

Interpreting rights globally: Courts and constitutional rights in emerging democracies

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Summary

Democracy has spread over Africa and with it new constitutions with justiciable bills of rights have been accepted. The main focus of the article is on constitutional interpretation and how a constitution should be interpreted in view of the fact that a constitution, and especially the bill of rights, is not only made up of clear-cut rules, but also of ideals and principles. Purposive and creative interpretations are particularly needed in Africa's emerging democracies. Creative constitutional interpretations are further enhanced when courts engage in comparative constitutional analysis. The article gives examples of how courts around the world have used comparative case law. The author further defends the approach of comparative constitutionalism in the light of the objections that have been raised against it.

While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from . . . distinguished jurists [in other places] who have given thought to the same difficult issues that we face.¹

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¹ SD O'Connor 'Keynote address before the ninety-sixth annual meeting of the American Society of International Law' (2002) 96 *American Society of International Law Proceedings* 348 350.

1 Introduction: A brave new continent

Africa is currently experiencing momentous political and economic transformation for the better and, sometimes, for the worse. What was unthinkable yesterday, today has become reality. Until relatively recently, Africa was a continent consisting of barricades and subjected to various forms of evils, including the evils of colonialism, apartheid, military *coups d'état*, and one-party dictatorships. In the last few decades, however, a cleft has opened in the pitiless walls of the continent, allowing citizens to breathe the fresh air of freedom and to experience constitutional and democratic governance. These positive changes are due partly to the euphoria and hysteria of globalisation and liberalisation and partly to the 'explosion of anger against the abuse of power, violations of human rights, economic failure, and hardship, and a deep longing for peace and order'.²

Regimes still totter and fall in a few African countries, notably Côte d'Ivoire, the Democratic Republic of Congo, Liberia, Sierra Leone and Somalia. Togo might join these failed states — unless reason prevails over passion — as some criminal elements in that country are trying to suppress due constitutional process and popular sovereignty and foist a dynasty on a country that has endured the late Gnassingbe Eyadema's despotism for four decades, largely through guile, force and French support. These setbacks notwithstanding, it may be said that the wind of change is blowing where it wishes in Africa, with 'the ballot . . . increasingly replacing the bullet as a means of attaining political power and maintaining legitimacy'.³ Democracy may not be a system of government that embodies all the democratic ideals, but it is one that approximates these ideals to a reasonable degree.⁴

Following the demise of apartheid, South Africa exemplifies this brave new continent.⁵ Apartheid was consigned to the ignominy of history through the common identity and unity of purpose by segments of civil society and international organisations.⁶ This paved the way for the

² C Legum *Africa since independence* (1999) 56.

³ DM Ayine 'Ballots as bullets? Compliance with rules and norms providing for the right to democratic governance: An African perspective' (1998) 10 *African Journal of International and Comparative Law* 709-10. See generally NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209.

⁴ See A Lijphart *Democracy in plural societies: A comparative exploration* (1977) 4.

⁵ See *The Prosecutor v Tadić* para 622 Trial Chamber Judgment Case No IT-94-1-T (7 May 1997).

⁶ Welcoming the vanquishing of apartheid in South Africa, the country's first elected black President, Nelson Mandela, elatedly said: 'That historic change has come about not least because of the great efforts in which the United Nations [and the Organization of African Unity] engaged to ensure the suppression of the apartheid of crime against humanity.' Cited in United Nations *Basic facts about the United Nations* (2000) 232.

institution of majority rule and a multi-party democracy in South Africa in 1994, after 'voters queued around the country for hours, and in some cases, days to mark their "X" on the ballot papers', in an 'election [that] was a moment of national pride'.⁷

One of the remarkable developments in these new democracies is their constitution-making process, which has been inclusive and participatory, allowing various groups to express their perceptions and concerns before being channelled into a constitution. The 1993 Constitution of Ghana, for example, was brought into existence pursuant to a referendum in April 1992, which was a recognition that sovereignty belongs to the people and that they must agree on the content of the instrument meant to govern their lives.

The South African experience presents a sterling case study of a democratic constitution-making process. As described by an 'outside' commentator,⁸ the Constitutional Assembly that was charged with drafting the South African Constitution embarked upon a programme of public participation, adopting a three-pronged approach — community liaison, media liaison and advertising. It established a media department that utilised print, radio, television, billboards and other advertising strategies to attract public interest in the constitution-making process. The media strategy also included the establishment of a newsletter — *Constitutional Talk* — a telephone talk-line, and the creation of an internet home page. In the end, the Constitutional Court, itself a creation of the Constitution, was given the 'unusual' power to decide whether the new constitutional text adopted by the Constitutional Assembly complied with the constitutional principles contained in the interim Constitution.⁹ The final Constitution came into force on 4 February 1997 after the Constitutional Court held, in December 1996, that the amended text complied with all the principles established at Kempton Park.¹⁰ The constitution-making process in South Africa has been 'hailed not only as unique but as one of the most democratic and inclusive constitution-making exercises in history'.¹¹

This inclusiveness has not been uniform in Africa. In some countries, the constitution-making processes lacked inclusivity, diversity, participation, transparency, autonomy and accountability. Nigeria's 1999 Con-

⁷ K O'Regan 'Human rights and democracy — A new global debate: Reflections on the first ten years of South Africa's Constitutional Court' (2004) 32 *International Journal of Legal Information* 200.

⁸ See JO Ihonvbere *Towards a new constitutionalism in Africa* (2000) 60.

⁹ See sec 71 of the interim Constitution of South Africa.

¹⁰ See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996, 1997 2 SA 97 (CC); 1997 1 BCLR 1 (CC).

¹¹ J Sarkin 'Innovations in the interim and 1996 South African Constitution' (1998) 60 *The Review* 57.

stitution, for example, was prepared and promulgated in great secrecy by the military, led by the then caretaker head of state, General Abdulsalami Abubakar. The drafting process — if, indeed, it was a process — was largely non-consultative and non-transparent, thus making the ‘we the people’ clause in the Preamble a fraud. The legitimacy crisis that the Constitution suffers from has led to repeated calls for a Sovereign National Conference to address the concerns of the diverse nations that make up Nigeria and to draw up a people’s constitution. President Obasanjo is unlikely to convene such a conference; instead, he is proposing a National Political Reform Conference, the contents whereof are yet to be grasped by Nigerians.

Another charade was the constitution-making process in Zimbabwe where President Robert Mugabe, in response to campaigns by civil society groups for a fully representative constitutional assembly tasked with drawing up a new constitution, established a Constitutional Commission (CC) pursuant to his powers under the Commission of Inquiry Act. This executive action had two intended effects: First, it allowed Mugabe to determine the size and make-up of the CC; and, second, the CC was merely tasked with submitting a report with recommendations for a new constitution to a President who was under no obligation to accept any or all of the recommendations.¹² Yet, as Van der Vyer warned, ‘a superimposed constitutional formulae or constitutional arrangements that ... do not address the real causes of discontent, are sure to generate their own legitimacy crisis’.¹³ Experience has also shown that ethnic conflicts in Africa are often the products of regimes that promote feelings of exclusion within certain groups.

Meanwhile, the establishment of a Constitutional Court in South Africa as the highest court of appeal in all constitutional matters has produced dynamic constitutional litigation in the last decade, which is parallel to none on the continent. The organisers of this conference have chosen *S v Makwanyane*¹⁴ as a point of reference for reflection on this development. However, since they have also graciously allowed me to choose my own topic, I have chosen to address a larger but related question of how a creative and global interpretation of constitutional rights in Africa could assist in mainstreaming respect for the values associated with those rights. This paper is also concerned with redefining the role of the judiciary in Africa, particularly in emerging democracies.

As this paper will later show, *Makwanyane’s* case was remarkable for

¹² See J Hatchard ‘Some lessons on constitution making from Zimbabwe’ (2001) 45 *Journal of African Law* 210.

¹³ J van der Vyver ‘Constitutional options for post-apartheid South Africa’ (1991) 40 *Emory Law Journal* 745 822.

¹⁴ *S v Makwanyane* 1995 3 SA 391 (CC).

its invocation of international and comparative law. The question, of course, is whether comparative constitutionalism is lawful and/or legitimate, since constitutions 'are often the outcome of constituent processes which can be defined in various ways and which are, undoubtedly, influenced, on the one hand, by the historical, cultural, philosophical and ideological background of the countries in question, and, on the other, by contingent political, economic and diplomatic factors'.¹⁵ I start by briefly noting the nature of rights guaranteed in emerging democratic constitutions in Africa. Thereafter, I examine how courts may translate these rights from the realm of rhetoric into practice — through a creative interpretation that is also global or comparative. Finally I present a conclusion.

2 The constitutionalisation of rights

Any approach to the protection of human rights in Africa must take the constitution as its point of departure because a constitution is the foundation of the legal system and a protocol of survival and continuity for any social group, ensuring that no one attains salvation or offers a programme of salvation to the populace by another route. It is a blueprint of intra-governmental relations, setting forth the general parameters of executive, legislative and judicial powers and embodying fundamental rights granted to individuals under the law. It provides both a framework of government for a society in a continual process of transition and a framework of fundamental principles of humanity and respect for human rights to control and guide the exercise of all governmental power. It provides a measure of rationality or consistency in decision-making, both in relation to the individual and society.¹⁶

The constitutions of most emerging democracies in Africa begin by affirming faith in the universal values of justice, democracy, freedom, equality and the dignity of the human person. Of course, this does not mean that all constitutions share the same values, but each system shares most of them. Section 1 of the South African Constitution, for example, provides that the Republic of South Africa shall be founded, *inter alia*, on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution and the rule of law. Similarly, the Preamble to the Constitution of Burundi affirms the country's

¹⁵ V Piergigli 'The reception of liberal constitutionalism and 'universal' values in the African bills of rights: Ambiguities and perspectives in the turn of the millennium' <http://www.eur.nl/frg/iacl/papers/piergigli.html> (accessed 28 February 2005).

¹⁶ See BO Nwabueze *Ideas and facts in constitution making* (1993) 98.

... commitment to construct a political order and a system of government inspired by ... and founded on the values of justice, democracy, good governance, pluralism, respect of the freedoms and basic rights of the individual, unity, solidarity, mutual understanding, tolerance and co-operation between the different ethnic groups ...

Almost all of these constitutions contain lofty human rights provisions.¹⁷ While some constitutions guarantee primarily only civil and political rights, others guarantee economic, social and cultural rights as well. Civil and political rights underscore the fact that the nature and dignity of the human person have to be absolutely protected and indicate the inviolable, imprescriptible and inalienable rights to be promoted and protected by the state. Socio-economic rights have the aim of giving people the possibility of receiving help from the state, thus guaranteeing equality and social justice. Provisions guaranteeing civil and political rights typically begin with a solemn declaration concerning the principle of non-discrimination, that is, equality before the law and equal protection under the law. Some writers believe that both principles are strong candidates for inclusion among *jus cogens*.¹⁸

The Constitution of South Africa, for example, expresses, in its Preamble, the need for a 'new order ... in which there is equality between people of all races ...' Equality and non-discrimination are also the first substantive rights protected in the country's Bill of Rights. Section 9 of the Constitution provides:

- 1 Everyone is equal before the law and has the right to equal protection and benefit of the law.
Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 3 The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 4 No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- 5 Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Equality is a positive expression of non-discrimination. In *Harksen v Lane*,¹⁹ the South African Constitutional Court held that section 9(1) would be violated if a measure differentiates between categories of

¹⁷ For human rights provisions in constitutions of African states, see generally C Heyns (ed) *Human rights law in Africa* (2004) 247 (discussing human rights protection enshrined in laws of African countries).

¹⁸ See W Mckean *Equality and discrimination under international law* (1983) 279 282.

¹⁹ *Harksen v Lane* NO 1998 1 SA 300.

people and the differentiation does not bear a rational connection to a legitimate government purpose.²⁰

Beyond equality and non-discrimination, most constitutions guarantee the right to life and personal integrity, the right to develop one's personality (physically, morally, socially and culturally), freedom from cruel and inhuman treatment and freedom from slavery or forced labour. These provisions usually precede a detailed or concise list of rights, such as the right to liberty and security of the person, freedom of domicile, the right to respect for a person's correspondence, freedom of movement and residence, freedom of expression and religion (except for Islamic countries where Islam is the state religion), freedom of assembly, demonstration and association, including the right to form or join a political party or a trade-union as well as political and citizens' rights.

However, certain rights that are often emphatically declared on the basis of universal principles only exist on paper, due to the legal constraints that they are dependent on, constraints which are either vague and indeterminate or, in contrast, extremely precise. Consequently, rights previously declared in such a solemn manner are deprived of any real meaning, a ready example being the fundamental right to life — often implicit in Western constitutions. Various constitutions in Africa — Equatorial Guinea, Ghana, Libya, Malawi, Nigeria, Seychelles and Uganda — contain provisions on the death penalty which directly or indirectly deny the right to life. The death penalty is permitted for numerous reasons: as a sanction or if the life of a person constitutes a danger to society or according to a law reasonably justified in a democratic society or to fulfil a death sentence imposed by a competent court of justice or confirmed by the highest court of appeal.

The second class of rights usually protected in national constitutions is social, economic and cultural rights. This is sometimes positioned under a special title in the part of the constitution concerning freedoms in general, as is the case in the Constitutions of Cape Verde, Madagascar, Mozambique and São Tomé and Príncipe. In others, they are arbitrarily placed with civil and political rights and sometimes they are positioned after them. Yet, in some African constitutions, such as that of Nigeria, these 'second generation' rights match the principles concerning policy or the fundamental directives of the state. Those social and economic rights that are protected in most constitutions include family and labour rights, the right to health and to a healthy environment, the right of ownership (individual or collective), economic freedom and cultural rights. Some systems provide for claims so as to eliminate sex discrimination deriving from historical customs and traditions and to guarantee equal political, social, economic and cultural

²⁰ n 19 above, para 53.

rights, including labour rights and rights concerning personal matters. Such is the case with the Constitutions of Chad, Egypt, Ethiopia, The Gambia, Malawi, Namibia, South Africa and Uganda.

In the past, Africa's judiciary lacked institutional independence and financial autonomy, with judges holding their offices at the sufferance of the executive. Emerging constitutions contain formal commitments to the independence of courts. Almost all constitutions are cast in nearly the same mould, so that these guarantees are generally similar. But the difference in structure between federal and unitary states results in variations in procedures of judicial review and the organisation of the judiciary. These constitutions are characterised by the following main principles: due process of law, legislative authority over the administrative structure of the judiciary, the obligation of the judiciary to uphold the constitution and the law and its immunity from dismissal and independence from the legislative and executive branches.

Some constitutions, such as those of Cape Verde and Ghana, contain specific clauses on the independence of the judiciary. Others, such as those of Benin, Central African Republic, Equatorial Guinea, Gabon, Mali and Togo, refer to judges and constitutional courts as 'the guardians of fundamental freedoms' and mandate them to enforce fundamental rights. Seventeen constitutions designate the judicial power as the 'guardian of human rights', including, randomly, Algeria, Burkina Faso, Burundi, Congo, Mali, Rwanda, Senegal and Togo. Other constitutions, such as those of South Africa and Uganda, confer a right of access to justice both on individuals and groups, thus mirroring the African Charter on Human and Peoples' Rights (African Charter).²¹ In some countries, like Benin, Central African Republic, Egypt and South Africa, the Constitutional Court is independent and autonomous; but in others, as in Burkina Faso and Nigeria, it is an appendage of the Supreme Court. The guarantees under the Bill of Rights are protected in some cases by enabling individuals to appeal to the Constitutional Court or the Supreme Court against laws or public acts or omissions believed to be detrimental to those rights. This is the case in Benin, Burundi, Cape Verde, Central African Republic, Congo, Djibouti, Liberia and Seychelles.

A number of countries, including Benin, Ghana, Mali, Namibia, Nigeria, South Africa and Uganda, have established other institutions to complement the judiciary, with the mandate to protect the public from abuses by government and quasi-government bureaucracies. These institutions, which are variously called Public Defender, Public Complaint Commission or simply Ombudsperson, are also given inves-

²¹ African Charter on Human and Peoples' Rights, adopted on 27 June 1981 and entered into force on 21 October 1986; Doc OAU/CAB/LEG/67/3/Rev 5, reproduced in (1982) 21 *International Legal Materials* 59.

tigatory and prosecutorial powers and are expected to liaise with the judiciary and other appropriate national institutions. Other countries — like Ethiopia, Ghana, Nigeria, South Africa and Uganda — have established national human rights institutions with the mandate to promote and protect human rights and further the cause of social justice. Still others, such as South Africa, have gender commissions to promote, protect and uphold the fundamental tenets of gender equality.

It is not certain if the constitutionalisation of rights guarantees their respect in practice, but it provides, at least, an important mechanism for mainstreaming respect for the values that are associated with those rights, both in law and in policy making. It provides the basis for holding governments accountable and provides an instrument for political action and mass mobilisation. Meanwhile, the manner in which courts interpret these rights goes a long way to mainstreaming the values inherent in them.

3 Interpreting constitutional rights: Thinking global, acting local

3.1 The Constitution as a living instrument

Much of the burden of realising constitutional rights in emergent democracies in Africa rests on the shoulders of constitutional courts — whatever their name tags — since these courts are the primary guardians of the bill of rights. Whatever else may be their tasks in interpreting and adjudicating constitutional rights, they certainly include striking ‘a balance between the individual’s freedom and the right of the state to self preservation’.²² The state is far more powerful than any individual and is endowed with ‘state authority’ that gives it a monopoly on the legitimate use of force within its territory. Being a predator, the state must be contained if the individual is not to be placed in an extremely vulnerable position. Plato saw the dangers of unchecked power many centuries ago, when he wrote: ‘No human being . . . is capable of having irresponsible control of all human affairs without becoming filled with pride and injustice.’²³

Constitutionalism, then, is about limitations on the powers of a government. If democracy is a government of the people and if, as in Africa, ‘the people’ is the sovereign or whatever name that is fashionable to ascribe majority rule, then there has to be some limitations on that sovereign power lest it ends in despotic majority absolutism. Many democracies in the past believed that the ‘self-restraint of the majority’ would preserve the delicate balance between majority rule and respect

²² BO Nwabueze *Judicialism in commonwealth Africa* (1977) 139.

²³ Plato *The laws* bk IV 713. C (RG Bury transl Leob Classical Library ed 1926).

for human rights, but the 20th century shattered this dream. The post-World War II era has seen the emergence of written constitutions with written bills of rights and an independent judiciary empowered to enforce those rights; and the essence of judicial independence is the power of judges to say 'no' — 'no' to legislators, presidents, governors, municipal or local authorities, in short, 'no' whenever 'the needs of the political moment clash with constitutional guarantees'.²⁴

A constitutional court must be policy-oriented, formulating and articulating the values of general validity and acceptance within a given society and infusing these values with meaning and vitality. It must be guided at all times by national ideology — what the Germans call the *Volkgeist* or national spirit. Unless the goals and the fundamental attitudes and values that should inform the behaviour of its members and institutions are clearly stated and accepted, Ben Nwabueze warns, 'a new nation is likely to find itself rudderless, with no sense of purpose and direction'.²⁵ While the decision of a constitutional court in a democracy should serve the purpose of settling disputes between the parties before it or correcting individual mistakes in lower court judgments, its primary concern should be to elucidate, safeguard and develop the values inherent in a constitution. According to Barak:²⁶

The supreme court's primary concern is broader, system wide corrective action. This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy.

Interpreting constitutional rights involves, first, determining the meaning and scope of a guaranteed right and, second, determining whether a challenged law or conduct conflicts with the fundamental rights. In determining the meaning and scope of guaranteed rights, a constitutional court should constantly remind itself that a constitution is not a document frozen in time but is a living instrument to be applied to the changing needs of a society still in the process of maturation. A constitution, like law, is not merely composed of a closed set of clear-cut rules, but deals with lofty ideals and principles. They lay down, in the words of Ronald Dworkin, 'general, comprehensive moral standards that government must respect but . . . leaves it to statesmen and judges to decide what these standards mean in concrete circumstances'.²⁷ Similarly, constitutional rights are not formulated as detailed set of rules designed to deal with specific, envisaged situations.

²⁴ The Hon MH Marshall 'Speech: "Wise parents do not hesitate to learn from their children": Interpreting state constitutions in an age of global jurisprudence' (2004) 79(5) *New York University Law Review* 1633 1639.

²⁵ Nwabueze (n 22 above) 140.

²⁶ A Barak 'The Supreme Court, 2001 term-forward, a judge on judging: Role of a Supreme Court in a democracy' (2002) 116 *Harvard Law Review* 16 27-28.

²⁷ R Dworkin *Life's dominion: An argument about abortion, euthanasia and individual freedom* (1993) 119.

Constitutional rights must be interpreted in such a way that they trump governmental interest,²⁸ for the simple reason that human rights protect not only the individual in a democracy but democracy itself. A constitutional court must not be very positivistic or legalistic in its attitude, but must go to the spirit of the law in the defence of human rights and human beings. Although a court should seek logical consistency and the symmetry of the legal structure and should not lightly sacrifice certainty, uniformity, order and coherence on the altar of judicial dexterity, it is incorrect to assert that judges can extract the meaning of constitutional provisions from legal materials alone.²⁹ Human rights are not merely legal rights; they are also moral rights, and moral decisions do not admit of mathematical certainty. A constitutional court may be, in the words of Hans Kelsen, 'a negative legislator';³⁰ but it is a legislator nonetheless and it must look for openings and create jurisprudence — through a creative interpretation of constitutional rights.

The South African Constitutional Court contributed remarkably to the elaboration of general principles on constitutional interpretation that is worth noting. The *Makwanyane* case provides a point of departure. In that case, the Constitutional Court adopted a liberal and creative approach to the interpretation of the Bill of Rights, when it stated:³¹

Whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give . . . expression to the underlying values of the Constitution'.

This principle was put to a decisive but controversial use in *S v Mhlungu*,³² when the majority of the Constitutional Court allowed persons involved in cases pending at the commencement of the Constitution to rely on rights in the interim Bill of Rights, despite the apparent provision in the Constitution to the contrary.³³ According to the Court:³⁴

²⁸ See R Dworkin *Taking rights seriously* (1977) ch 7 (arguing that rights are 'trumps' held by individuals that outweigh collective goals).

²⁹ Traditional constitutional courts assert that the constitutions themselves and domestic commentaries are the sole bases for the analysis and interpretation of their constitutions. See PJ Smith 'States as nations: Dignity in cross-doctrinal perspectives' (2003) 89 *Vanderbilt Law Review* 1 21.

³⁰ Cited in AS Sweet *Governing with judges: Constitutional politics in Europe* (2000) 35. Kelsen defines a 'negative legislator' as one who cannot make law freely because the decision making is 'absolutely determined by the constitution'.

³¹ *Makwanyane* (n 14 above) para 9.

³² *S v Mhlungu* 1995 3 SA 867 (CC).

³³ See sec 241(8) of the Constitution of South Africa 1996: 'All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed.'

³⁴ *Mhlungu* (n 32 above) para 9.

An interpretation which withholds the rights guaranteed by chapter 3 of the [interim] Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that chapter a construction which is 'most beneficial to the widest amplitude' and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course.

Nigeria's Supreme Court also has laid down a principle for constitutional interpretation in a number of cases, notably *Nafiu Rabiu v The State*,³⁵ where Justice Udo-Udoma stated:³⁶

My Lords, it is my view that the approach of this Court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this Court so to construe any of the provisions of the constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.

These are encouraging signals. Purposive and creative interpretations of constitutional rights are particularly needed in Africa's emergent democracies to help governments understand their legal obligations, the positive consequences for implementing those obligations, and negative ones for non-compliance. All genuine interpretation is necessarily creative, that is, it is 'a matter of interaction between purpose and object'.³⁷ Creative interpretation is also constructive, in that it imposes 'purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong'.³⁸

3.2 Interpreting rights globally

Creative constitutional interpretations are enhanced when courts think global and act local, that is, when judges engage in comparative constitutional analysis. Comparative constitutionalism is 'emphatically . . . relevant to the task of interpreting constitutions and enforcing human rights'³⁹ and can be 'helpful in the quest for a theory of the public good and right political order'.⁴⁰ It could help one to understand what the law is and to understand one's constitutional traditions better. It could provide guidance, perspective, inspiration or reassurance for judges and may help in elucidating different functional concerns to similar

³⁵ *Nafiu Rabiu v The State* (1980) FRN 509.

³⁶ n 35 above, 519.

³⁷ R Dworkin *Law's empire* (1986) 52.

³⁸ As above.

³⁹ RB Ginsburg & DH Merritt 'Fifty-first Cardozo Memorial Lecture: Affirmative action: An international human rights dialogue' (1999) 21 *Cardozo Law Review* 253 282.

⁴⁰ DP Kommers 'The value of comparative constitutional law' (1976) 9 *John Marshall Journal of Practice and Procedure* 685 692.

questions and in strengthening the quality of judicial decisions, by providing a benchmark against which such decisions can be judged.⁴¹

There is an emerging trend in many jurisdictions towards an extra-territorial interpretation of constitutional rights that is both dynamic and edifying. Some countries' constitutions, such as those of Angola, Cape Verde, Malawi and South Africa, expressly enjoin their courts to invoke international and comparative law. Section 21(2) of the Constitution of Angola and section 17(3) of the Constitution of Cape Verde provide that constitutional and legal norms related to fundamental rights shall be interpreted and incorporated in the light of international instruments. Section 11(2) of the Constitution of Malawi enjoins the judiciary to 'have regard to current norms of public international law and comparative law.' Section 36 of the Constitution of South Africa 1996 requires any limitation of a fundamental right to be 'reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity.' Section 39(1) further provides:

- When interpreting the Bill of Rights, a court, tribunal or forum —
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

The jurisprudence of the South African Constitutional Court reveals a dynamic bent towards a global interpretation of rights. As the Court explained, again in *Makwanyane's* case, '[i]nternational agreements and customary international law provide a framework within which . . . [the Bill of Rights] can be evaluated and understood'⁴² and these include both binding and non-binding public international law.⁴³ The *Makwanyane* case, itself, provides a classic example of the Court's invocation of international and comparative law; the Court assumed that an expansive comparative constitutional analysis was necessary in determining the constitutionality of the death penalty. The Court went on to discuss decisions from courts in the United States, Canada, Hungary, India, the European Court of Human Rights as well as the UN Committee on Human Rights, and concluded that the death penalty was unconstitutional for being cruel and inhumane.

In *S v Williams*⁴⁴ — the corporal punishment case — the Constitutional Court noted a 'growing consensus in the international community' that judicially imposed whipping 'offends society's notions of decency and is a direct invasion of the right which every person has to human dignity'.⁴⁵

⁴¹ See VC Jackson 'Narratives of federalism' (2001) 51 *Duke Law Journal* 223 254-63.

⁴² *Makwanyane* (n 14 above) paras 36-7.

⁴³ O'Regan (n 7 above) 207 writing: 'Like many South African courts before us, we find international law and comparative law most helpful in our jurisprudence. There is an emerging dialogue across continents and nations concerning democracy and human rights and we engage this dialogue in the development of our own Constitution in our own specific context.'

⁴⁴ *S v Williams* 1995 7 BCLR 861 (CC).

⁴⁵ n 44 above, para 39.

The Court even drew upon decisions of sister institutions in Africa, to wit the Supreme Courts of Namibia and of Zimbabwe, wherein these courts held that corporal punishment constitutes inhuman or degrading punishment.⁴⁶ In *S v Ephraim*,⁴⁷ the Court ruled that 'abduction [violates] the applicable rules of international law'.⁴⁸

The ruling in *S v Ephraim* was particularly important when contrasted with the practice in the United States in which an officer may, in the absence of an express ban treaty, abduct a foreigner and forcibly transport him to the US to stand trial. The US Supreme Court approved such a practice in *United States v Alvarez-Machain*,⁴⁹ largely because of its traditional reluctance to apply comparative constitutional analysis in interpreting the US Constitution.⁵⁰ Even as late as 1997, Justice Scalia wrote: 'Comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.'⁵¹ Ackerman agreed, arguing that the 'spirit of the American Constitution requires limiting the scope of inquiry to American sources'.⁵² Ackerman continued:⁵³

To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern . . . As we lose sight of these ideals, the organising patterns of our political life unravel.

In recent years, however, the US Supreme Court has tried to redeem itself from this 'frozen-in-time' approach to interpretation, and American scholars and justices now freely discuss the merits of a comparative approach to a constitutional question.⁵⁴ *Thomson v Oklahoma*⁵⁵ was

⁴⁶ n 44 above, paras 31-32 34.

⁴⁷ *S v Ephraim* 1991 2 SA 553 (A).

⁴⁸ n 47 above, 568.

⁴⁹ See *United States v Alvarez-Machain* (1992) 504 US 655 670.

⁵⁰ See Barak (n 26 above) 114 (stressing the reluctance of the US Supreme Court in invoking comparative law); C Moon 'Comparative constitutional analysis: Should the United States Supreme Court join the dialogue?' (2003) 12 *Journal of Law and Policy* 229 240.

⁵¹ *Printz v United States* (1997) 521 US 898 921 n 11; A Scalia 'Commentary' (1996) 40 *St Louis University Law Journal* 1119 (arguing that 'international norms' should not control adjudication of domestic issues in the US courts).

⁵² B Ackerman *We the people: Foundations* (1991) 3.

⁵³ n 52 above, 3-4 6.

⁵⁴ See eg SD O'Connor 'Remarks at the ninety-sixth annual meeting of the American Society of International Law' (2002) 96 *American Society International Law Proceedings* 350 ('Conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts'); WH Rehnquist 'Constitutional courts — Comparative remarks' in P Kirchhof & DP Kommers (eds) *Germany and its basic law: Past, present and future — A German-American symposium* (1993) 411 412 ('Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.').

⁵⁵ *Thomson v Oklahoma* (1988) 487 US 815.

one of the pioneer cases in this regard. In that case, a majority of the Supreme Court found that the execution of a 15 year-old would violate the Eight Amendment's prohibition against cruel and unusual punishment, arguing that:

The conclusion that it would offend civilised standards of decency to execute a person who was less than 16 years old at the time of his or her offence is consistent with the views that have been expressed by respected professional organisations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

Since then, the Supreme Court has warmly embraced the influence of globalisation in American constitutional jurisprudence, for example, in *Grutter v Bollinger*,⁵⁶ in which Justice Ginsburg referenced 'the international understanding' concerning the duration of affirmative action programme; *Washington v Glucksburg*,⁵⁷ in which Justice Rehnquist, writing for the majority, provided as relevant background a lengthy footnote concerning foreign court decisions on the constitutionality of bans on assisted suicide; and *Thompson v Oklahoma*,⁵⁸ in which the Court stressed the relevance of international views on the death penalty. Others are *Lawrence v Texas*,⁵⁹ in which its Supreme Court struck down a law criminalising homosexuality as a violation of the Fourteenth Amendment, citing *Dudgeon v United Kingdom*,⁶⁰ a 1981 European Court of Human Rights decision that struck down the United Kingdom's criminal sodomy laws; and *Atkins v Virginia*,⁶¹ in which Justice Stevens, writing for the majority, noted that executing the mentally retarded is a practice that has been 'overwhelmingly disapproved' by the 'world community',⁶² a fact which, according to him, supports the conclusion that such executions are prohibited by the Eighth Amendment, being 'cruel and unusual punishments'.⁶³

There is, indeed, a global cross-pollination of human rights, as many courts in other jurisdictions frequently cite decisions of international human rights tribunals that do not even have jurisdiction over them. Examples include the Australian case of *Leask v Commonwealth*,⁶⁴ in which Justice Toohey cited the European Court of Human Rights' decision in *Soering v United Kingdom*,⁶⁵ concerning extradition to a country permitting the use of the death penalty; the Canadian case of *United*

⁵⁶ *Grutter v Bollinger* (2003) 539 US 306.

⁵⁷ *Washington v Glucksburg* (1997) 521 US 702 718 n 16.

⁵⁸ *Thompson v Oklahoma* 487 US 815 830-31.

⁵⁹ *Lawrence v Texas* (2003) 539 US 558.

⁶⁰ *Dudgeon v United Kingdom* (1981) 45 Eur Ct HR Ser A.

⁶¹ *Atkins v Virginia* (2002) 536 US 304.

⁶² n 61 above, 316 n 21.

⁶³ As above, 307 321.

⁶⁴ *Leask v Commonwealth* (1996) 187 CLR 579 615-16.

⁶⁵ *Soering v United Kingdom* (1989) 161 Eur Ct HR Ser A.

States v Burns,⁶⁶ which also cited *Soering v United Kingdom*; and the Hong Kong case of *Shum Kkwok Sher v HKSAR*,⁶⁷ in which that country's Court of Final Appeal cited *Hashman & Harrup v United Kingdom*,⁶⁸ concerning the specificity requirement of laws constraining freedom of speech. These courts also consult the jurisprudence of other municipal courts in constitutional interpretations. In *The Queen v Keegstra*,⁶⁹ for example, the Canadian Supreme Court considered whether the Canadian criminal code could prohibit hate speech. In interpreting the Charter of Rights and Freedoms, the Court turned to American jurisprudence as well as international human rights law for assistance. Chief Justice Dickson justified such an approach by asserting that 'international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of parliament's objective'.⁷⁰

In the Australian case of *Mabo v Queensland [No.2]*,⁷¹ the High Court — the country's highest court — rejected, by a six to one majority, the doctrine of *terra nullius*, supporting its holding not only with the decision of the International Court of Justice but also with decisions from Nigeria, Canada, India, New Zealand and the United States.⁷² In another case, *Australia Capital Television Pty v Commonwealth*,⁷³ the Court held as unconstitutional an Act allowing the government to pass legislation limiting or restricting the freedom of communication and broadcasting rights. In arriving at its decision, the Court looked to decisions from Canada, England, the US and the European Court of Human Rights.⁷⁴

Refreshingly, a few other constitutional courts in Africa also participate in this international dialogue. In *Mwellie v Ministry of Works*,⁷⁵ for example, the Constitutional Court of Namibia considered decisions from India, US, Canada, England, Malaysia, South Africa and the European Court of Human Rights. Indeed, Africa's transitional judiciaries have managed to produce a corpus of constitutional case law, though not many of them are active participants in the comparative constitu-

⁶⁶ *United States v Burns* [2001] 1 SCR 283 para 53.

⁶⁷ *Shum Kkwok Sher v HKSAR* [2002] 2 HKLRD 793.

⁶⁸ *Hashman & Harrup v United Kingdom* (1999) Eur Ct HR Ser A.

⁶⁹ *The Queen v Keegstra* [1990] 3 SCR 697.

⁷⁰ n 69 above, 749-50. See generally L LeBel & G Chao 'The rise of international law in Canadian constitutional litigation: Fugue or fashion? Recent developments and challenges in internalising international law' (2002) 16 *Supplement Constitutional Law Review* 23 45; GV la Forest 'The expanding role of the Supreme Court of Canada in international law issues' (1996) 34 *Canadian Yearbook of International Law* 89 90-91.

⁷¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁷² n 71 above, 40 48 83-83 123-24 137 164-65.

⁷³ *Australia Capital Television Pty v Commonwealth* (1992) 177 CLR 106.

⁷⁴ n 73 above, 107 168-69.

⁷⁵ *Mwellie v Ministry of Works* [1995] 4 LRC 184.

tional dialogue. Some are not even aware of the existence of many international human rights tribunals, let alone draw inspiration from their dynamic and rich jurisprudence.

The celebrated Nigerian case of *Abacha v Fawehinmi*⁷⁶ reveals a gratuitous ignorance of international human rights jurisprudence on the part of some of the Supreme Court justices. Among the issues for determination was included the question whether a treaty incorporated into the laws of Nigeria has a status higher than, and superior to, other municipal laws and what, in particular, was the relationship between the African Charter and the Nigerian Constitution and between the Charter and other municipal laws. The Supreme Court agreed with the Court of Appeal that the African Charter (Domestication Act) is a statute with international flavour and that if there is a conflict between it and another statute, the provisions of the Charter prevail over that other statute, based on the presumption that the legislature does not intend to breach an international obligation.⁷⁷ The Court, however, held that the African Charter is not superior to the Constitution and that the National Assembly has the power to remove a treaty from the body of its municipal laws.⁷⁸

In a passage that remains highly embarrassing, Justice Belgore — the most senior member of the Nigerian Supreme Court justices — said, in his concurring judgment: ‘There is provision in the [African] Charter for a Commission to be set up, but since 19th January 1981 when the Charter was made in Banjul, The Gambia, no Commission has been set up.’⁷⁹ This statement was made on 28 April 2000. One wonders if the learned justices might have reasoned differently if they knew that an African Commission on Human and Peoples’ Rights had been in existence for more than 12 years⁸⁰ prior to the *Fawehinmi* case and that the Commission had developed a pool of jurisprudence on human rights.

The African Commission itself is involved in international dialogue aimed at giving life and force to the African Charter. In interpreting the Charter, the Commission is enjoined to:⁸¹

draw inspiration from international law on human and peoples’ rights, the Charter of the United Nations, the . . . [Constitutive Act of the African Union], the Universal Declaration of Human Rights, other instruments adopted by the United Nations and African countries in the field of human and peoples’ rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

⁷⁶ See *Abacha v Fawehinmi* [2000] FWLR (Pt 4) 533.

⁷⁷ n 76 above, 586.

⁷⁸ As above.

⁷⁹ n 76 above, 595.

⁸⁰ The Commission was established and inaugurated in 1987 ‘to promote human and peoples’ rights and ensure their protection in Africa’; art 30 African Charter.

⁸¹ Art 60 African Charter.

By placing reliance on international human rights jurisprudence, the Commission has succeeded in extending the paradigm of human rights in Africa to the basic needs of peoples, thereby departing from the original paradigm. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,⁸² for example, the Commission created a right to housing in the African Charter even in the absence of an express guarantee. According to the Commission:⁸³

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing . . .

3.3 Points of discord

The question that begs for an answer is whether comparative constitutionalism can be justified in the absence of an express authorisation. What is more, is it lawful and legitimate for transitional judiciaries to invoke international and comparative law in interpreting constitutions that are products of different cultural and historical developments? Comparative constitutionalism is met with the objection that it opens the floodgate to the application of laws that were born to different countries in different ages and in very different circumstances. Opponents of comparative constitutionalism insist that it upsets the acculturation of a society through the legislative process; that it is wrong to disaggregate legislation from its cultural instantiation, since laws are imbedded in the culture of a people.⁸⁴ They appeal to Montesquieu, who argued that laws 'should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another'.⁸⁵

Comparative constitutionalism, according to its opponents, also raises serious questions of democratic legitimacy. Modern liberal democracies tend to justify judicial authority in terms of the rule of law; and the rule of law produces an argument for 'legislative sover-

⁸² See eg Communication 155/96 *Social and Economic Rights Action Centre v Nigeria* Fifteenth Annual Activity Report Annex V (*SERAC* case).

⁸³ n 82 above, para 60.

⁸⁴ See D Childress III 'Using comparative constitutional law to resolve domestic federal questions' (2003) 53 *Duke Law Journal* 193 217 219 (arguing, incorrectly, that '[e]ach legal system is autonomous and is perhaps incapable of legal transplant. Any transplant would be a rejection of the organic law that is part of that society and culture').

⁸⁵ C de Secondat 'Baron de Montesquieu' in DW Carrithers (ed) *The spirit of the laws* bk 1 ch 3 104-05 (1977) (1748).

eignty in its narrowest and least reflective sense'.⁸⁶ Others fear the danger that judicial comity may one day require that a country's constitutional court or Supreme Court reach a decision that is not in that country's best interest.⁸⁷

These objections are true; but they do not represent the whole truth. Of course, a judge should necessarily take the history and changing conditions of his community as his point of departure in interpreting a constitution. He should, however, not stop there; he should pay attention to legal developments in the rest of the world and to their role in keeping their countries in step with these developments, realising, as the United States (US) Supreme Court did — in *Lawrence v Texas*⁸⁸ — that:⁸⁹

[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

There are several reasons why comparative constitutionalism is legitimate and imperative. The first is that the language of human rights is global, spoken by political leaders and ordinary citizens alike. This is because of the rediscovery that humanity is confronted with basically common issues. Dr Samuel Johnson wrote many years back that people everywhere are prompted by the same motives, deceived by the same fallacies, all animated by hope, obstructed by danger, entangled by desire, and seduced by pleasure.⁹⁰ It is naïve, in the light of this rediscovery, for judges to expect the breeze of globalisation to pass them by. No institution of government can afford to ignore the rest of the world; and that includes the courts.

A second but related justification is that, despite the differences in the historical development or the conceptual structure and style of operation that exist in different legal systems, these systems give the same or similar solutions to the problems of life. The bills of rights in Africa are generally composed in a very similar manner to those of the Western world and bear, in particular, the imprimatur of the Universal Declaration of Human Rights of 1948 (Universal Declaration).⁹¹ These constitutions rest, to borrow Weinrib's words, 'on a shared constitutional conception that, by design, transcends the history, cultural heritage,

⁸⁶ C Harlow 'Voices of difference in a plural community' (2002) 50 *American Journal of Comparative Law* 339 341.

⁸⁷ See Moon (n 50 above) 245.

⁸⁸ *Lawrence v Texas* (2003) 123 S Ct 2472.

⁸⁹ n 88 above, 2482.

⁹⁰ See BH Bronson (ed) *Samuel Johnson: Rasselas, poems, and selected prose* (1971) 95.

⁹¹ Universal Declaration of Human Rights, adopted on 10 December 1948; GA Res 217 A (III) GAOR 3d Sess.

and social mores of any particular nation-state'.⁹² Thus, nearly all countries in Africa assume a model that basically draws from those of liberal democracies, at least from a formal point of view.⁹³

The values that underpin modern constitutions — justice, democracy, freedom, equality and the dignity of the human person — share a multinational history and universal acceptance; they are standards for sound constitutional structuring, making it imperative for constitutional courts and lawyers to be comparatists. Dignity, for example, is the common denominator of our very humanity and is 'above all price and so admits of no equivalent'.⁹⁴ The Universal Declaration also provides that '[a]ll human beings are born free and equal in dignity and rights'⁹⁵ and almost all other international human rights instruments contain similar provisions. A state cannot use its particular national or religious tradition as justification for its failure to respect human dignity; neither could such failure be justified 'in the name of majoritarian political processes'.⁹⁶

Dignity is a central value that animates the South African Constitutional Court's interpretation of the Bill of Rights. Section 39(a) of the South Africa Constitution provides that interpretation of the Bill of Rights 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.⁹⁷ Justice O'Regan stressed as much, in *Makwanyane's* case, when she held:⁹⁸

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.

It is self-defeating for African judges to stick to an unchanging line in a radically changed world. Convergence, not divergence, has been the mega-trend since the early 1980s and beyond. Our judges should pro-

⁹² LE Weinrib 'Constitutional conceptions and constitutional comparativism' in V Jackson & M Tushnet (eds) *Defining the field of comparative constitutional law* (2002) 3 15.

⁹³ See Piergigli (n 15 above) (noting exceptions in constitutional provisions concerning torture or slavery and forced labour, that is, practices that are either autochthonous or related to the colonial period).

⁹⁴ HE Jones *Kant's principle of personality* (1971) 127.

⁹⁵ Art 1 Universal Declaration.

⁹⁶ H Botha 'Comparative law and constitutional adjudication' (unpublished but on file with author).

⁹⁷ See also *Makwanyane* (n 14 above) para 144 (where the Constitutional Court described the rights to life and dignity as 'the most important of all human rights, and the source of all other personal rights' in the Bill of Rights); and generally A Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal on Human Rights* 193.

⁹⁸ *Makwanyane* (n 14 above) para 329.

mote judicial comity, by opening their minds to new approaches, mindful that 'other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit'.⁹⁹ They should use their best skills and judgment to fit human rights law to the new challenges that an evolving democratic society leaves at the doors of their courthouses.¹⁰⁰ Human rights law can only develop if its jurisprudence is a dialogue rather than a monologue; and, if applied more frequently, African courts could use international and comparative norms to make justiciable many of the socio-economic rights that some African constitutions regard as mere fundamental objectives and directive principles of state policies.

Of course, constitutional interpretation must be system-specific, as unscientific juridical comparison will yield very limited results. The South African Constitutional Court, for example, is keenly aware of this danger and has repeatedly stressed that, in the final analysis, it is the South African Constitution that must be interpreted and that its provisions must be placed within the context of South African society.¹⁰¹ In the *Makwanyane* case, for example, the Court held in balance its references to foreign jurisprudence with its reliance on the indigenous African concept of *ubuntu*, which was taken to signal values of respect, dignity, compassion and solidarity.¹⁰² Constitutional courts must also maintain uniformity and predictability, so that litigants and advocates alike can rely on the continued application of the same rules. As Cody Moon pointedly asks, 'When one constitutional court decides an issue one way and another reaches a different conclusion, who determines which court is correct?'¹⁰³

A final point to stress is that advances in information and communication technologies (ICTs) have, undoubtedly, aided the global cross-pollination of human rights, making decisions of international and constitutional courts only a mouse click away. The internet affords access to foreign judicial decisions and law journals contain all manners of commentaries. African judges should acquaint themselves with, and avail themselves of, the opportunities that the ICTs have opened up to the international community. These, of course, have their limitations; but therein lie the challenges. Every court must determine for itself the

⁹⁹ SD O'Conner 'Broadening our horizon: Why American judges and lawyers must learn about foreign law' *International Judicial Observer* June 1997 2, cited in RB Ginsburg 'Looking beyond our borders: The value of a comparative perspective in constitutional adjudication' (2004) 22(2) *Yale Law and Policy Review* 329 337.

¹⁰⁰ See JS Kaye 'Delivering justice today: A problem-solving approach' (2004) 22(1) *Yale Law and Policy Review* 125.

¹⁰¹ See eg *Williams* (n 44 above) paras 50 51.

¹⁰² *Makwanyane* (n 14 above) paras 130-31 223-27.

¹⁰³ Moon (n 50 above) 245.

acceptable uses of ICTs and must test and retest new ideas, retain and refine what is good and reject what is bad, recognising, as Benjamin Cardozo did, that 'in the endless process of time, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine'.¹⁰⁴

4 Conclusion

O'Regan writes:¹⁰⁵

The challenge of building one nation and one economy in which all South Africans may participate and from which all may benefit remains a major challenge for the short, medium and perhaps even long-term.

This is also the challenge facing almost all emerging democracies in Africa, including Ghana, Kenya, Nigeria, Uganda, Zambia and Zimbabwe. In these countries, the wealth of nations has become the poverty of peoples due, largely, to corruption and mismanagement of national resources. Politics is still a freak-show in Africa, rather than deliberative democracy. Recycled politicians are busy fattening their bank accounts, with voices of pleasure pouring out their notes on every side. On such systems as these the electorates matter little — they are foam on waves.

In the meantime — and probably in the long run as well — transitional judiciaries in Africa should expound African constitutions with Africa's ugly past and present challenges in mind.¹⁰⁶ They should draw upon international and comparative law to assert their institutional authority and should 'abandon their longstanding insularity and inertia in matters of jurisprudential innovation and borrowing'.¹⁰⁷ Since the final cause of law is the welfare of society,¹⁰⁸ African judges should devote themselves towards this end rather than being defenders of the *status quo*. Most courts in the past, including those of South Africa, were passive instruments of legitimating authoritarian regimes. The dying dynasty of dictators on the continent presents present courts with golden opportunities to develop constitutionalism, by enforcing limitations on the exercise of governmental power, exercising their powers of judicial review to advance and deepen the transition to constitutional democracy, and, above all, protecting human rights through comparative constitutionalism.

¹⁰⁴ B Cardozo *The nature of the judicial process* (1921) 179.

¹⁰⁵ O'Regan (n 7 above) 201.

¹⁰⁶ OW Holmes Jr *The common law* (1881) 1 ('The life of the law has not been logic; it has been experience').

¹⁰⁷ HK Prempeh 'A new jurisprudence for Africa' (1999) 10(3) *Journal of Democracy* 135 146.

¹⁰⁸ See Cardozo (n 104 above) 62.

The Constitutional Court, the Bar and similar institutions in South Africa have helped, and continue to help, the nation and the people in surviving an unprecedented wicked and oppressive era in their history. Such a remarkable achievement within such a limited time frame is worth celebrating; but as we celebrate, let us remind ourselves that, in the general condition of human life in Africa, there is much more to be endured than enjoyed. There is still a wide gap between promise and performance, that is, between rights guaranteed in bills of rights and their actual enjoyments by the intended beneficiaries. The following lines from Abigail Adams are as relevant for us today as they were when she first wrote them to her son during the era in which he was coming of age:¹⁰⁹

These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.

Our consolation should be that we are not alone in sharing our past pains, our present concerns and our future challenges. Let us look to the next decade with optimism, which is the motor that drives hope but without which there would only be the despair that fulfils its own prophecy of doom.

¹⁰⁹ 'Letter from Abigail Adams to John Quincy Adams' quoted in D McCullough *John Adams* (2001) 226.