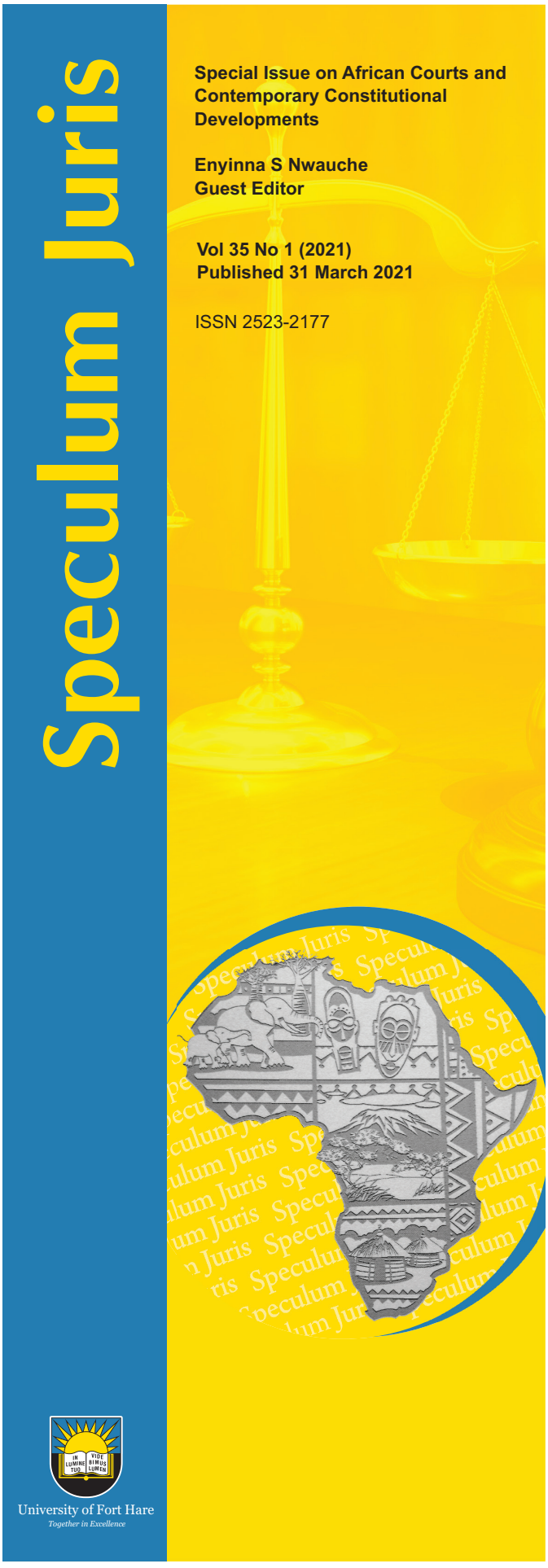

African Courts and Contemporary Constitutional Developments: Introduction

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This special edition of *Speculum Juris* is a revised collection of essays first presented at the African Network of Constitutional Lawyers (ANCL) Biennial Conference hosted by the Department of Law University of Botswana between 11-14 October 2018 with the theme "Courts, Power and Constitutional Law in Africa". This theme recognised the potential successes and shortcomings of African courts. The call for papers (CFP) of this conference recognised the rising powers and role of African courts as a significant development in African constitutionalism but noted a marginal performance in some African states. Different panels at the conference discussed the task of these courts in defining the relationship between state organs and individual citizens; the protection and promotion of the rights of citizens; the relationship between national and African regional courts; the constitutional dialogues between different courts and the issues that may not be amenable to judicial review. Many of the issues discussed at the conference revolve around recent constitutional developments and suggest an increased capacity of African courts to respond to these issues. The revised papers presented at the conference that are part of this collection are critical yet sanguine of African courts. Given the size of Africa and its jural diversity, there is no doubt that the revised papers in this collection are insufficient to reach significant conclusions of the developments in African constitutionalism. That said, these essays are an important contribution in the development of African constitutionalism because they reflect the yearnings of Africans for democracies that are guided by ideals of constitutionalism; for African courts that are a credible means of protecting their human rights; and the exercise of public power in a transparent and rational if not reasonable manner.

The challenge of the use of foreign and comparative jurisprudence by African courts are addressed by Kennedy Kariseb, who in the paper titled *Reflections on judicial cross-*

fertilisation in the adjudication of human rights and constitutional disputes in Africa: The case of Namibia examines how Namibian courts, have engaged in foreign and comparative dialogue with other common law jurisdictions, particularly in human rights and other constitutional disputes. He draws attention to recent developments, beginning with the passage of Rule 130 of the Rules of the High Court of Namibia, which has brought caution and reduced the speed at which Namibian courts have resorted to foreign and comparative jurisprudence. He argues that judiciaries in Africa, in general, need to encourage and strengthen the use of foreign law, though with caution, in domestic legal systems as a means to the emerging trend of harmonisation and universalism in laws, legal practice and legal systems globally. He illustrates the turn to judicial "nationalism" through a consideration of several cases and highlights the fear of the domination of the jurisprudence of Namibia's neighbour South Africa and how this has seemingly led Namibian courts to realise the need to articulate homegrown jurisprudence. The need to articulate a meaningful balance between homegrown and foreign jurisprudence is particularly important because some recent African constitutions such as the 2010 Kenyan Constitution have followed the example of the South African constitution that in section 39(1)(*c*) requires South African courts the discretion to consider foreign law. The influence of international law mandated by section 39(1)b of the South African constitution when a court is interpreting the Bill of Rights is considered by Angelo Dube and Mfundo Nkosi in their joint paper titled *The impact of bill of rights litigation on state practice in international criminal law: An analysis of the jurisprudence of the South African Constitutional Court*. They argue that the overlap between international law and domestic norms aimed at protecting human rights and fighting international crimes has created conflicts of norms and executive displeasure of judicial review of state compliance with international criminal law obligations. A review of the jurisprudence of the South African Constitutional Court in *National Commission of the South African Police Service v Southern Africa Human Rights Litigation Centre*[1]*; Democratic Alliance v The Minister of International Relations and Cooperation; Engels v Minister of International Relations and Co-operation*[2] and *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*[3] convince the authors of the negative reaction of the South African government by their decision to withdraw from the Rome Statute of the International Criminal Court. In his paper, Mtende Mhango partly explores the significance of the use of comparative jurisprudence in his examination of "*Executive Accountability and the Separation of Powers: Introducing the Political Accountability Doctrine in South Africa*". This can assist South African courts to develop the contours of the political accountability doctrine, which is characterised as the political question doctrine in many other jurisdictions.

Mtende Mhango explores the limits of judicial review concerning the exercise of political power and argues in his paper titled *Executive Accountability and the Separation of Powers: Introducing the Political Accountability Doctrine in South Africa* that certain discretionary exercise of executive power should be beyond judicial review for the sake of ensuring the separation of powers and allowing the electorate to hold the executive to account. In less clear terms, the paper by Dube and Nkosi[4] also dwell on the political accountability question. Throughout their narrative of how the Bill of Rights litigation has shaped South Africa's international relations is their conviction of the belief by South Africa's government that it possesses exclusive discretion to craft South Africa's international relations. Annika Rudman also examines the limits of judicial review of the decisions of the African Union Commission whose decision to recognise an NGO is a threshold of standing to access the advisory process of the African Court of Human and Peoples' Rights.

Two papers in this collection address the challenge faced by regional courts in Africa. The first by Allwell Uwazuruike[5] examines Nigeria's compliance with the orders of the ECOWAS Court of Community Justice (ECCJ) which is a regional Court established under the auspices of the by ECOWAS Treaty. He points out that Nigeria has been ambivalent towards decisions of this court because Nigeria has shown cooperative and compliant rhetoric towards adverse

1 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC).
2 2018 (6) SA 109 (GP)
3 2015] 3 All SA 505 (GP).
4 "*The impact of bill of rights litigation on state practice in international criminal law: An analysis of the jurisprudence of the South African Constitutional Court*".
5 "*An analysis of Nigeria's soft non-compliant approach to domestic and regional court orders and its implication for human rights and the rule of law.*"

judgments and orders as well as a predetermined position to disobey the judgments/orders and rulings. Uwazuruike in his paper titled " *An analysis of Nigeria's soft non-compliant approach to domestic and regional court orders and its implication for human rights and the rule of law*" reflects the tension and contradictions between regional and national legal systems where the decisions of regional human rights courts are not directly applicable in legal systems of member states. In such situations where the benevolence of member states is needed to enforce regional court judgments even in the face of treaty obligations to the contrary, Uwazuruike's paper is a timely reminder of the unfortunate but largely symbolic status of regional courts in Africa. Uwazuruike chronicles the realisation by the ECCJ of Nigeria's ambivalent position and the different means through which the Court has sought to remind Nigeria of her treaty obligations and commitment to the rule of law. This is commendable since Nigeria holds significant strings to the court's purse being its majority donor and host. The second paper by Annika Rudman explores the threshold of the procedural requirement of standing for Non-Governmental Organisations that seek advisory opinions of the African Court on Human and Peoples Rights. In her paper titled *Recognition' by the African Union as a locus standi requirement in advisory opinions before the African court: An analysis of NGOs' access to justice under the African regional human rights system* Rudman examines the *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project*[6] and the *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*[7] that are recent rulings by the African Court on Human and Peoples Rights, that recognition by the African Union of an NGO satisfy the standing requirement to access the advisory process of the Court. These rulings convince Rudman that they are an attempt by the African Union through its member states, to dismantle the African Union human rights-related accountability mechanisms. These two papers clearly reflect the lukewarm attitude of African states to regional human rights standards and institutions.

The essays are generally narratives of Africa's bold dynamic judiciaries who are alive to the enormous powers of judicial review and who have developed an array of tools to build retain and exercise judicial power. This fact is evident in all the essays in this collection but is at the heart of the essay written by David Hofisi[8] who engages in a contextual analysis of the Constitutional Courts of South Africa and Zimbabwe founded on identical constitutional provisions but operate in different historical and political contexts. Hofisi explores how the Zimbabwean Supreme Court, established in 2013, has managed to be a productive site of human rights enforcement, despite the authoritarian space in which it operates is largely as a result of the pragmatic exercise of its powers. Hofisi argues that the South African Constitutional Court operating within a democratic space has also been pragmatic in the exercise of its powers avoiding confrontation with the executive. Hofisi concludes that the objective of the South African Constitutional Court in building institutional legitimacy through its pragmatic outlook is a lesson for the Zimbabwean Constitutional Court. Pragmatism towards institutional survival appears to be a tool of African courts

Ken Mutunma,[9] highlights a success story in Africa's election petitions through his argument that the decision of the Kenyan Supreme Court in *Raila Amolo Odinga v Independent Electoral and Boundaries Commission* (*Raila Odinga 2017*)[10] is a break from a formalistic engagement with electoral rules and a turn towards fidelity with substantive rules of electoral conduct. In *Raila Odinga 2017*, the Kenyan Supreme Court annulled the presidential election and ordered the Independent Electoral and Boundaries Commission (IEBC) to conduct another election within 60 days. The Court held that the election was conducted outside the principles of the constitution and was characterised by substantial irregularities and illegalities. Mutunma correctly identifies the decision of the Kenyan Supreme Court as the first to nullify a presidential election in Africa. Of great significance is the greater theme of a judicial engagement with accountability transparency and principles in the exercise of public power in Africa where pragmatism rather than principle is often at the heart of the adjudication of presidential election outcomes. Given Africa's dismal reputation of rigged poorly organised elections and inadequate judicial review, Mutunma's essay is a narrative in judicial courage and a lesson for

6 Application No. 001/2013, Advisory Opinion 26 May 2017.
7 Application No. 002/2015, Advisory Opinion 28 September 2017.
8 *The Constitutional Courts of South Africa and Zimbabwe: A contextual analysis.*
9 *Kenya's annulled presidential election: A step in the right direction*
10 Presidential Election Petition No 1 of 2017.

Africa's judiciaries.

Jennifer Gitiri and Boldizsár Szentgáli-Tóth[11] bring up the rear of this collection of essays through their paper exploring the impact of organic law on constitutional adjudication and the judicial branch in francophone Africa. They conclude that existing evidence shows that more Francophone countries have experienced violent constitutional changes and regime changes than their Anglophone counterparts as to conclude that the adoption of organic laws has not necessarily led to better outcomes. The question they examined in their paper titled "*The organic laws in francophone Africa and the judicial branch: A contextual analysis*" is whether the adoption of organic laws by Francophone countries has led to better protection of institutions and fundamental rights and freedoms when compared to Anglophone countries.

I commend the essays in this special edition of Speculum Juris to All in the hope that they bring further illumination to Africa's persistent constitutional governance challenges.

ES Nwauche
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11 *The organic laws in Francophone Africa and the judicial branch : A contextual analysis*