.43	0.45	0.80	0.60	1.00	0.31
Niger	0.43	0.64	1.00	0.83	1.00	0.76
Senegal	0.43	0.64	0.40	0.67	1.00	0.24
Togo	0.37	0.56	1.00	0.83	1.00	0.63
France	0.26	0.33	0.50	0.78	1.00	0.16
Average deviation from France	0.27	0.29	0.22	0.09	0.00	0.31
Spread	0.89	0.67	0.60	0.23	0.00	0.80

Note: The full index does not represent an average of the dimensions. Aggregation method detailed in Annex 1.

Source: Authors' data and representation.

## 4 Explaining the Differences

Having shown that Gallic diffusion is still an important source of institutional design and more precisely constitutional court design, we still need to explain variance. While parts of the deviation from France can be explained by indirect diffusion of constitutional reforms that eventually failed in France (e.g., exception of unconstitutionality), there are still considerable differences between the Francophone West African states. We assume that whenever Gallic diffusion has not resulted in the adoption of the French model, the divergence can best be explained with insurance theory. We have shown that recent studies support the focus on this theory. The basic idea of insurance theory is that the more politically competitive the situation is in the period of court creation, the stronger and the more independent the formal design of the court should be. In other words, the more likely political competitors (particularly incumbents) face electoral defeat, the more interested they are in an independent guardian of constitutional rights.

### 4.1 Political competition

Above, we have proposed a measure for de jure independence. Now, we need to assess the impact of competition on the constitutional courts' de jure independence. Therefore, we need to measure competition – political competitiveness to be precise. Ginsburg (2003), whom we follow, uses a variant of the classic winner's margin, which he calls "party strength." This is:

the difference in the first postconstitutional election between the seat share of the strongest and second-strongest parties or blocs of parties in the legislature. [...] This captures the extent to which there is a dominant party and should correlate with the degree of political uncertainty during constitutional drafting. The lower the differential between seat shares, the less certain will be the leading party or bloc that it will end up in power.<sup>58</sup>

Ginsburg assumes a typical political transition from dictatorship to multiparty elections and constitutionalism. Consequentially, he further assumes that the first elections after the constitution-making process in which the constitutional court was designed are representative of the level of competition in the institutional design period. This is a systematic choice with some shortcomings such as ignoring earlier elections or events in the period between constitution making and the actual election day, but it is a systematic and broadly applicable choice. We thus adopted Ginsburg's proposal but adapted the measurement and took into account the shortcomings.

The first issue regarding the competition measurement concerns the actors' anticipation skills. Do the results of the first elections mirror the actors' perception of competition at the time of constitutional drafting? Political transition periods are generally characterized by an

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<sup>58</sup> Ginsburg, *Judicial Review in New Democracies*, 60.

elevated level of uncertainty.<sup>59</sup> This uncertainty can result in a false assessment of the level of competition, which may distort the expected probability to lose power and, eventually, impact the incentives to create a strong constitutional court. However, it is difficult to retrospectively measure the key actors' – essentially the incumbents' – perceptions. We thus assume, in accordance with Ginsburg, that first-election results may not be the best proxy but are an acceptable one if we do not ignore further qualitative information. Second, election results might distort the real level of competition due to electoral fraud or opposition boycotts. To assess the reliability of the election results with regard to competition, we supplemented the competitiveness measure with an assessment of the credibility of the elections. Third, the focus on legislative elections can be misleading in the Francophone West African context. The countries in our sample all adopted presidential systems after independence. Furthermore, political parties tend to be weak in Francophone West Africa, while politics are highly personalized.<sup>60</sup> Thus, politically relevant competition should be observed in presidential elections. This is why we included the level of competition in both elections. Finally, we agree that seat shares are more important for power relations than vote shares. However, measuring party strength via seat share margins for the purpose of insurance theory implies a high degree of information and awareness about the most probable effects of the electoral system on the transformation of votes into seats. Therefore, we believe vote shares to be the better cross-national indicator for preelectoral levels of competition if we account for the electoral behavior of parties, such as boycotts. However, we supplemented the vote share margin with seat share effects by considering whether the leading party won by a margin that secured it a dominant position.

## 4.2 Comparative Empirical Analysis

Data from the first elections after the constitutionalization of constitutional courts support the argument that political insurance tends to explain deviations from the French model. A comparison of the level of electoral competitiveness and the quality of elections shows rather clear discriminatory patterns across the nine African cases. Most election results allow for a rough distinction in either high or low levels of competition (see Table 3).

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59 Guillermo A. O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986).

60 Nicolas van de Walle, "Presidentialism and Clientelism in Africa's Emerging Party Systems," *Journal of Modern African Studies* 41, no. 2 (2003): 297–321.

**Table 3: Electoral Data**

	<i>Benin</i>	<i>Burkina Faso</i>	<i>Côte d'Ivoire</i>	<i>Guinea</i>	<i>Mali</i>	<i>Mauritania</i>	<i>Niger</i>	<i>Senegal</i>	<i>Togo</i>
CC creation	1990	1991	1994	2010	1992	1991	1999	1992	1992
Legislative election	1991	1992	1995	n/a	1992	1992	1999	1993	1994
Competitiveness	0.071	0.361	(0.880)	n/a	0.577	0.603	0.133	0.284	0.000
Credibility	+	--	--	n/a	+	--	+	+	-
Opposition behavior	no boycott	no boycott	partial boycott	no boycott	no boycott	partial boycott	no boycott	no boycott	no boycott
Presidential election	1991	1991	1995	2010	1992	1992	1999	1993	1993
Competitiveness	0.091	1.000	0.923	0.254	0.304	0.300	0.095	0.264	0.945
Credibility	+	-	--	+	+	-	+	+	--
Opposition behavior	no boycott	boycott	partial boycott	no boycott	no boycott	no boycott	no boycott	no boycott	partial boycott

Notes: 1) Competitiveness: Vote share of the strongest party or candidate less vote share of the second strongest party or candidate (winner's margin). First round of presidential elections. The lower the margin, the higher the level of competitiveness.

2) Credibility of elections according to Lindberg's data distinguishing four levels of credibility: ++ = Yes, entirely; + = Yes, somewhat; - = No, irregularities affected outcome; -- = No, not at all.<sup>61</sup> Credibility embraces the freedom and fairness of the elections and if they roughly reflect the voters' will. Guinea's presidential elections assessed by the authors.

3) Vote shares were unavailable for Côte d'Ivoire's legislative election, thus we use seat shares as a proxy.

Sources: Authors' compilation partially using data from Lindberg,<sup>62</sup> African Elections Database, official government documents.

One third of the observed elections show a winner margin of above 0.5 (i.e., more than 50 percentage points), which indicates a very safe majority. This group includes the legislative elections in Mali and Mauritania, the presidential elections in Burkina Faso and Togo as well as the legislative and presidential elections in Côte d'Ivoire. To accept margins above 0.5 as lowly competitive is a demanding threshold. However, as any other threshold would be theoretically arbitrary, we used one additional criterion. If a winner margin below 0.5 but still of considerable size<sup>63</sup> is combined with the strongest party winning an absolute majority of seats or the leading presidential candidate (affiliated to the strongest party) winning an absolute majority in the first round, we deem the case to have a low level of competitiveness. This is adequate for Francophone Africa where two ballot systems for presidential elections are the rule. We argue that such results exclude the uncertainty of falling victim to a coalition of losers. Negotiations with other parties or candidates would increase competition and would force the winner to make concessions to hold onto power. According to this additional rule, Burkina Faso's legislative elections, Senegal's presidential and legislative elections as well as

61 Staffan I. Lindberg, *Democracy and Elections in Africa* (Baltimore: Johns Hopkins University Press, 2006).

62 Ibid.

63 We deliberately avoid clear thresholds which would only produce the illusion of precision.

Mauritania's presidential election are classified as lowly competitive. All other elections are classified as highly competitive. Remaining discrepancies ought to be assessed with the help of specific case knowledge.

There is no reason to expect a perfect correlation of party strength and court strength.<sup>64</sup> Thus, the simple dichotomous assessment summarized in Table 4 should be appropriate for finding trends. The countries in the upper right box combine high competitiveness in both presidential and legislative elections; the lower left box indicates the opposite. If insurance determines the trend of deviation from the "natural point of reference" (France), we should observe the largest positive deviations ( $\Delta$ ) in the upper right field.

**Table 4: Comparative Assessment of Electoral Competitiveness and De Jure Independence**

		Presidential election	
		Low	High
Legislative election	High	Togo (IFI 0.63; $\Delta$ +0.47)	Guinea (0.93; $\Delta$ +0.77) Niger (0.76; $\Delta$ +0.60) Benin (0.72; $\Delta$ +0.56)
	Low	Côte d'Ivoire (0.54; $\Delta$ +0.38) Burkina Faso (0.31; $\Delta$ +0.15) Senegal (0.24; $\Delta$ +0.08) Mauritania (0.14; $\Delta$ -0.02)	Mali (0.31; $\Delta$ +0.15)

Note: Values in brackets indicate the respective CC's absolute IFI value and the deviation  $\Delta$  from the French model's IFI. French IFI (1990) equals 0.16. The IFI range is 0 to 2.

Source: Authors' data and representation.

The two sets of elections in Benin, Guinea and Niger were highly competitive. All of these countries designed much stronger courts than France, thus supporting our combination of political insurance and Gallic diffusion. Elections in Burkina Faso, Côte d'Ivoire, Mauritania and Senegal were lowly competitive. Political insurance theory would predict generally weak courts. However, we simply expected a lower deviation from the French model. This holds true for three countries but raises doubts in the case of Côte d'Ivoire, which deviates by 0.38 points. The Ivorian Constitutional Court thus sits between the weakest court in the high/high box (Benin) and the remaining cases in the low/low box. However, presidential and legislative elections have been partially boycotted and legislative elections were flawed. Consequently, the classification of Côte d'Ivoire as a country with low levels of electoral competitiveness is biased. The Ivorian situation was blurred for many years in the 1990s. Different actors followed different strategies and the post-Houphouët-Boigny period was difficult to assess for all actors.<sup>65</sup> On the one hand, we could argue that this signifies uncertainty

<sup>64</sup> Ginsburg, *Judicial Review in New Democracies*, 26.

<sup>65</sup> Christof Hartmann, *Externe Faktoren im Demokratisierungsprozess: eine vergleichende Untersuchung afrikanischer Länder* (Opladen: Leske + Budrich, 1999), 146–152.

that should lead to a stronger court. On the other hand, it was very uncertain at the time whether rule of law would provide a reliable basis for insurance in the near future. The mid-level design of the Court may actually be a result of this fuzzy historical situation – though further research is needed.

In Togo and Mali, the level of competitiveness in the presidential elections was different from the legislative elections. They are puzzling cases at first sight. Although perfect congruence of the levels of competitiveness is unlikely, a high degree of difference appears to be implausible. The difference is particularly high in Togo, where elections for the National Assembly appeared to be very competitive – contrary to the overwhelming winner margin for president. This gap can be explained by Togo's transition being shaped by confrontation rather than cooperation.<sup>66</sup> The radical opposition dominated the 1991 National Conference, which resulted in unacceptable outcomes for President Eyadéma.

Because of longstanding authoritarian rule (Eyadéma had been in power since 1967) and highly polarized power relations, all political actors were uncertain about the results of credible elections and feared electoral defeat.<sup>67</sup> Human rights issues dominated the discussions at the National Conference. The opposition feared further violent repression, while the government feared violent revenge after losing the elections. Therefore, the design of the Constitutional Court became a sideshow dealt with mainly by the technical Constitutional Commission<sup>68</sup> – members of which confirmed that political parity and legal professionalism shaped the work.<sup>69</sup> We could not trace the exact origin of the Court's design, but there was clearly little trust in the rule of law as an effective guardian of constitutional rights among key political players. Elections were shaped by partial boycotts and irregularities that highlight polarized and only partially free competition. President Eyadéma stood almost unopposed for election due to a boycott, which explains the enormous winner margin. Some months later, however, one of the more moderate opposition parties managed to win more seats in parliament than Eyadéma's state-party – although the major opposition party did not participate in the election.

With regard to Togo, we can thus assume that the legislative elections give a more appropriate impression of the existing level of competitiveness. Hence, constitution drafters may have translated the polarized competition into legal language by creating a constitutional court with greater de jure independence from political actors. Regional diffusion from neighboring Benin – which had achieved a peaceful democratic transition only one year be-

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66 Jennifer C. Seely, *The Legacies of Transition Governments in Africa: The Cases of Benin and Togo* (New York: Palgrave Macmillan, 2009).

67 The government was expected to be strong on the countryside – particularly in the North of the country – as well as among government beneficiaries and people originating from the North but living in the southern capital region. Strong opposition was expected in the capital Lomé, which is home to approximately half of the population.

68 The transitional fundamental law (National Conference Act No. 7) did not mention a constitutional court.

69 Interviews (codes HRA-TGO-04 & 38) conducted by the first author with opposition and government camp commission members, Lomé, June 2010.

fore – may have also played a role. One element of Benin’s constitutional innovations was the country’s strong Constitutional Court functioning as a guardian of the Beninese Constitution and political stability. Consequently, we should not be surprised by the medium-to-high positive deviation from the French model.

Mali is the second puzzling case in Table 4. Its National Assembly elections were clearly lowly competitive as the Alliance for Democracy in Mali (ADEMA) won a majority of seats and votes – the latter by a margin of about 60 percentage points. The country demonstrates “low” parliamentary competition, but “high” presidential competition according to our strict criteria. However, ADEMA’s candidate Alpha Oumar Konaré won 45 percent of the vote in the first round – some 30 percentage points ahead of his closest challenger Tiéoulé Mamadou Konaté. Moreover, the presidential contest was far from polarized. The runner-up Konaté supported democratization, while former military dictator Moussa Traoré was not allowed to run for election. Konaré’s broad and inclusive alliance thus secured the second round and the parliamentary elections in a landslide victory. This revised assessment ultimately supports our combined approach: the incentive to create a particularly strong guardian of constitutional rights was low due to the very moderate level of competition. Consequently, decision makers picked the easiest solution and adhered closely to the French model.

However, details of the constitutional drafting process in Mali point to more competition during the institutional design process than in the subsequent elections. The participation of representatives of the old regime and conflicts among democratic forces caused the National Conference to be less harmonious than the electoral data suggests. A priori, this higher degree of competitiveness should have led to a stronger positive deviation from the French model. First, however, Traoré’s associates prioritized the electoral system over the protection of constitutional rights. They sought to introduce proportional representation to raise the chances of the former unitary party winning a greater number of parliamentary seats and thus preserve some political influence. Second, a number of young jurists challenged the construction of a strong independent constitutional review body per se and even pleaded for a weaker constitutional review mechanism within the Supreme Court.<sup>70</sup> Third, the National Conference suffered from severe time constraints as the new Malian Constitution had to be drafted within 15 days. Therefore, despite the conference’s competitive atmosphere,<sup>71</sup> no major actor feared the loss of power to an extent that provoked insurance measures. Political trenches were bridgeable for the sake of rapid decisions, thus resulting in little qualitative deviation from the French model.

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70 Abdoulaye Diarra, *Démocratie et droit constitutionnel dans les pays francophones d’Afrique noire. Le cas du Mali depuis 1960* (Paris: Karthala, 2010), 166; Susanna D. Wing, *Constructing Democracy in Transitioning Societies of Africa: Constitutionalism and Deliberation in Mali* (New York: Palgrave Macmillan, 2008), 71.

71 Stefanie Hanke, *Systemwechsel in Mali: Bedingungen und Perspektiven der Demokratisierung eines neopatrimonialen Systems* (Hamburg: Institut für Afrika-Kunde, 2001), 119–125.



To sum up, political insurance can well explain the extent and direction of deviation from the French model in Benin, Burkina Faso, Niger, Guinea, Mauritania and Senegal. At first sight, the cases of Côte d'Ivoire, Mali and Togo do not perfectly fit the theoretical prediction. However, closer qualitative examinations do not contradict the combination of diffusion and insurance approaches.

## 5 Conclusion

The spread of constitutional review is usually explained by theories of diffusion or strategic action. While diffusion explains constitutional choices with international factors, strategic action approaches (such as insurance theory) stress the importance of domestic factors. The latter consider power relations and perceptions of political uncertainty as decisive for constitutional design. So far, theory testing has considered the two approaches to be in conflict and has tended to find stronger support for insurance theory.<sup>72</sup> However, at least in Francophone West Africa, a subversion of diffusion theory (mimicry) dominates the discourse of practitioners and Francophone legal scholars. The argument that former French colonies still basically copy the Constitution of the Fifth French Republic is far from dead.

This contribution thus asked how the approaches can be integrated in a theoretically sound way without neglecting either the academic findings that favor strategic action or the strong local discourse that emphasizes mimicry. We framed the theories as complementary rather than conflicting approaches. Different phases in constitution-drafting processes rely on different logics. In times of political reform, constitution drafters do not necessarily explore the entire universe of constitutional options. It is more likely that they start their exploration with constitutions that – due to historical or geographical reasons – they know best. This is the phase in which diffusion is most important. Subsequently, a process of political negotiations starts in which the degree of institutional and democratic innovation is determined. This is when domestic factors are most important. In this approach, well-known constitutions serve as a natural point of reference for institutional change, while strategic action determines the degree of deviation from the baseline.

Political transitions in the early 1990s opened the window of opportunity for institutional diffusion and pushed Francophone West Africa toward the adoption of separate constitutional review bodies. In the absence of domestic incentives to create stronger courts, the formally weak but well-known French model was closely followed. Thus, France represents the minimum standard of diffusion in this region. This is what we call “Gallic diffusion.” However, strategic action – political insurance strategies to be precise – explains deviations from the French reference point according to the level of competition.

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72 Brinks and Blass, “Diffusion and Domestic Politics: Designing Courts for Governance”; Ginsburg and Versteeg, “Why Do Countries Adopt Constitutional Review?”

We compared the original posttransition constitutions of all nine former AOF countries with the 1990 French Constitutional Council. The IFI was introduced to make the comparison as theoretically sound and meaningful as possible. It aggregates 28 indicators from five dimensions. The index combined and refined earlier index proposals rather than adding a completely new one. With regard to Francophone West Africa, we found extensive indicator congruence with France. Thus, Gallic diffusion has obviously persisted and indeed provided the natural point of reference for reforms. However, the nine Francophone West African constitutions deviate to different degrees from the French model. Deviation is particularly strong in the dimensions (access, powers and ex ante constraints) in which the French Constitutional Council was particularly weak.

Insurance strategies well explain the margin of deviation from baseline Gallic diffusion. The level of competitiveness and the degree of deviation from the French model clearly converged in six of our nine cases. Closer qualitative exploration of the three remaining cases did, at least, not substantially contradict the combined diffusion-insurance approach. In Mali, for instance, our systematic competition assessment proved to be too strict. Meanwhile, in Togo, the maintenance of autocratic power affected the competition data, and other priorities distracted political actors from the Constitutional Court as a potential effective guardian of fundamental constitutional rights.

We cannot claim that the combination of diffusion and insurance theories holds true for other regions in sub-Saharan Africa or worldwide. However, we find strong diffusion in Francophone West Africa combined with strategic action effects. History and France's lingering influence on the region and its decision makers are good reasons to believe that diffusion was stronger in former French colonies. However, similar effects should not be ignored in other (postcolonial) regions. Any de facto analysis requires solid groundwork on the de jure framework. Thus, future research should include the extent and quality of deviation from reference models as a potential determinant of the de facto performance of constitutional courts.

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### Annex 1: The Index of Formal Independence (IFI)

The index aggregates four dimensions of which one is divided into two subdimensions (**ACcesS** to the court; **POWers**, that is formal competences, of the court; **CON**straints on the decision-making process in cases the court is competent, this includes ex ante influences via appointments – sometimes called the “autonomy” dimension – and ex post accountability of the judges; **REACH** of the court’s decisions) and integrates 28 indicators that are briefly described in Annex 2.

$$(1) IFI = \frac{(ACS' + POW)(CON + REA')}{2} = \frac{(ACS * POW + POW)(CON + IMP * CON)}{2}$$

$$(2) ACS = \frac{OPPO + OUT + \frac{LC + SELF}{2}}{3}$$

$$a) OPPO = 1 - (2 * \text{share of MPs}); \text{ iff share } < 50\% \text{ and } > 1 MP$$

$$(3) POW = \frac{\frac{PRIO + MAND}{2} + CONCR + ABSPOST + AMP + IAP + IBC - \frac{1}{2}}{\frac{7}{2} + IAP + IBC}$$

$$(4) CON = CON_{ante} * CON_{post}$$

$$a) CON_{ante} = \frac{1 - SUPMC + TWO + PEER + EXT + SUPM + PROFQ + JUD}{4 + SUPM + PROFQ + JUD}$$

$$b) CON_{post} = \frac{TEN + UNLTD + NRN + REM?JP + \frac{TERM + NJUF + JURF}{3} + STAG}{4 + NRN + STAG}$$

$$(5) REA = \frac{INVAL + BP + EO}{2 + (BP * EO)}$$

**Annex 2: Brief Description of the Index for Formal Independence's (IFI) Indicators**

<i>Dimension</i>	<i>Indicator</i>	<i>Brief Description</i>	<i>General Element Reference</i>
ACS	OPPO	Degree of parliamentary minority access to the court (any individual MP=1, ≥50%=0).	1
	OUT	Are outsiders to the political systems empowered to access the court directly?	1
	LC	Are lower courts involved in concrete reviews?	1
	SELF	Is the court empowered to carry out self-referrals?	1
POW	PRIO	A priori review?	2
	MAND	Mandatory a priori review for all or special laws?	2
	CONCR	Concrete review (not only abstract)?	2
	ABSPOST	Abstract a posteriori review?	2
	AMP	Amparo or similar (such as the German Verfassungsbeschwerde or any other direct access to the court in fundamental rights issues)	2
	IAP	Important ancillary powers?	2
	IBC	Arbitration in interbranch conflict explicitly mentioned in the constitution.	2
CON <sub>ante</sub>	SUPMC	Supermajority needed in the court to strike a law?	
	TWO	Appointment made with the involvement of at least two state organs from different branches of government?	3
	PEER	Appointment at least partially made by peers (or bodies in which they have the majority)?	3
	EXT	Appointment made with the involvement of actors external to the political system?	3
	SUPM	Supermajority consensus of the involved actors required?	4
	PROFQ	Required professional qualifications to be eligible include prior judicial experience or scholarly accomplishment?	5
	JUD	Appointment exclusively made by peers (or bodies in which they have the majority)?	3
CON <sub>post</sub>	TEN	Tenure longer than appointer's tenure?	6
	UNLTD	Unlimited term in office?	6
	NRN	Term nonrenewable?	6
	REM?JP	Impeachment or removal by judicial procedure only?	7
	TERMF	Judges' term fixed in the constitution?	8
	NJUF	Number of judges specified (i.e., fixed) in the constitution?	8
	JURF	Jurisdiction (i.e., competences) specified (i.e., fixed/enumerated in the constitution)?	8
	STAG	Not all judges are appointed at the same moment in time (staggered appointments)?	6
REA	INVAL	Court empowered to invalidate legislative or executive acts?	11
	BP	Binding precedent?	11
	EO	Erga omnes?	11

Source: Authors' compilation.

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