2010

International Law and African Judiciaries: The Example of South Africa

Erika George

THE RISING USE OF INTERNATIONAL LAW BY AFRICAN JUDICIARIES

This panel was convened at 10:45 a.m., Friday, March 26, 2010, by its moderator, Angela Banks of William & Mary School of Law, who introduced the panelists: Erika George of S.J. Quinney College of Law; Obiora Okafor of Osgoode Hall Law School; and Jeremy Levitt of Florida A&M University College of Law.*

INTERNATIONAL LAW AND AFRICAN JUDICIARIES: THE EXAMPLE OF SOUTH AFRICA

By Erika R. George†

In recent years, commentators have questioned the extent to which African courts would rely upon foreign law or resort to rules of international law in their domestic decision making.[1] Comparatively, the African continent offers an interesting and important point of departure for exploring the influence of international law on domestic legal systems. While Africa boasts a number of new constitutional democracies, Africa is also home to a number of countries that remain burdened by colonial legacies and conflict.

It would not be unreasonable to expect international and foreign law to meet with considerable resistance or to be rejected as a remnant of an unjust and unpleasant colonial past, particularly given the political imperative in many post-colonial states to move beyond the past. In South Africa, however, not only have international and foreign legal sources been received and relied upon by the judiciary, but the judiciary has reshaped the substance of international law through reconciling indigenous and international normative concepts in revolutionary ways that advance human dignity.

My remarks consider the South African Constitutional Court's ("the Court") expansive use of international and foreign legal sources to inform understandings of substantive human rights. First, it explains the distinctive status granted to international law by the country's constitution. Next, it examines how international and foreign legal sources have been used as interpretive resources and reconciled with indigenous sources of normative authority by different justices on the country's Constitutional Court in selected landmark human rights cases. In conclusion, it explores the potential consequences of the Court's current approaches to incorporating international and foreign legal sources.

INTERNATIONAL LAW IN THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

South Africa has demonstrated a firm constitutional commitment to promote respect for international law and to permit reference to foreign law. The constitution of the Republic of South Africa includes an express requirement that international law be respected as law of the Republic.[2] The South African constitution recognizes both international agreements

* Obiora Okafor did not submit remarks for the *Proceedings*.

† Professor, University of Utah, S.J. Quinney College of Law.

[1] *See e.g.*, Richard Frimpong Oppong, *Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa*, 30 FORDHAM INT'L L.J. 296 (2007); Neville Botha & Michele Olivier, *Ten Years of International Law in the South African Courts: Reviewing the Past and Assessing the Future*, 29 S. AFR. Y.B. INT'L L. 42 (2004); Mirna E. Adjami, *African Courts, International Law and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?* 24 MICH. J. INT'L L. 103 (2002).

[2] S. AFR. CONST. 1996 §§ 231 & 232.

and customary international law as incorporated into the law of the Republic. Notably, with few exceptions, the constitutions of other African states with provisions on international law do not include express recognition of customary international law.[3]

The South African constitution requires that regard be given to international law even when questions of constitutional or local law are under review. According to Article 39, when interpreting the constitution, "a court, tribunal or forum *must* consider international law" and "*may* consider foreign law."[4] Moreover, when interpreting legislation, courts "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

Constitutional Court Cases: International and Foreign Law as Interpretive Aids

The Court has applied constitutional provisions pertaining to international law expansively, more expansively perhaps than a plain reading of the text would seem to require in some of its most celebrated cases. In human rights cases, it is not unusual for the Court to reference the full range of sources of international law identified in the Article 38(1) of the Statute of the International Court of Justice.

In its relatively brief existence, the Court has confronted a number of important human rights cases and has ruled on a range of civil, political, social, economic, and cultural rights. International and foreign legal sources have informed the Court's efforts to give substantive content to the rights contained in the country's constitution and influenced public discourse.

South Africa's constitution is silent on the question of capital punishment. In its 1995 decision, *S. v. Makwanyane*, the Court spoke—it told the world that the death penalty had no place in the new nation. The eleven members of the Court reached this conclusion unanimously, in eleven separate opinions. Most members of the Court relied on or referenced international or foreign legal sources.

Judge Chaskalson, president of the Court, extols the value of international and foreign authorities when confronting questions as complicated and contested as capital punishment. Properly understood in the context of South Africa's constitution, Chaskalson defines international law to include "non-binding as well as binding law," such that both are appropriately used as "tools of interpretation."[5] Using these tools, Chaskalson's opinion explores evidence of a global trend towards abolition. He concludes that a majority of world's nations in practice oppose capital punishment because only a minority allow capital punishment, and then only in the most extreme instances.

After acknowledging a number of the binding international instruments that could "provide guidance as to the correct interpretation" of particular South African constitutional provisions, Chaskalson reviews the jurisprudence of a number of foreign jurisdictions. The United States was observed to be on a path so fraught with the pragmatic problems of both endless litigation over and arbitrary application of the death penalty as to caution against South Africa following a similar route.

[3] The constitution of Malawi also grants status to international law in a manner comparable to South Africa. Tijanyana Maluwa, *The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey*, 23 S. Afr. Y.B. Int'l L. 45 (1998) (surveying 52 African constitutions and suggesting that the role of international law in local legal systems remains an open question).

[4] S. Afr. Const., *supra* note 2, at art. 39.

[5] State v. Makwanyane, Case No. CCT/3/94 (1995), para. 35, 1 LRC 269.

Judges Langa, Madala, and Mokgoro incorporate discussions of international law as well as the African concept of "ubuntu" in their opinions. In particular, Judge Mokgoro explains the congruence between the African concepts and concepts animating the rights contained in the International Covenant on Civil and Political Rights as relevant to the question of capital punishment. In *Makwanyane*, the Court forges its own path but looks to foreign and international sources as guideposts to give meaning to constitutional claims.

The Court interpreted the substantive meaning of equality with reference to international and foreign legal sources in its 2003 decision in *Bhe v. Magistrate of Khayelitsha*. Bhe, an impoverished widow and mother of children born outside of a formally recognized marriage, brought suit on behalf of her two minor children. She challenged the constitutionality of a prevailing customary law that prohibited women from inheriting property.

Writing for the Court, Judge Langa invalidated the customary provision as inconsistent with the meaning of equality, a right "cherished in the constitutions and the jurisprudence of many open and democratic societies" and contained in a number of international instruments to which South Africa is a party. After reviewing relevant provisions of a variety of international instruments—including the Convention on the Elimination of Discrimination Against Women (CEDAW); the Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child; the African [Banjul] Charter on Human and Peoples' Rights; the Protocol to the African Charter on the Rights of Women in Africa; and the African Charter on the Rights of the Child—the *Bhe* Court observed that international human rights law contemplated special protections for women and children in order to guarantee their ability to enjoy rights.

The Court also looks to sources of foreign law, including the European Court of Human Rights [ECHR]. It has cited an ECHR decision holding that treatment of extramarital children differently from those born within marriage constitutes a suspect ground of differentiation under Article 14 of the European Charter of Human Rights. A U.S. Supreme Court decision holding that discrimination on grounds of illegitimacy is illogical and unjust was also referenced in the Court's discussion of Article 28 of the South African constitution on the rights of children.

Although in agreement with an outcome that would permit women to inherit property, Judge Ngcobo wrote separately to reject the Court's reasoning with respect to its treatment of customary law. Judge Ngcobo's separate opinion also uses foreign legal sources to support the position that it would have been more appropriate for the Court to develop customary rules or allow them to evolve in a manner consistent with the Bill of Rights rather than to invalidate them.

Article 211(3) of South Africa's constitution requires courts "to apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law." In addition to CEDAW, Judge Ngcobo's opinion references several provisions of the African Charter, including Article 27 which provides that "every individual shall have duties towards his family and society," and Article 29(1) which recognizes a duty "to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need." Therefore, for Judge Ngcobo's the obligation to care for family members vital to an African value system and could be read into customary laws in ways that would favor women.

Jurisprudence from Nigeria, Zimbabwe, Tanzania, and Ghana is cited as evidence of evolving treatment of women with respect to property ownership, inheritance, and equality. Judge Ngcobo explains:

> Other African countries that face the same problem have opted not for replacing indigenous law with common law or statutory laws. Instead, they have accepted that indigenous law is part of their laws and have sought to regulate the circumstances where it is applicable ... this approach reflects recognition of the constitutional right of those communities that live by and are governed by indigenous law. It is recognition of our diversity, which is an important feature of our constitutional democracy.

In 2004 the Court again took up the question of the meaning of substantive equality by looking to, and beyond, international and foreign legal sources in *Minister of Home Affairs v. Fourie*. In *Fourie* a lesbian couple seeking to marry challenged their inability to do so under law as a denial of equal protection of the law and unfair discrimination. The South African Constitution does not expressly include a right to marry. Judge Sachs wrote for the Court, rejecting arguments that international law limits recognition and protection to heterosexual marriage only such that permitting gay marriage would be prohibited. Judge Sachs accepts that the Universal Declaration of Human Rights in Article 16(3) envisions the family as "the natural and fundamental group unit in society entitled to protection." However, he rejects that family must "inexorably and forever" be confined to heterosexual unions, leaving all others without legal protection for all time. Rather, Justice Sachs explains: "[R]ights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity."[6]

Unlike many other constitutions, the South African constitution recognizes sexual orientation as a prohibited ground for unfair discrimination; accordingly, for Judge Sachs, "it would be a strange reading of the constitution that utilized the principles of human rights law to take away a guaranteed right. This would be more so when the right concerned was openly expressly and consciously adopted by the constitutional assembly."[7] In *Fourie* the Court appears to be ahead of international human rights bodies in offering inclusive interpretations of equality and family.

Although South Africa is not presently a party to the International Covenant on Economic, Social and Cultural Rights, the South African constitution contains rich socioeconomic rights provisions. Nevertheless, the Court's reliance on international and foreign authorities has been less enthusiastic in this area. In *Soobramoney v. Minister of Health* (1997) the Court denied claims from an individual suffering kidney failure for dialysis. In doing so the Court considers and distinguishes a decision of the Indian Supreme Court and looks to British commentary questioning the institutional capacity of courts to preside over decisions about resource constraints. Later, in *Minster of Health v. Treatment Action Campaign* (2002), the Court directed the government to distribute antiretroviral drugs to prevent mother-to-child transmission of HIV. While the Court cites the ICESCR, it declines to adopt the committee's definition of a "minimum core" of service provision. In the *Grootboom* decision (2000), a case concerning housing rights, Judge Yacoob qualifies the Court's consideration of international authority explaining: "the weight to be attached to any particular principle or rule of international law will vary."[8]

[6] Minister of Home Affairs v. Fourie, Case No. CCT 60/04, para. 102.

[7] *Id.* at para 104.

[8] Government of the Republic of South Africa v. Grootboom, 2000 1 SA 46 (CC), paras. 231–35.

Conclusion

The South African Constitutional Court's pioneering incorporation and interpretation of international and foreign legal authorities has generated an expansive human rights jurisprudence that should serve to inspire the international community. Whether the Court's commitment to an inclusive interpretive mode will continue remains to be seen. What is certain is that the implementation of rights won before the Court will continue to depend on the sustained commitment of civil society to remain engaged in challenging rights violations in the judiciaries of Africa and beyond.

Domesticating International Law Through Truth and Reconciliation Commissions: The Case of the Liberian TRC

By Jeremy I. Levitt[*]

Introduction

On March 16, 2010, Professor Angela Banks invited me to participate in a panel discussion entitled, *The Rising Use of International Law by African Judiciaries,* which would took place on March 26th at the 104th Annual Meeting of the American Society of International Law (ASIL) in Washington, DC. I was pleased to receive the invitation and honored to join the esteemed panel that included Professors Erika George and Obiora Okafor. Professor Banks' timely envisioning of the topic provided me with a wonderful opportunity to discuss my work as head of International Technical Advisory Committee (ITAC) of the Truth and Reconciliation Commission of Liberia (Liberian TRC).

After agreeing to participate on the panel, I immediately asked myself: What do we mean by African judiciary? For a continent comprised of fifty-three countries with different histories, legal systems, and traditions, is it useful to begin my inquiry with mono-geographical lenses? Is there such a thing as the African judiciary? Over the years, I have worked with several African judiciaries and learned early that there is no agreed-upon definition of judiciary or what specific institutions within a state comprise it. For example, do African traditional authority structures and African customary law form a part of the African "judiciary"? Do truth and reconciliation commissions, particularly those empowered to make quasi-judicial and binding determinations, decisions, and recommendations, form a part of the judicial system? These questions lead to a series of others, including: What structures constitute the judiciary in Africa? How, if at all, does the African judiciary differ from those in other countries?

While there is a growing literature on judicial independence, judicial review, and judicial powers in Africa, few have defined what constitutes the "African judiciary." For purposes of my remarks, I broadly define it to mean a system of courts, tribunals, or other administratively designated judicatures that interpret and apply law in the name of the sovereign or state. The Statute of the African Charter on Human and Peoples Rights (ACHPR), Africa's foremost human rights treaty, does not specifically use the term "judiciary"; rather, it makes broad reference to courts, tribunals, or other adjudicatory mechanisms. What is abundantly clear, however, is that African courts, whether general or specific, contemplate international law as do African policy-makers in making legislation and policy.

[*] Associate Dean for International Programs, Distinguished Professor of International Law, and Director of the Center for International Law and Justice (CILJ), Florida A&M University College of Law.