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AFRICAN COURTS, INTERNATIONAL LAW, AND COMPARATIVE CASE LAW: CHIMERA OR EMERGING HUMAN RIGHTS JURISPRUDENCE?

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INTRODUCTION

State collapse, humanitarian crisis, and war are the faces of Africa that the world sees today. Lost in the tide of dark images are incremental steps for the protection of human rights. In the most dysfunctional of African countries, the skeletons of State institutions still stand. Some judiciaries have even started to engage in a progressive and sophisticated discussion of international human rights norms.

Member States of the Organization of African Unity (OAU) formalized their rhetorical commitment to the promotion and protection of human rights with the adoption of the African Charter of Human and Peoples' Rights in 1981.[1] Since the Charter's signing, critics have disparaged the African human rights system for its failure to establish a court that would safeguard and enforce the rights guaranteed in the Charter.[2] In 1994, the OAU began the process of establishing an African Court of Human and Peoples' Rights.[3] Given the lackluster performance of the African Charter's primary guardian institution, the African Commission, many commentators believed that the time had not yet come for the establishment of a court.[4]

Misgivings aside, the OAU adopted the Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an Afri-

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1. The African Charter on Human and Peoples' Rights, *opened for signature* June 21, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 I.L.M. 59 (1982) [hereinafter African Charter].

2. With the entry into force of the African Charter came the establishment of the African Commission on Human and Peoples' Rights, a supranational body entrusted with promotional and quasi-judicial functions to safeguard the Charter, but no court. *See, e.g.*, George William Mugwanya, *Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT'L & COMP. L. REV. 35 (1999).

3. *See* OAU Res. AHG/230 (XXX), *quoted in* Gino J. Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison*, 8 AFR. J. INT'L & COMP. L. 944, 945 (1996).

4. *See, e.g.*, EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICES AND PROCEDURES 193–97 (1996) (arguing that an African Human Rights Court will face similar hurdles in establishing a useful role in the protection of human rights as the African Commission); LONE LINDHOLT, QUESTIONING THE UNIVERSALITY OF HUMAN RIGHTS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN BOTSWANA, MALAWI, AND MOZAMBIQUE 74 (1997) (referring to the opinion of Professor Umozurike, member of the African Commission, that a court should not be established because of the lack of resources endemic in the African human rights system); Christof Heyns, *The Regional and Sub-Regional Protection of Human Rights in Africa: In Search of a Realistic Dream*, 8 AFR. SOC. INT'L & COMP. L. PROC. 170, 173–75 (1996). Heyns posits that although an independent human rights court could benefit the protection of human rights in Africa, the current obstacles of funding and the "need to first develop a human rights culture on the national level in African countries" indicate that it would be wise to wait to establish such a court. *Id.* at 175.

can Court on Human and Peoples' Rights in June 1998.[5] Since then, the Draft Protocol and the proposed African Court have been the focus of scrutiny by scholars of the African regional human rights system.[6] The proposed African Court has also captured the attention of international law scholars analyzing the proliferation of international courts and the effect of this phenomenon on international law.[7]

Though the potential creation of a supranational human rights court has brought international attention to the African human rights system, international law and human rights scholars rarely turn to African examples when studying the domestic application of international human rights norms.[8] This Article seeks to fill that gap by analyzing cases from several Anglophone common law countries in sub-Saharan Africa that invoke international law and comparative case law as interpretive support in their national fundamental rights jurisprudence.

Part I of this Article develops the conceptual framework for the examination of these cases by outlining theories of national judicial enforcement of human rights in Africa. First, it explores the technicalities of the relationship between international law and municipal law and shows how surprising the use of international sources is given their nonbinding status in domestic legal systems. It then traces the trend toward human rights constitutionalism through the post-independence creation of

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5. Draft Protocol to the African Charter on Human Rights and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), *reprinted in* 9 AFR. J. INT'L & COMP. L. 953 (1997).

6. *See, e.g.*, Yemi Akinseye-George, *New Trends in African Human Rights Law: Prospects of an African Court of Human Rights*, 10 U. MIAMI INT'L & COMP. L. REV. 159 (2001/2002); Arthur E. Anthony, *Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa*, 32 TEX. INT'L L.J. 511 (1997); Makau Mutua, *The African Human Rights Court: A Two Legged Stool?*, 21 HUM. RTS. Q. 342 (1999); Naldi & Magliveras, *supra* note 3; Andreas O'Shea, *A Human Rights Court in an African Context*, 26 COMMONWEALTH L. BULL. 1313 (2000); Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000).

7. *See, e.g.*, Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 720–23 (1999).

8. For example, recent compendiums which explore the role of domestic judiciaries in enforcing human rights norms have not included any reference to the experience of African courts. *See, e.g.*, ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997); INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996); JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? (Mark Gibney & Stanislaw Frankowski eds., 1999). A research bibliography of "International Human Rights Law and the Domestic Legal Order" includes references to the European and Latin American experiences but no African sources. *See* Jean-Marie Henckaerts, *Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide*, 26 INT'L J. LEGAL INFO. 56 (1998). One study of the legal effect of the Universal Declaration of Human Rights in national law did include some citations to several African cases examined in this Article. *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 312, 377–97 (1996).

justiciable bills of rights. This Part proceeds with an examination of the debate between universalism and particularism of human rights in the African context and concludes with an overview of the role and responsibility of African judiciaries in enforcing human rights.

It is in this context that Part II examines selected cases from Botswana, Namibia, Nigeria, South Africa, Tanzania, Zambia, and Zimbabwe that invoke international law and comparative case law. The cases discussed here were chosen because they highlight several distinct modes of interpretation. Part II first examines how African courts invoke international sources for support in adopting a broad policy of constitutional interpretation. It then explores how courts have relied on international sources in determining the substantive scope of fundamental rights, focusing on cases concerning corporal and capital punishment under constitutional provisions guaranteeing the freedom from "inhuman and degrading punishment." Part II concludes with a discussion of the tensions between international norms, the exercise of judicial license, and African traditions.

Researching African case law is a true challenge. Most African judiciaries function on the scarcest of financial resources. In these circumstances, compiling cases in law reports is the last priority. As such, most national decisions in African countries remain unpublished, and those that are printed in reporters are still difficult to access.[9] Nevertheless some African States do publish quasi-regular law reports.[10] Most of these regular reports are from Southern African countries or African Commonwealth countries.[11] Given the irregularity of the publication of

9. The jurisprudence of Anglophone common law countries is more widely accessible than that of other African countries. This could be a result of Anglophone countries following the common law system that values judicial precedent, as opposed to Francophone civil law systems that rely primarily on codes and statutes. Particular countries in southern Africa publish regular law reports.

10. Some of these State law reports are financed by donations from international donor organizations. In addition to State-sponsored law reports, several non-profit organizations or private publishers have published books or reporters that document jurisprudence from African countries. A new publication seeks to catalogue the human rights developments in all the countries on the African continent. These country reports include occasional references to national human rights jurisprudence. But even in the short lifetime of this series, the publication of annual editions has been delayed. *See generally* 1 HUMAN RIGHTS LAW IN AFRICA 1996 (Christof Heyns ed., 1996); 2 HUMAN RIGHTS LAW IN AFRICA 1997 (Christof Heyns ed., 1999); 3 HUMAN RIGHTS LAW IN AFRICA 1998 (Christof Heyns ed., 2001); 4 HUMAN RIGHTS LAW IN AFRICA 1999 (Christof Heyns ed., 2002). In 1998, the Nigerian Law Publications Ltd. published its inaugural volume of the *Human Rights Law Reports of Africa* (HUM. RTS. L. REP. AFR.), which compiled and reprinted human rights jurisprudence in Nigerian courts. The Nigerian decisions examined in this Article were taken from this reporter. However, this publication faces difficulties in its production and has only published its inaugural volume thus far.

11. Additionally, the *South African Law Reports* reprints selected decisions of various courts in South Africa, Namibia, and Zimbabwe.

case law, any comprehensive search for African case law is unscientific and incomplete. Consequently, the cases examined in Part II were selected from a small subsection of national cases that were discovered that draw on international and comparative law in their fundamental rights jurisprudence.[12]

This Article uses the shorthand "international sources" to refer to the full range of international authorities that these African courts reference in their decisions. These sources include international human rights instruments[13] and decisions of international tribunals. Additionally, the courts rely on comparative jurisprudence, drawing authority from other common law countries, particularly from members of the Commonwealth.

By examining these judicial decisions this Article seeks to highlight the potential of the African State, through the judiciary, to play a positive role as an enforcer and protector of human rights at the national level.[14] It takes this position not with the naïve belief that the judicial protection of human rights can substitute for the grassroots development of a human rights culture or the conscious self-restraint of other branches of government in complying with human rights obligations, but rather with the view that the judiciaries can and do play a pivotal role in developing a normative climate in which such developments can occur.

This Article, therefore, does not address how the political climate of a country limits, even undermines, the role of judiciaries in African States. Most sobering is the reality that many of the countries whose jurisprudence is examined in this Article do not respect the rule of law. Their judiciaries are also not fully independent. Authoritarian governments have intervened to overturn progressive court decisions on

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12. Locating these varied sources required more than a little detective work. Some secondary sources on human rights in Africa report on human rights jurisprudence in African courts. These leads were subsequently tracked down in printed law reporters, additional secondary materials, or internet cites. It was more systematic, if labor-intensive, to scan page-by-page the law reports available on the shelves of well-stocked international law libraries for cases that reference international and comparative case law.

13. These include both binding and non-binding instruments such as the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III) at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]; the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; the Convention for the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; and the African Charter, *supra* note 1. The technical aspects of how these sources take force in the domestic legal order will be explored in discussion *infra* Section I.A.

14. The vision is one of the progression that starts with States that protect human rights to the idealized "human rights [S]tate." Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 70–71 (1997).

human rights issues by fiat or have reigned in the judiciaries when the judges have been deemed to exercise too much independence.[15]

The decisions examined in this Article illustrate how African courts have used international law and comparative case law as interpretive tools in their domestic rights jurisprudence. Even within the context of repressive regimes and dysfunctional States, and despite the challenges to the legitimacy of human rights in the African context, there exists the potential for the indigenous judicial acceptance of international human rights norms that can contribute to the expansion of a global human rights jurisprudence.

I. THEORIES OF NATIONAL JUDICIAL ENFORCEMENT OF HUMAN RIGHTS IN THE AFRICAN CONTEXT

A. *The Status of International Human Rights Law in National Courts*

According to international law principles, international human rights instruments do not automatically confer justiciable rights in national courts. Before turning in Part II to a discussion of how African courts have used international law to adjudicate fundamental rights claims brought by nationals, this Section provides a brief overview of the relationship between international law and municipal law. African courts draw upon international law and comparative jurisprudence, but not in ways that traditional international law scholarship would expect.

Two alternative theories define the relationship between municipal law and international law.[16] According to the monist theory, international

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15. For two examples of how Zimbabwe reversed the effects of progressive human rights court decisions through constitutional amendment, see 2 HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 10, at 317, and *infra* note 286. The Tanzanian Parliament has also enacted legislation to complicate the procedures for bringing rights claims in court. *See* 2 HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 10, at 285. But see the example of Botswana, in which the Parliament enacted legislation to codify a positive rights decision by the court. *See infra* text accompanying note 279.

16. The theories of monism and dualism and the general relationship between international law and municipal law are discussed in most treatises on international law. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31–33, 41–51 (5th ed. 1998). For a comprehensive discussion of these theories see J.G. Stark, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936). Scholars of international law and its role in Africa have also commented on the monism and dualism theories. *See* JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 36–57 (1994); TIJANYANA MALUWA, INTERNATIONAL LAW IN POSTCOLONIAL AFRICA (Studies and Materials on the Settlement of International Disputes, vol. 4, 1999); U. OJI UMOZURIKE, INTRODUCTION TO INTERNATIONAL LAW 29–36 (1993); Tijanyana Maluwa, *The Incorporation of International Law and its Interpretational Role in Municipal Legal Systems in Africa: An Explanatory Survey*, 23 S. AFR. Y.B. INT'L L. 45 (1998) [hereinafter Maluwa, *Incorporation of International Law*].

law and municipal law comprise a single legal order within a national legal system, with international law superior to national law.[17] In this system, national courts must give effect to principles of international law over superceding or conflicting rules of domestic law. Under the dualist theory, international law and municipal law form two separate and independent legal systems. International law prevails in regulating the relations between sovereign States in the international system, whereas municipal law takes precedence in governing national legal systems. According to the dualist theory, for a municipal legal system to give effect to international law, national legislatures must incorporate international law into domestic law, thereby creating justiciable rights suitable for enforcement by domestic courts.

International jurists also distinguish between the types and sources of international law when speaking of international law's binding status in domestic legal systems. International norms that have attained the status of international customary law, for example, are considered to be part of municipal law under both the monist and dualist theories, and therefore prevail over national law even in domestic courts.[18] Whether norms and treaties of international law have reached such a status to be automatically incorporated into municipal law remains a matter of debate in practice.[19] Moreover, insofar as international treaties and conventions do not reflect norms of international customary law, the status of international conventions and treaties in a national system depends on whether a State follows the monist or dualist model.

African States inherited the international law frameworks of their colonial powers. Most Francophone African countries that were under French or Belgian colonial rule have adopted a monist view of

17. *See* UMOZURIKE, *supra* note 16, at 30. Umozurike notes that although the majority of monists believe in the primacy of international law over municipal law, a small school of "inverted monists" believe that municipal law takes precedence over international law. *See id. See also* George Slyz, *International Law in National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 8, at 71, 72 n.11.

18. *See* UMOZURIKE, *supra* note 16, at 33. However, this is not the case in Britain. *See id.* ("A British court will endeavor to apply municipal law in a manner that is compatible with international customary law but if municipal law is clearly in conflict, it has no alternative but to apply municipal law.").

19. To reach the status of customary international law, an international law principle must meet the definition of article 38 of the Statute of the International Court of Justice, which refers to "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, [hereinafter ICJ Statute]. One African commentator has argued that only a few provisions of international humanitarian law enshrined in the Geneva Conventions have attained this customary law status to be automatically incorporated into municipal law. *See* Michel-Cyr Djiena Wembou, *Les normes internationales relatives aux droits de l'homme et leur application dans la législation interne des Etats africains: problèmes et perspectives*, 11 AFR. J. INT'L & COMP. L. 51, 52–53 (1999).

international law, while Anglophone States of British colonial heritage have embraced the dualist position.[20] Of the national judiciaries examined in Part II, Nigeria, Tanzania, and Zambia are Anglophone, common law countries that operate under the dualist theory. Botswana and Zimbabwe are also former British colonies with common law legal systems that follow the dualist tradition. Given their particular colonial experience, South Africa and Namibia follow the Roman-Dutch law model, while also adopting an English common law approach to adjudication, including its dualism.[21]

The effect of international law on a national system also hinges on the properties of international instruments themselves. The Universal Declaration of Human Rights is a hortatory declaration of principles and aspirations and does not have the legal status of a treaty.[22] The two International Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR), however, as well as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), are binding treaties.[23] The Universal Declaration, the ICCPR, and the ICESR comprise what is commonly referred to as the International Bill of Rights.[24]

The African Charter on Human and Peoples' Rights is also binding on its States Party. Under article 1 of the Charter parties must "recognize the rights, duties and freedoms [of the] Charter and . . . undertake to adopt legislative or other measures to give effect to them."[25] This creates a treaty obligation of domestic incorporation of the Charter for States Party.[26] The failure to do so constitutes a breach of the Charter.[27] Article

20. *See* Wembou, *supra* note 19, at 57; *see also* P.F. Gonidec, *The Relationship of International Law and National Law in Africa*, 10 AFR. J. INT'L & COMP. L. 244, 245–46 (1998); P.F. Gonidec, *Droit International et Droit Interne en Afrique*, 8 AFR. J. INT'L & COMP. L. 789, 794–95 (1996).

21. *See* ONKEMETSE TSHOSA, NATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: CASES OF BOTSWANA, NAMIBIA AND ZIMBABWE 17, 45–46 (2001).

22. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 151 (2d ed. 2000).

23. The binding effect of a treaty stems from the international law principle of *pacta sunt servanda*, codified in article 26 of the Vienna Convention on the Law of Treaties which reads, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* BROWNLIE, *supra* note 16, at 620.

24. *See* STEINER & ALSTON, *supra* note 22, at 141.

25. African Charter, *supra* note 1, art. 1.

26. *See* U. OJI UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 110 (1997).

27. It has been posited that during the drafting process of the Charter, the OAU States were aware of the disparity between the effect of international law in monist and dualist States and sought through article 1 to emphasize the character of the treaty as binding on States. *See* LINDHOLT, *supra* note 4, at 85.

62 further requires States Party "to submit every two years . . . a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter."[28] The combined effect of articles 1 and 62 suggests that in light of resistance to the signing and ratification of the International Covenants, the drafters of the African Charter paid particular attention to ensuring the binding force of the Charter in national legal systems. Of the dualist, African common law countries, only Nigeria has enacted implementing legislation to incorporate the African Charter of Human and Peoples' Rights into its municipal legal system.[29]

Several African constitutions include specific provisions that define the role of international law in the municipal legal order. Although Namibia and Malawi have constitutions that have been described as "international law friendly,"[30] South Africa is best known for its constitutional embrace of international law. The Interpretation Clauses[31] of the South African Constitution mandate that courts take international law into consideration when interpreting the South African Bill of Rights,

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28. African Charter, *supra* note 1, art. 62.

29. In 1983, the same year that Nigeria signed the African Charter, its National Assembly passed the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Decree, which forms chapter 10 of volume 1 of the Laws of the Federation of Nigeria. Given that the President of the time was overthrown in a military coup, the Act was not approved to take effect until October 1, 1990 with the provision that the effect of the Act would backdate to 1983. *See* UMOZURIKE, *supra* note 26, at 111. One commentator notes, "[I]t is ironic, but perhaps predictable, that the clearest illustration of the potential effect of the African Charter in domestic law is found in Nigeria under a military regime at a time of severe repression . . . ." Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43 J. AFR. L. 1, 7 (1999). Given the military decrees that have suspended the effect of many domestic laws, the High and Supreme Courts of Nigeria have faced the issue of whether ouster provisions affect the African Charter Ratification and Enforcement Act. The High Court of Lagos has determined against the odds that this Act remains untouched by ouster decrees. *See* Registered Trustees of the Constitutional Rights Project (CRP) v. President of Nigeria (High Ct. 1993), *reprinted in* 4 J. HUM. RTS. L. & PRACTICE 218, 248–49 (1994).

30. Maluwa, *Incorporation of International Law*, *supra* note 16, at 46.

31. *See* S. AFR. CONST. §§ 39(1), 233. Section 39(1) provides "[w]hen interpreting the Bill of Rights, a court, tribunal or forum— . . . (b) *must* consider international law; and (c) may consider foreign law." (emphasis added). Section 233 states that "every court must prefer any reasonable interpretation of the legislation [under consideration] that is consistent with international law over any alternative interpretation that is inconsistent with international law." The formulations of these two constitutional provisions of the Final Constitution of 1996 broadened the scope of the courts' power to employ international law as interpretive guidance when adjudicating domestic Bill of Rights provisions than was granted under the Interim Constitution of 1994. *See generally* Andre Stemmet, *The Influence of the Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law*, 33 INT'L L. 47 (1999).

resulting in the emergence of a body of human rights jurisprudence that has gained international prominence.[32]

Most African constitutions do not provide such explicit approval of the use of international sources for domestic jurisprudence. Under the traditional dualist theory of incorporation, African judiciaries' use of international law would thus be subject to general limitations under the principles of the relationship between international law and municipal law. Not surprisingly, African international law scholarship has largely framed the question of the application of international law in domestic courts according to this traditional model.[33]

As Part II illustrates, many African courts have overcome the technical obstacle that nonincorporation would normally impose through their use of international human rights instruments as persuasive authority in national court decisions. Indeed, many of the decisions examined in Part II include explicit statements to this end. As the Chief Justice declared in one Ghanaian case:

> Ghana is a signatory to this African Charter and Member States of the [OAU] and parties to the Charter are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.[34]

This manner of incorporation may be better understood under an alternative model of how domestic courts use international law, namely the transjudicial model.[35] The transjudicial model accounts for the actual use

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32. Much scholarly attention has been paid to South African rights jurisprudence. This Article minimizes its discussion of this body of South African jurisprudence, only incorporating discussions of cases that fit within the realm of the methodologies analyzed in Part II. For a general survey of the use of international law in South African jurisprudence see generally Richard Cameron Blake, *The World's Law in One Country: The South African Constitutional Court's Use of Public International Law*, 115 S. AFR. L.J. 668 (1999); Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531 (1997); Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67 (1999); Jeremy Sarkin, *The Development of a Human Rights Culture in South Africa*, 20 HUM. RTS. Q. 628 (1998); Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998).

33. This is evidenced by the African sources used to explore the traditional model of the status of international law in domestic courts in this Section. *See supra* notes 16–32.

34. *See* New Patriotic Party v. Inspector-Gen. of Police, Accra (Archer, C.J., concurring) (Ghana 1993), *quoted in* Viljoen, *supra* note 29, at 5 *and* 2 HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 10, at 175.

35. The founding proponent of the transjudicial model is Anne-Marie Slaughter. *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99

of international law and comparative case law in domestic courts, regardless of the binding or nonbinding status of their sources. This results in the cross-fertilization of international law and comparative case law in domestic courts in continents around the globe.[36] It evidences the dawn of an era of "judicial dialogue"[37] and "judicial comity."[38]

B. *African Human Rights Constitutionalism*

Unable to rely on international human rights instruments in national courts, does an individual victim of a human rights violation in Africa have other recourse? This Section highlights the institutional innovations that postcolonial African States have used to lay the framework for the judicial protection of human rights in these countries.

Many Anglophone common law countries in Africa adopted constitutions, either at independence or through later amendment, that contain bills of rights inspired by international human rights instruments. The rights enshrined in these instruments are at the heart of the cases examined in Part II and provide the basis for the potential of human rights constitutionalism in Africa.

"Constitutionalism" refers to a political order organized on the basis of a constitution that forms the highest law.[39] Although the term is a malleable one, the literature on constitutionalism in Africa reflects a general understanding of the concept of a constitutional structure that limits the

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(1994) [hereinafter Slaughter, *Transjudicial Communication*]; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) [hereinafter Slaughter, *Judicial Globalization*]. Karen Knop analyzes the challenges to international law scholarship on how to approach studying the domestic application of international law. Her article debates the merits and limits of the traditional versus transjudicial models. *See* Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (2000); *see also Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 2049 (2001) ("The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation").

36. *See* Slaughter, *Transjudicial Communication*, *supra* note 35, at 117–18; Slaughter, *Judicial Globalization*, *supra* note 35, at 1116–19 (specifying further the phenomenon of "constitutional cross-fertilization").

37. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998).

38. Slaughter, *Judicial Globalization*, *supra* note 35, at 1112–14 (emphasizing the increased respect and deference between courts as judicial colleagues).

39. *See* Carla M. Zoethout & Piet J. Boon, *Defining Constitutionalism and Democracy: An Introduction*, *in* CONSTITUTIONALISM IN AFRICA: A QUEST FOR AUTOCHTHONOUS PRINCIPLES 1, 5 (Carla M. Zoethout et al. eds., 1996) [hereinafter CONSTITUTIONALISM IN AFRICA]; *see also* Louis Henkin, *Elements of Constitutionalism*, *in* 60 THE REVIEW 11, 11–20 (Int'l Comm'n of Jurists ed., 1998) (providing a comprehensive list of the elements of constitutionalism: government according to the constitution, separation of powers, popular sovereignty and democratic government, constitutional review, an independent judiciary, control over the police, civilian control of the military, and individual rights).

power and authority of government.[40] A key element of constitutionalism is the protection of individual rights and freedoms from governmental encroachment.[41] Bills of rights are drafted to serve this end. Entrusting national judiciaries with the duties of guaranteeing these rights and holding the other branches of government accountable further provides the foundation for human rights constitutionalism.

The creation of national institutional structures for the protection of rights in Africa, however, has not resulted in the respect for them.[42] According to one commentator, the experience of constitutionalism in Africa presents a paradox. "The paradox lies in the simultaneous existence of what appears to be a clear commitment by African political elites to the idea of the constitution and an equally emphatic rejection of the classical or at any rate liberal democratic notion of constitutionalism."[43] Other commentators, drawing upon this paradox and evaluating the status of and prospects for constitutionalism in Africa, have observed that while African elites acknowledge the necessary limiting role of constitutions, they often fail to respect their inviolability by changing and amending them at their will.[44]

Furthermore, the lack of autochthonous principles in African constitutions presents an obstacle for their societal legitimacy.[45] Some argue that because of the inherited nature of constitutionalism in postcolonial Africa, resistance to constitutionalism is not only inevitable, but also indispensable to the internalization of viable mechanisms for constraining power.[46] Although the legal structures of these countries are a legacy of their colonial experience, enforcing human rights through national

40. *See* H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 66–67 (Douglas Greenberg et al. eds., 1993).

41. *See* Zoethout & Boon, *supra* note 39, at 6.

42. *See, e.g.*, A.O. Adede, *Constitutionalism, Culture and Tradition: African Experiences on the Incorporation of Treaties into Domestic Law*, 7 AFR. Y.B. OF INT'L LAW 239, 243–44 (1999) (citing eight deficiencies in African constitutionalism, including the lack of independence of judiciaries).

43. Okoth-Ogendo, *supra* note 40, at 66. Okoth-Ogendo also notes that the failure of constitutionalism in Africa has resulted in a dilemma for scholars, which he dismisses as inconsequential or even false, to decide "whether to abandon the study of constitutions altogether on the grounds that no body of *constitutional law or principles of constitutionalism* appears to be developing in Africa, and might well fail to do so . . . ." *Id.* Okoth-Ogendo has elsewhere commented, power elites have accepted "the need for constitutions only in the minimalist sense of constitutive instruments, not in the maximalist sense as bodies of norms governing the legitimacy, exercise, and distribution of [S]tate power." H.W.O. Okoth-Ogendo, *Human and Peoples' Rights: What Point is Africa Trying to Make?*, *in* HUMAN RIGHTS AND GOVERNANCE IN AFRICA 74, 84 (Ronald Cohen et al. eds., 1993) [hereinafter Okoth-Ogendo, *Human and Peoples' Rights*].

44. Zoethout & Boon, *supra* note 39, at 11.

45. *See id.*

46. Okoth-Ogendo, *supra* note 40, at 80.

judiciaries is a move toward more entrenched human rights constitutionalism.

This Article assumes that the source of authority for the emerging human rights jurisprudence lies in the institutionalization of human rights constitutionalism. This term stresses the primacy of rights in the constitutional structure and the judiciary's potential role in fighting the paradox of constitutionalism in Africa through its institutional enforcement of the respect for constitutional rights. Properly functioning judiciaries that enforce the bills of rights that codify international human rights norms articulate these norms through a national voice that may be accepted as more legitimate. Given the heavy influence of international human rights instruments on the drafting of bills of rights in African countries,[47] when a litigant brings a claim under these provisions and a court enforces them, they are in effect nationalizing international human rights norms.

Former British colonies in Africa underwent a unique independence process. Given that the United Kingdom had neither a constitution of its own nor a written bill of rights, the process of drafting postcolonial constitutions was not a matter of transplanting the British model. The political structures of the newly independent States reflected the British imprint nonetheless. Though this included establishing a Westminster system of government, characterized primarily by a parliamentary system with a strong executive,[48] most African States have since departed from the original British model by process of constitutional amendment or by force.[49]

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47. The influence of international instruments on African bills of rights is generally accepted. *See* Franck Moderne, *Human Rights and Postcolonial Constitutions in Sub-Saharan Africa*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 315, 324 (Louis Henkin ed., 1990).

48. *See* William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L.Q. 67, 72–73 (1993). Dale lists the principles which constitute the fundamental elements of the Westminster system: at least one cameral elected legislature; a plural party system; executive power exercised largely by a prime minister and a cabinet chosen from the majority party in the elected chamber; a recognized opposition; and constitutional conventions. *See id.* "From Ghana in 1957 to Zimbabwe in 1982 the format adopted in constitution-making in English speaking Africa was the same." H.W.O. Okoth-Ogendo, *Constitutionalism Without Constitutions: The Challenge of Reconstruction of the State in Africa*, *in* CONSTITUTIONALISM IN AFRICA, *supra* note 39, at 49 [hereinafter Okoth-Ogendo, *Challenge of Reconstruction*].

49. Ghana was the first country to change its constitution in order to establish a one-party State and subsequent military coups, such as in Ghana, Nigeria, and Uganda, further resulted in the subversion if not the outright suspension of established constitutional rule. *See* Dale, *supra* note 48, at 72, 77–78. According to Dale, "It is hardly likely that a form of parliamentary government, evolved through three centuries of political and social development by an island on the fringe of Western Europe, could be successfully transplanted there." *Id.* at 80. As Okoth-Ogendo phrased it, "the state in Africa at independence was not a *constitutional*

Although the British required their colonies to adopt constitutions at independence, they did not originally intend for independence constitutions to include bills of rights.[50] The first African country to consider including a constitutional bill of rights was Nigeria.[51] During that country's independence transition, a Minority Commission was appointed to safeguard the interests of minority ethnic groups. Faced with the choice of either federalizing the government structure or adopting constitutional fundamental rights to guarantee equal treatment for minority groups, the Commission opted for the latter. The resulting Nigerian Constitution contained a bill of rights "which corresponded almost word for word with the [European] Convention."[52] The Nigerian experience served as the precedent for subsequent African countries.[53] The cases examined in Part II come from countries that have included a bill of rights in their constitution, either at independence like Nigeria, or through constitutional amendment.[54]

The European Convention had a particularly powerful impact on the creation of these national rights instruments. There are several reasons for this phenomenon. First, the rights elaborated in the European Convention are more explicitly defined than those in the Universal Declaration.[55] Second, article 63(1) of the European Convention, popularly known as the "Colonial Clause," allows "any state [to] . . . declare . . . that the present Convention shall extend to all or any of the territories for whose international relations it is responsible."[56] This implied that a State Party to the European Convention could choose whether to extend the application of the Convention to its colonial territories. The United

state. Rather, it was a *constituted state*." Okoth-Ogendo, *Challenge of Reconstruction*, *supra* note 48, at 53.

50. *See* Christof Heyns, *African Human Rights Law and the European Convention*, 11 S. AFR. J. HUM. RTS. 252, 256 (1993). In fact, Heyns contends that Britain was "staunchly opposed" to the inclusion of bills of rights in these independence constitutions. *See id.* In particular, the independence constitution of Ghana, the first African country to gain independence from Britain in 1957, did not include a bill of rights and only made "cursory references to one or two rights." *Id.*

51. *See id.* at 257.

52. *Id.*; *see also* PALAMAGAMBA JOHN KABUDI, HUMAN RIGHTS JURISPRUDENCE IN EAST AFRICA: A COMPARATIVE STUDY OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL IN TANZANIA, KENYA AND UGANDA 37 (1995).

53. Heyns, *supra* note 50, at 258 ("The Nigerian Bill of Rights can therefore be described as the conduit for the importation of the Western articulation of the concept of human rights into modern African human rights law.").

54. Tanzania, for example, though a one-party State, has amended its constitution to include a bill of rights. *See* Chris Maina Peter, *Five Years of the Bill of Rights in Tanzania: Drawing a Balance-Sheet*, 4 AFR. J. INT'L & COMP. L. 131 (1992). The Tanzanian Bill of Rights, as well as the bills of rights of other East African countries also drew upon the language of the European Convention. *See* KABUDI, *supra* note 52, at 38.

55. *See* Moderne, *supra* note 47, at 325.

56. European Convention, *supra* note 13, art. 63(1), 213 U.N.T.S. at 250.

Kingdom did so in 1953, rendering the Convention applicable in its colonies in Africa and elsewhere until their independence.[57]

Although the European Convention had little practical effect in the African colonies through article 63(1) under colonialism,[58] it came to play a significant role in the process of drafting independence constitutions. The European Convention is credited with inspiring the bills of rights of at least twenty-six Commonwealth countries, an influence of unprecedented scale and geographic scope.[59]

The American conception of civil rights has also influenced African human rights constitutionalism.[60] African courts find parallels in U.S. constitutional rights jurisprudence and use these cases as precedent. As one commentator noted, "there is a vigorous overseas trade in the [American] Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law."[61] Although this commentator's article examined human rights jurisprudence in the common law countries of India and the Caribbean, it failed to note the emergence of such jurisprudence from common law African countries. As Part II demonstrates, the overseas trade extends to and continues in the African continent.

C. *Universal or Particular Human Rights in African Courts?*

Analyzing rights jurisprudence in national courts in Africa provides a mechanism for testing the viability of the universal rights discourse in Africa. The colonial influence on the creation of African State structures has been blamed for the failure of constitutionalism in many African States. Similarly, Western conceptions of human rights are contested as culturally illegitimate in the African context. This Section provides an overview of the universalism versus cultural relativism debate[62] in order to better evaluate the relevance of the use of international human rights sources in African adjudication.

The academic and practical concern over the applicability and legitimacy of international human rights norms in Africa raises two questions when examining the domestic application of human rights

57. *See* Heyns, *supra* note 50, at 255.

58. *See id.* at 255–56.

59. *See* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

60. *See* Moderne, *supra* note 47, at 322.

61. Lester, *supra* note 59, at 541.

62. For a general discussion of the universalism/cultural relativism debate see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989); Jack Donnelly, *Cultural Relativism and Human Rights*, 6 HUM. RTS. Q. 400 (1986); Raimundo Pannickar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982).

norms. First, does the human rights jurisprudence in African courts substantiate or debunk the African particularists' claim that the individualistic rights rhetoric of the International Bill of Rights is alien to Africans? Second, have the efforts to Africanize human rights through the creation of an African regional human rights system and the adoption of the African Charter led individual litigants and domestic African courts to rely more upon and give greater credibility to the rights defined in their African articulation?

The experience of the national courts through the cases studied in Part II indicates that thus far, litigants and national courts in Africa have embraced the universalist and internationalist discourse on human rights with fewer cultural hesitations than the staunch proponents of African particularism would predict. This is a striking phenomenon with implications for the future enforcement of human rights in Africa.

The main premise behind the critique of the applicability and legitimacy of international human rights norms in Africa lies in the historical formulation of the current international norms by Western, namely European and North American, cultures. In particular, upholding human dignity through individualized rights is criticized as a distinctive Western conception.[63] Relativists argue that Africans value their group and communal identity more than their individuality,[64] thereby rendering the individualistic human rights rhetoric not only irrelevant to African concerns but also of questionable cultural legitimacy.[65] Although many of the proponents of a culturally specific perspective on human rights in Africa are Africans themselves,[66] not all African critics of the human rights rhetoric reject the universalist premise of human rights norms.[67]

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63. *See* Virginia A. Leary, *The Effect of Western Perspectives on International Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 15, 15–25 (Abdullahi Ahmed An-Na`im & Francis M. Deng eds., 1990).

64. *See* Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987). "[I]n the same way that people in other cultures are brought up to assert their independence from their community, the average African's worldview is one that places the individual within his community." *Id.* at 323. *See generally* Rhoda E. Howard, *Group Versus Individual Identity in the African Debate on Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 63, at 159.

65. *See* Abdullahi Ahmed, *Problems of Universal Cultural Legitimacy for Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES , *supra* note 63, at 331, 332; *see also* Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 343 (1995).

66. For an overview of the prominent African proponents of a particular African perspective on human rights, see Mutua, *supra* note 65, at 352–54. *See also* Rhoda E. Howard, *Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons*, 6 HUM. RTS. Q. 160 (1984).

67. *See, e.g.*, B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984).

Several attempts have been made to reconcile the universalist discourse with a particularist African perspective on human rights. For example, some scholars have located parallels in the underlying principles of human rights norms in particular traditional African societies.[68] These efforts have sought to establish a "historically indigenous human rights tradition"[69] in Africa and have relied upon experiences from precolonial African societies.[70] A critique of this approach points out the tendency in this literature to generalize about Africans as if all Africans of the continent share the same tradition and culture.[71]

Other approaches have started from the premise that although precolonial societies in Africa might have espoused traditions that uphold respect for the notion of human dignity, these practices did not articulate this respect in terms of our modern conception of rights.[72] According to this view, the important question to ask is whether African traditions share values that are consistent with the underlying principles of human rights norms so that they can lead to the promotion and observance of human rights.[73]

Two themes of the peculiarity of concepts of human rights and dignity in Africa emerge from the literature. First is the contention that human rights are communalist rights based on the group-identity of African societies.[74] Second is the view that economic and social concerns in

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68. *See, e.g.*, Francis M. Deng, *A Cultural Approach to Human Rights among the Dinka*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 63, at 261; Kwasi Wiredu, *An Akan Perspective on Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 63, at 243.

69. Timothy Fernyhough, *Human Rights and Pre-colonial Africa*, *in* HUMAN RIGHTS AND GOVERNANCE IN AFRICA, *supra* note 43, at 39, 39.

70. *See* Mutua, *supra* note 65, at 346–54.

71. *See* James Silk, *Traditional Culture and the Prospect for Human Rights in Africa*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 63, at 290, 323; *see also* Heyns, *supra* note 4, at 171 (arguing that the success of the European human rights system is due to the close cultural, historical, geographical, and economic ties between the nations of Europe and that the African system cannot aspire to such success based on the diversity of traditions in Africa).

72. *See* RHODA E. HOWARD, HUMAN RIGHTS IN COMMONWEALTH AFRICA 17 (1986).

73. *See* Silk, *supra* note 71, at 315. Silk suggests:

> The task is to look past these, almost as distractions, for a value that constitutes an underlying, if latent, receptivity to the concept of universal human rights . . . seek some fundamental value or concept in traditional African society that, coexisting with communalism, might constitute the necessary prerequisite for embracing the basic human rights concept embodied in modern international norms.

Id. at 323.

74. *See supra* text accompanying note 64. "The combination of these . . . related concepts—the emphasis on collective or communal or group rights over individual rights and the dependence of individual rights on ascribed status within a group—provides the core of the uniquely African concept of human rights proclaimed by these authors." Silk, *supra* note 71, at 312.

Africa prevail over civil and political rights, or first generation rights that form the core of international human rights instruments.[75] Proponents of these two positions sharply discredit the views of the other.[76]

These themes offer alternative frameworks for understanding the position of human rights in Africa. According to one perspective, the colonial experience in Africa has left the continent struggling to reclaim its voice and particular heritage. According to the other, African traditions espouse a framework for the respect of human dignity that lets the continent aspire to the greater respect for human rights, even if it is through their articulation as international norms. One author mediates between the two camps:

> [W]estern chauvinistic claims that human rights are inventions of Europe and North America are hollow and ignorant; African reactionary claims that human rights are "colonial and imperialist" are also false . . . the overall conclusion I draw is that the demands for human rights and democracy in Africa today are firmly rooted in the concrete experiences of the broad popular masses and are not ephemeral.[77]

A concern for human rights and democracy motivates most who theorize about the applicability and legitimacy of human rights in Africa. Underlying both positions is a shared desire to find the best means for promoting and protecting human dignity in Africa. Similarly, both positions recognize that the rejection of human rights as a purely Western construct or the insistence on the particular African expression of human rights are positions that can be manipulated to justify the disrespect of human rights.[78]

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75. *See* HOWARD, *supra* note 72, at 163; *see also* Rhoda E. Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence From Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1985).

76. *See* Fernyhough, *supra* note 69 (providing a concise and insightful overview of these two schools and how they interact with each other). For harsh critiques of the Howard positions, see Cobbah, *supra* note 64, at 326; Mutua, *supra* note 65, at 354–58. Similarly, Howard devotes considerable attention in her own work in responding to and countering the indigenous Africanist positions. *See* HOWARD, *supra* note 72, at 11–27.

77. SHADRACK GUTTO, HUMAN AND PEOPLES' RIGHTS IN AFRICA: MYTHS, REALITIES AND PROSPECTS 6 (1991). Also in an attempt to reconcile the two positions in view of focusing on how to effectively enforce human rights, An-Na`im has claimed that "despite the inadequate concern with cultural legitimacy in formatting the current international standards of human rights, it is advisable to work with these standards rather than to seek to repudiate and replace them." An-Na`im, *supra* note 65, at 355.

78. *See* Lakshman Marasinghe, *Traditional Conceptions of Human Rights in Africa*, *in* HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 32, 32 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984); *see also* Mutua, *supra* note 65, at 380 ("Part of the reason for the failure of the post-colonial [African] [S]tate to respect human rights lies in the seemingly alien character of that corpus."); Silk, *supra* note 71, at 291 (claiming that an African particularist's

These combined interests, of promoting and ensuring the respect for human rights and creating a culturally legitimate human rights regime in Africa, prompted African States to negotiate, draft, and adopt the African Charter of Human and Peoples' Rights in the context of the OAU.[79] According to the draft documents of the OAU, the authors of the Charter drew upon "African wisdom" to seek out the "aspirations of the African peoples" through a human rights instrument.[80] Additionally, the drafters commented, "We feel gratified . . . about the originality of the text which reflects the concerns expressed by one and all, in that the Charter must reflect an African conception of Human Rights and Duties, in other words the respect the African has for individuals and peoples."[81] Given this particular heritage, the African Charter has been heralded as the most inclusive international human rights instrument.[82]

The African Charter nonetheless embraces universal norms of international human rights instruments. For example, the Charter has "due regard to the . . . Universal Declaration of Human Rights."[83] Further, the drafters of the Charter felt it "prudent not to deviate much from the international norms solemnly adopted in various universal instruments by the different [M]ember [S]tates of the OAU."[84] Consequently, the rights enshrined in articles 3–18 resemble those espoused in the International Bill of Rights.

Despite its commitment to universal norms, the African Charter espouses several distinguishing characteristics. The language of the preamble to the African Charter reflects its unique African heritage and "serves as a guide for the significant themes"[85] that run throughout the Charter and are reflected in the universalism versus particularism debate. In light of its heritage, the Charter "[takes] into consideration the virtues of [the] historical tradition [of African States] and the values of African civilization which should inspire and characterize their reflection on the

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riposte to human rights violations would be that "Africa cannot be held to standards that are culturally inappropriate and that Africans had no part in establishing").

79. *See* Edward Kannyo, *The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background*, *in* HUMAN RIGHTS AND DEVELOPMENT IN AFRICA, *supra* note 78, at 128.

80. OAU Doc. AHG/102/XVII, Nairobi, June 1981, at 22, *quoted in* N.S. REMBE, THE SYSTEM OF HUMAN RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: PROBLEMS AND PROSPECTS 1 (1991).

81. OAU Doc.CM/112/Pt. 1, Nairobi, June 1981, at 31, *quoted in* REMBE, *supra* note 80, at 1.

82. *See* GUTTO, *supra* note 77, at 8.

83. African Charter, *supra* note 1, pmbl., 21 I.L.M. at 59.

84. OAU Doc. CAB/LEG/67/3, rev. 1, at 2, *quoted in* Okere, *supra* note 67, at 152.

85. Richard Gittleman, *The Banjul Charter on Human and Peoples' Rights: A Legal Analysis*, *in* HUMAN RIGHTS AND DEVELOPMENT IN AFRICA, *supra* note 78, at 152, 155.

concept of human and peoples' rights."[86] The title of the instrument includes "peoples' rights" alongside human rights, thereby reflecting the particular concern for the communalist tradition in African society. Although the term "peoples" is never defined in the Charter, it is accepted to evoke the group-based rather than individual notion of African society.[87]

The African communalist ideal is also expressed through the Charter's recognition that "the enjoyment of rights and freedom also implies the performance of duties on the part of everyone." The articulation of individual duties[88] is widely accepted to be the African Charter's greatest innovation in comparison to other international human rights instruments,[89] and a reflection of the alleged consensus in Africa that "the consciousness of rights and correlative duties is ingrained in community members from birth."[90]

Lastly, the preamble of the Charter addresses the African critique of the primary focus of international human rights instruments on civil and political rights.[91] It states that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."[92] It has been argued that the inclusion of duties in the African Charter "is an excellent point of departure in the reconstruction of a new ethos and the restoration of confidence in the continent's cultural identity."[93]

Though praised for its efforts to legitimize human rights in the African context, critics contend that the African Charter's emphasis on tradition creates a loophole for the protection of rights.[94] The example of

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86. African Charter, *supra* note 1, pmbl., 21 I.L.M. at 59.

87. *See* Richard N. Kiwanuka, Note, *The Meaning of "People" in the African Charter for Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 82 (1988).

88. *See* African Charter, *supra* note 1, arts. 27–29, 21 I.L.M. at 63.

89. *See* Mutua, *supra* note 65, at 364. Mutua however sees as precursors to the elaborate articulation of duties in the African Charter, article 29 of the Universal Declaration which states, "everyone has the duties to the community in which alone the free and full development of his personality is possible," and the American Declaration of the Rights and Duties of Man. *See id.* at 364 n.90; *see also* Gittleman, *supra* note 85, at 154.

90. Mutua, *supra* note 65, at 362.

91. *See supra* text accompanying note 75.

92. African Charter, *supra* note 1, pmbl., 21 I.L.M. at 59.

93. Mutua, *supra* note 65, at 380 ("[The rights/duties conception] reintroduces values that Africa needs most at this time: commitment, solidarity, respect, and responsibility.").

94. Some of the staunchest criticism of the Charter focuses on the inclusion of "claw-back" clauses that are appended to particular rights, namely those elaborated in articles 8–14. These articles articulate substantive rights, yet subject them somehow to limitations by an undefined "law." According to one commentator, these clawback clauses "tend to be less pre-

women's rights best illustrates this tension. Views diverge as to the Charter's commitment to upholding the principle of equal treatment and antidiscrimination toward women. The Charter's antidiscrimination principle is contained in article 18(3): "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[95] In itself, this provision can be read as an unambiguous guarantee of the protection of women's rights.

Reading this antidiscrimination provision in conjunction with other Charter provisions, however, gives cause for some misgivings.[96] Article 17(3), for example, states that "the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."[97] Additionally, the Charter's "family provisions," such as articles 18, 27, and 29 place great value on upholding the traditional concept of the African family. The language of these provisions, "seeks to entrench the oppressive family structure, complete with its exploitation and marginalization of women in the public and the so-called private spheres."[98] Given the traditional, subjugated, role of women in certain African societies, the Charter sanctions conflicting mandates without providing any guidance as to which should prevail.

In sum, both the debate over the applicability and legitimacy of human rights norms in Africa and the meshing of universal norms with African specificities in the African Charter leaves us with two questions when examining the rights jurisprudence of domestic African courts. First, is the resistance to the body of Western international human rights norms reflected in any way in these courts' jurisprudence? As will be seen in Part II, the answer to this question is no. The fact that individual litigants are bringing claims to challenge violations of their human rights, often their civil and political rights, shows that at least some Africans are willing to embrace the individualistic articulation of their rights and reclaim them in a court of law.

Second, the African specificity of the African Charter would lead one to believe that litigants would prefer to claim the rights as articulated in the African Charter than in other human rights instruments or comparative bills of rights. As one commentator phrased it, "[d]oes one

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cise than derogation clauses because the restrictions they permit are almost totally discretionary." Gittleman, *supra* note 85, at 158.

95. African Charter, *supra* note 1, art. 18(3), 21 I.L.M. at 62.

96. *See* REMBE, *supra* note 80, at 13.

97. African Charter, *supra* note 1, art. 17(3), 21 I.L.M. at 61.

98. Makau wa Mutua, *The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation*, 5 LEGAL F. 31, 33 (1993).

choose the 'universal' U.N. package or the 'specific' African package?"[99] Without the incorporation of the African Charter in domestic law, individuals cannot claim rights under the Charter directly in national courts.[100] The evidence from Part II suggests that parallels are drawn between rights enshrined in domestic bills of rights more with those of the International Bill of Rights than of the African Charter.

D. *The Role of African Judiciaries in Enforcing Human Rights*

It may seem as if African courts face insurmountable obstacles in developing a domestic human rights jurisprudence. Given the widespread nonincorporation of international human rights law into national legislation, the limitations on the status of international law in domestic courts, and the precarious cultural balance between indigenous African values and universal human rights norms, it is surprising that national courts in Africa have interpreted the fundamental rights enshrined in their postcolonial legal systems in light of international norms. This Section explores the opportunities and importance of judicial activism in the area of human rights in Africa and the role that lawyers and judges play in bringing life to the rights guarantees enshrined in national constitutions.

African judiciaries have been criticized for their complicit role in the undermining of the rule of law in the post-independence experience in Africa. As one African human rights lawyer observes:

> [T]he judiciaries in Common Law African countries must take substantial responsibility for the collapse of constitutional government . . . . the judiciary in many of these countries deliberately and knowingly abdicated its constitutional role to protect human rights and, in many cases, actively connived in the subversion of constitutional rule and constitutional rights by the executive arm of government.[101]

Judiciaries stood by as constitutions were regarded as tantamount to ordinary legislation, to be changed or ignored at the will of the executive.[102] As autocratic rulers established single-party States throughout the continent, judiciaries were either totally co-opted and used as tools of the

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99. Howard, *supra* note 66, at 165.

100. See discussion, *supra*, on the status of international law in national courts in Section I.A.

101. Chidi Anselm Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights*, 8 AFR. SOC. INT'L & COMP. L. PROC. 124, 124 (1996).

102. *See id.* at 130.

executive, or proved incapable of maintaining their independence and force as an institutional check on the governments.[103] The presence of white, expatriate, or English-trained judges on the courts of southern African States was also considered by some to be a vestige of colonialism, diminishing the judiciary's legitimacy as an indigenous postcolonial institution.[104]

Recent trends among more independent- and liberal-minded judges challenge this paradigm, empowering the judiciaries to assume a new responsibility in the promotion and protection of human rights norms enshrined in national constitutions.[105] In a series of meetings sponsored by the Secretariat of the Commonwealth of Nations, judges from a number of common law countries have gathered to discuss the topic of the domestic application of international human rights norms. The first such high level judicial colloquium met in Bangalore, Pakistan in 1988[106] and resulted in the adoption of the Bangalore Principles,[107] a statement of these judges' commitment to infusing international human rights norms in their domestic jurisprudence. The Principles recognize the nascent trend "for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law—whether constitutional, statute or common law—is uncertain or incomplete,"[108] and declare that:

> [i]t is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.[109]

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103. *See* Isaak I. Dore, *Constitutionalism and the Postcolonial State in Africa: A Rawlsian Approach*, 41 ST. LOUIS U. L.J. 1301, 1307 (1997).

104. *See* Odinkalu, *supra* note 101, at 131. Furthermore, Odinkalu notes that certain judiciaries "looked to the wrong sources for guidance" in interpreting their national constitutions, such as the parliamentary system in England and to the jurisprudence of apartheid South Africa. *See id.*

105. *See id.* Odinkalu's forecast remains hesitant as he does not underestimate the legacy of the early, post-independence jurisprudence in the present day. *See id.*

106. *See generally* 1 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat ed., 1988).

107. *See* Bangalore Principles, 1 DEVELOPING HUMAN RIGHTS JURISPRUDENCE, *supra* note 106, at ix. The Bangalore Principles are also reprinted in 14 COMMONWEALTH L. BULL. 1196 (1988).

108. Bangalore Principles, 1 DEVELOPING HUMAN RIGHTS JURISPRUDENCE, *supra* note 107, principle 4, at ix.

109. *Id.* principle 7, at ix.

In sum, the Principles are a statement of understanding among judges recognizing the extent of their power in interpreting laws in their common law systems and the degree to which using this power in the incorporation of international human rights in national jurisprudence will advance human rights at the national level.

Although only one Justice from an African court attended this first colloquium in Bangalore, subsequent colloquia have involved greater participation from and a greater focus on Africa.[110] In particular, the judicial colloquia in Harare, Zimbabwe in 1989,[111] in Banjul, The Gambia in 1990,[112] in Abuja, Nigeria in 1991,[113] at Balliol College at Oxford in the United Kingdom in 1992,[114] and in Bloemfontein, South Africa in 1993[115] were attended by numerous justices from common law African

110. The colloquia with lesser African participation included one held at Balliol College in Oxford, England in 1992 and another in Georgetown, Guyana in 1996. *See generally* 5 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat & Interights eds., 1993); 7 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat & Interights eds., 1998). Although several African justices attended the conference in England, the colloquium in Guyana focused on Caribbean common law jurisprudence and only one justice from Zimbabwe attended.

111. *See generally* 2 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat ed., 1989). This meeting concluded with the Harare Declaration of Human Rights which affirmed the Bangalore Principles and recognized that it is "essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect," as "[t]hey must not be seen as alien to domestic law in national courts." Harare Declaration of Human Rights, principle 3, *reprinted in id.* at 11.

112. *See generally* 3 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat & Interights eds., 1990). This colloquium resulted in the Banjul Affirmation, which affirmed the Bangalore Principles and Harare Declaration on Human Rights. *See* Banjul Affirmation, *reprinted in id.* at 1–4.

113. *See generally* 4 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat & Interights eds., 1992). This meeting culminated in the Abuja Confirmation. In confirming the Bangalore Principles, it made a specific reference to "an impressive body of case law which affords useful guidance to the national courts." Abuja Confirmation, principle 17(iii), *reprinted in id.* at 173–77. The justices present at the conference included the following sources in this body of law: "the judgments and decisions of the European Court and Commission of Human Rights, the judgments and advisory opinions of the Inter-American Court of Human Rights, and decisions and general comments of the United Nations Human Rights Committee." *Id.* Additional reference to comparative constitutional law, particularly among Commonwealth countries, was made. *See id.*

114. *See generally* 5 DEVELOPING HUMAN RIGHTS JURISPRUDENCE, *supra* note 110. The Balliol Statement adopted at this meeting highlighted for the first time the limitations of the role of the judiciary in enforcing human rights and the danger of fundamental human rights and freedoms present in societies as "paper aspirations" only. This Statement proclaimed, "Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection." Balliol Statement, principle 6, *reprinted in id.* at vii–viii.

115. *See generally* 6 DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat & Interights eds., 1995). The Bloemfontein Statement was agreed upon at this

countries, increasing these justices' awareness of the importance and potential of applying international human rights norms in their domestic courts. Furthermore, Part II illustrates that national African courts have cited the Bangalore Principles and other statements from these judicial colloquia as justification for their liberal use of international human rights instruments and comparative jurisprudence in their domestic adjudication.

Following these Principles leads judges to reach outside of their jurisdiction for sources of inspiration and guidance to interpret indeterminately worded constitutional or statutory provisions. Those who believe in the true dualist tradition that separates international law from municipal law, however, view the Bangalore Principles as "heretical."[116]

Nevertheless, it is apparent that the judges who attended these judicial colloquia and signed on to the Bangalore Principles viewed themselves primarily as activists whose goal is the greater protection of human rights norms. "[I]n a democratic society which has a Constitution . . . a Bill of Rights" and which has subscribed to international human rights instruments, "judicial activism on the part of the judiciary is an imperative, both for strengthening participatory democracy and for realisation of basic human rights by large numbers of people in the country."[117]

Justice Enoch Dumbutschena, a former Chief Justice of the Zimbabwean Supreme Court and a frequent participant at these judicial colloquia, also believed in the necessary link between judicial activism and the promotion of human rights:

> In order to advance human rights through the courts there are two essentials to be met. The judge's personal philosophy must have a bias in favour of fairness and justice. There must exist an activist court. Judicial activism in human rights cases is a prerequisite for the development of a human rights jurisprudence.[118]

He also recognized that judicial activism is a radical break from the practices of the post-independence courts,[119] a change that was made in

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meeting, which again confirmed the principles, statements, and declarations of the previous judicial colloquia.

116. M. D. Kirby, *The Impact of International Human Rights Norms—A "Law Undergoing Evolution,"* 22 COMMONWEALTH L. BULL. 1181, 1184 (1996).

117. P. N. Bhagwati, *The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint*, 18 COMMONWEALTH L. BULL. 1262, 1262 (1992).

118. Enoch Dumbutschena, *Role of the Judge in Advancing Human Rights*, 18 COMMONWEALTH L. BULL. 1298, 1301 (1992).

119. Enoch Dumbutschena, *Judicial Activism in the Quest for Justice and Equity*, *in* THE JUDICIARY IN AFRICA 185, 185 (Bola Abijola & Deon van Zyl eds., 1998) ("[T]hose of us

favor of promoting social justice. Justice Dumbutschena's former colleague on the Zimbabwean Supreme Court, Justice Gubbay, shared his view.[120] The decisions emanating from these justices have contributed to the Zimbabwean Supreme Court's reputation as an activist court, despite the limits placed on its independence and effect by the repressive Mugabe regime.

Judicial activism is not without its critics. The most common complaint is that the free license to stray from a national legal text leads to judicial arbitrariness. A particularly harsh critic of the new South African Constitutional Court's extensive use of international and comparative sources called this methodology "rainbow jurisprudence,"[121] claiming that "we have as much chance of finding genuine instruction about substantive reasoning in these wishy-washy pronouncements as we have of touching a rainbow."[122]

Proponents of judicial activism counter such criticism. First, as long as a judge's reasoning is transparent, that judge will be held accountable and will not act arbitrarily.[123] Second, insofar as claims are raised under national constitutions, it is still within the judges' powers to look beyond the text to the values underlying the constitution.[124] Furthermore, judicial activism is tempered by the opportunity, need, inclination, and methodology of common law adjudication.[125] Despite these reasonable arguments, a recent Zimbabwean case that dealt a blow to women's rights[126] supports either the skeptics' position that broad judicial interpretation can provide judges with the leeway to reach any desired result at any end of the rights spectrum or the view that the failure to adopt an activist position can result in the violation of an international human rights norm.[127]

[judges] from Africa tended to want to be technicians of the law. We wanted to be 'British or French judges' in our own environment in Africa.").

120. *See* Anthony R. Gubbay, *The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience*, 19 HUM. RTS. Q. 227, 227 ("[J]udiciaries should make a greater conscious effort towards the protection and active enforcement of fundamental human rights and freedoms, and should always endeavor, where possible, to construe domestic legislation so that it conforms with the developing international jurisprudence of human rights.").

121. *See* Alfred Cockrell, *Rainbow Jurisprudence*, 12 S. AFR. J. HUM. RTS. 1, 11 (1996).

122. *Id.*

123. *See* Bhagwati, *supra* note 117, at 1267.

124. *See id.*

125. *See* M.D. Kirby, *Judicial Activism*, 23 COMMONWEALTH L. BULL. 1224, 1232–34 (1997).

126. See discussion on Magaya v. Magaya, [1999] 3 LRC 35 (1999) (Zimb.) in Section II.C.1, *infra*.

127. *See* Grace Patrick-Tumwine-Mukubwa, *Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa*, *in* CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES 287, 301 (J. Oloka-Onyango ed.,

Not only do judges have an activist role in advancing human rights in Africa, so too do the lawyers in national legal systems. Lawyers determine when to raise claims under constitutional guarantees of fundamental rights and have the ability to draw international and comparative law parallels in their briefs and arguments before the courts. This encourages judges in the national court systems to take these sources into account in their adjudication.[128]

In fact, human rights nongovernmental organizations are developing programs that encourage African civil rights lawyers to use international law and comparative case law in the fundamental rights cases that they argue before their national courts. These programs have emerged as a direct result of African courts' invocation of international law and comparative case law in the cases examined in Part II. Some of the organizations sponsoring such human rights lawyering programs are international organizations with general international mandates that include Africa.[129] Other organizations, however, focus on increasing human rights awareness and lawyering specifically in Africa.[130] The activities of these organizations significantly contribute to the gradual increase in the use of international law and comparative case law in fundamental rights cases in Africa.

The real challenge to national human rights lawyering lies in countries in which a legal infrastructure exists to enforce rights provisions yet a repressive government is in power that would stifle and intimidate efforts to enforce rights against the government before the courts.[131] Despite these obstacles, much power rests with lawyers to ensure that human rights provisions "do not simply become dead letters."[132]

2001) ("A court which is not activist can cause considerable injustice as happened in the Zimbabwe case of *Venia Magaya v. Nakayi Shonhiwa Magaya* . . . .").

128. *See generally* Anthony Lester, *Preparing and Presenting a Human Rights Brief*, 17 COMMONWEALTH L. BULL. 1055 (1991).

129. One such organization is the International Human Rights Law Group, which has published a manual for practitioners on how to engage in human rights lawyering. *See* INTERNATIONAL HUMAN RIGHTS LAW GROUP, PROMOTING JUSTICE: A PRACTICAL GUIDE TO STRATEGIC HUMAN RIGHTS LAWYERING (2001), *available at* http://www.hrlawgroup.org/resources/content/PromotingJustice.pdf (last visited Nov. 24, 2002).

130. One such organization is called Africa Legal Aid. Africa Legal Aid maintains a website that provides an overview of its activities and publications that promote human rights lawyering in national courts in Africa. *See generally* http://www.afla.unimaas.nl/ (last visited Nov. 24, 2002). Another international organization that is particularly active in advocating for increased human rights lawyering in Africa is Interights. *See generally* http://www.interights.org (last updated Oct. 29, 2002). Interight's website provides a database of national jurisprudence on fundamental rights from African countries.

131. *See* Philip Nnaemaka-Agu, *The Role of Lawyers in the Protection and Advancement of Human Rights*, 18 COMMONWEALTH L. BULL. 734, 736, 744 (1992).

132. *Id.* at 736.

II. HUMAN RIGHTS JURISPRUDENCE: A SURVEY OF THE MODES OF APPLICATION OF INTERNATIONAL AND COMPARATIVE SOURCES IN AFRICAN NATIONAL COURTS

Having surveyed theories of national judicial enforcement of human rights in the African context, this Part examines the ways in which several common law African courts have employed international sources in their domestic jurisprudence in cases involving human rights norms. The cases studied here come from the Courts of Appeal, High Courts, and Supreme Courts of Botswana, Namibia, Nigeria, South Africa, Tanzania, Zambia, and Zimbabwe.

This empirical analysis focuses on the methods in which the national courts under consideration reference international sources in reaching decisions under domestic law. The factual contexts of the cases are relevant for the purposes of this examination insofar as they involve instances of violations of a fundamental right guaranteed under domestic law analogous to an international human rights norm. The parallels between fundamental rights guaranteed in national bills of rights and those enshrined in international instruments have led national judges to look to international human rights instruments and foreign jurisprudence to support their analyses of the scope of fundamental rights in their national context.

In these cases, judges relied upon international and comparative sources as an interpretive device in two manners. First, they used international and comparative sources to support their court's adoption of a particular approach to constitutional and statutory interpretation. Some judges reflected on their role in defining the scope of rights embedded in a national constitution, given the novelty of constitutional interpretation as an exercise for them. For the most part, these judges adopted the purposive approach to constitutional and statutory interpretation,[133] playing an activist role in broadening the scope of the indeterminate language that is used to define fundamental rights. The judges did so consciously as part of an effort to follow the emerging consensus or trends in guaranteeing fundamental rights and join the ranks of judges of "civilized nations."[134]

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133. For a definition of what constitutes the purposive approach in these African justices' eyes see the discussion in Section II.A *infra*.

134. Like the term "purposive approach," the Justices of the opinions examined in this section refer loosely to the community of "civilized nations" that they seek to join. Despite their failure to define this notion, the idea of a community of "civilized nations" prevails throughout international law, as is evidenced in article 38(1)(c) of the Statute of the International Court of Justice, which lists "the general principles of law recognized by civilized nations" as one of the sources of international law. ICJ Statute art. 38(1)(c). For the interpretive purposes of the International Court of Justice, the "general principles" referred to in this article guide that international tribunal to borrow and adapt general principles that are re-

Second, these courts used international and comparative sources as an interpretive tool to establish the substantive definition of particular rights. Section B looks at several cases that examined the extent of the notion of freedom from "inhuman or degrading punishment" in the context of corporal punishment for crimes, and the constitutionality of capital punishment and the death row phenomenon.

The national judges do not always embrace the universalist discourse on human rights without reservations. The last Section examines passages from various cases that display an awareness of the tension between the universalist and particularist views of human rights in Africa. It first examines cases involving women's rights, an area in which rights to equality often come into direct conflict with traditional rules of customary law. It then explores language from other opinions that conveys cautionary attitudes toward adopting the universalist discourse.

What emerges from this Part is evidence that several common law African courts have employed the discourse of international human rights law to support their interpretive methodology and substantive decisions within the scope of the authority granted them by their national constitutions. Furthermore, these justices reference international sources, which include the vertical sources of international human rights instruments and horizontal sources of comparative jurisprudence from domestic and international tribunals without any distinction as to whether one type of source carries more sway than the other.

A. *Source of Support for a Broad Policy of Constitutional Interpretation*

A prevalent theme throughout the cases studied in this Section is the explicit reflection of African judiciaries on the nature of their role in constitutional interpretation. These courts have turned to international sources to find support for adopting a special approach to constitutional interpretation. They invoked common law precedent from foreign courts, in particular from Commonwealth countries, which share the same post-independence bill of rights heritage. Courts have also cited the Bangalore Principles, which encourage the domestic application of international human rights norms, as support for their methodology of constitutional interpretation.

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flected in the domestic law of "developed" legal systems. *See* BROWNLIE, *supra* note 16, at 16. "Civilized" can be viewed, then, as synonymous with Western. For the African justices who employ international sources as interpretive guidance in their jurisprudence, appealing to the notion of joining the "civilized nations" is to adopt a progressive narrative toward the end of greater human rights constitutionalism.

One of the earliest decisions studied in this Section, the Botswanan case of *Petrus v. State*[135] portrays the predominant approach of other common law African countries to constitutional decision making. In that case, Justice Aguda acknowledged the need to be transparent in his approach to interpreting the constitution. Noting the British influence on Botswana's legal institutions, he considered how to differentiate constitutional interpretation from statutory interpretation.[136] To support his view that constitutional interpretation should be broader than statutory interpretation, he cited to dicta from turn-of-the-twentieth-century decisions in Australia and the United States. He also quoted a 1981 Nigerian decision that declared:

> The [Constitution]; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn . . . that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore more technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution.[137]

In cases involving fundamental rights enshrined in a constitutional bill of rights, courts have often adopted what is called a purposive approach. The Botswana Supreme Court in 1992 relied upon a Canadian court decision to define the purposive approach: "Constitutional interpretation should be purposive. Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of indi-

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135. [1984] BLR 14 (Bots. Ct. App.).

136. "Given the British system of Government and the British judicial set-up, that was understandable, it being remembered that whatever statutes that might have the look of constitutional enactment in Britain, such statutes are nevertheless mere statutes like any others and can be amended or repealed at the will of Parliament." *Id.* at 34.

137. Rafiu Rabiu v. State, (1981) 2 N.C.L.R. 293, 326 (Nig.), *quoted in Petrus*, [1984] BLR at 34–35. The dissenter in a later Botswanan decision, however, also quoted this same passage only to reject its premise as illegitimate. *See* Dow v. Attorney-Gen., (1992) 103 I.L.R. 128, 200 (Bots. Ct. App.). But a more recent Nigerian decision of the Court of Appeals, Lagos Division, reflects a similar view of the constitution as a dynamic instrument and stresses the role of the court in ensuring that the document thrive:

> The Constitution is an organic document which must be treated as speaking from time to time .... It is for the courts to fill the fundamental rights provisions with contents such as would fulfil their purpose and infuse them with life. A narrow and literal construction of the human rights provisions of our Constitution can only make the constitution arid in the sphere of human rights.

Agbakoba v. Dir., State Sec. Serv. [1998] HUM. RTS. L. REP. AFR. 252, 282 (Nig. 1994).

viduals and minorities against an overbearing collectivity."[138] Justice Aguda read this passage to permit his court to combine a contextual analysis with the purposive guidance of protecting fundamental rights. Courts in Namibia[139] and Tanzania[140] have also adopted the purposive approach to constitutional interpretation in their fundamental rights jurisprudence.

These passages from Commonwealth jurisprudence defining the purposive approach to constitutional interpretation do not provide a satisfactory explanation of the origins of this purposive approach. Given the British origins of the Commonwealth legal systems that employ this approach, it may be that this form of constitutional interpretation derives from the purposive approach to statutory construction in British law.[141] Commonwealth courts in countries with post-independence constitutions have consequently sought to distinguish constitutional interpretation from statutory construction, yet have grafted the purposive approach to statutory construction into their methodologies of constitutional interpretation in order to find the latitude to construe indeterminate constitutional language. This purposive approach to constitutional interpretation finds a parallel in the teleological approach to treaty interpretation in international law.[142]

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138. *Dow*, (1992) 103 I.L.R. at 201–02 (Wilson, J.).

139. *See, e.g.*, Minister of Defence, Namib. v. Mwandinghi, (1991) 91 I.L.R. 341, 350 (Namib.) ("Although [article] 140 is not part of [chapter] 3 of the Constitution, [i.e.,] that part which sets out the Fundamental Human Rights and Freedoms, the article concerns in particular the continuance, *inter alia*, of vested rights of individuals and should therefore be interpreted in the same purposive and liberal manner for the preservation of such rights, as would be the case with [chapter] 3."); Namibia v. Cultura 2000, (1993) 103 I.L.R. 104, 116 (Namib.) ("A constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must be interpreted broadly, liberally and purposively so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulation of the values bonding its people and in disciplining its government.").

140. In *Ephrahim v. Pastory*, the Tanzanian High Court quotes Lord Denning's definition of "the purposive approach of interpretation which is sometimes referred to as the schematic and teleological method of interpretation," indicating its preference for such an interpretation over a literal and grammatical interpretation of a statute. *See* Ephrahim v. Pastory, (1990) 87 I.L.R. 106, 114 (Tanz. High Ct.) (emphasis omitted). The Tanzanian High Court recognized that this purposive approach was being applied by the Court of Appeal and approved of this approach as it guaranteed the reinterpretation of rules under the new "*grundnorm*" that was adopted when the Tanzanian Parliament adopted the Bill of Rights in 1984. *See id.* at 114–15.

141. For an explanation of the nature of purposive construction in the interpretation of statutes by courts in the United Kingdom, see FRANCIS BENNION, STATUTORY INTERPRETATION: A CODE 731–50 (3d ed. 1997). According to this canon of statutory construction, courts "should aim to further every aspect of the legislative purpose [of an Act]. Construction which promotes the remedy Parliament has provided to cure a particular mischief is now known as a purposive construction." *Id.* at 731.

142. Article 31 of the Vienna Convention on the Law of Treaties directs that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the

Justice Aguda, of the Botswana Court of Appeal in *Dow v. Attorney-General*, expressed his broad view of what a court does when adopting the purposive approach to constitutional interpretation. "The construction can only be purposive when it reflects the deeper inspiration and aspiration of the basic concepts which the Constitution must for ever ensure, in our case the fundamental rights and freedoms. . . ."[143] He continued to describe how judges must approach interpreting the "living constitution":

> It cannot be allowed to be a lifeless museum piece; . . . the courts must continue to breathe life into it from time to time as the occasion may arise . . . . I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.[144]

The juxtaposition of these quotations reflects a recurring phenomenon in the fundamental rights opinions, namely the invocation of a variety of international sources without much concern or explanation of the authoritative quality of these sources, used to the end of supporting a mode of broad constitutional interpretation to give effect to a constitutionally guaranteed fundamental right. In the example above, Justice Aguda evoked both the purposive approach to constitutional interpretation and his vision of the constitution as a living document that progresses with time.

The Zimbabwean Supreme Court has also espoused the vision of the constitution as a living instrument that is subject to broad construction. To support this position, that court cited Lord Wilberforce of the Privy Council, the highest appellate court for several states of the Commonwealth Caribbean,[145] in a case that originated in Bermuda:

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terms of the treaty in their context and in the light of its *object and purpose*." Vienna Convention, *supra* note 23, art. 31(1), 1155 U.N.T.S. at 340 (emphasis added). Combined, articles 31 and 32 allow recourse not only to the text of treaties and conventions, but also to "supplementary means of interpretation" in order to ensure that the "object and purpose" of the treaties be enforced. *See id.* arts. 31(1), 32, 1155 U.N.T.S. at 340.

143. *Dow*, (1992) 103 I.L.R. at 173 (Aguda, J., concurring).

144. *Id.* at 173. The metaphor of preventing a Constitution from turning into a "lifeless museum piece" by "breathing life into it" has been used as support by the Zimbabwean Supreme Court in Rattigan v. Chief Immigration Officer, (1994) 103 I.L.R. 225, 228 (Zimb.).

145. The Privy Council is comprised of British judges of the House of Lords and sits in London, yet it continues to serve as the highest appellate court for States of the Commonwealth Caribbean and other former British colonies. *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1867 (2002). Helfer questions

> A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.[146]

This case and Lord Wilberforce's opinion therein have been cited frequently in the collection of cases from African common law countries that interpret the scope of rights under their national bills of rights. Some of the references to this case consist simply of a brief reference to the general principles espoused by Lord Wilberforce.[147] Two cases, however, have quoted a lengthier passage from the Lord Wilberforce opinion in order to highlight the importance of giving life to a bill of rights while engaging in constitutional interpretation:

> Here, however, we are concerned with a Constitution . . . . It can be seen that this instrument has certain special characteristics. (1) It is . . . drafted in a broad and ample style which lays down principles of generality. (2) Chapter I is headed "Protection of Fundamental Rights and Freedoms of the Individual". It is

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whether the Privy Council can be viewed as a domestic court of the Commonwealth Caribbean given its colonial legacy. *See id.* at 1908–09.

146. Minister of Home Affairs, Berm. v. Fisher, *quoted in* Bull v. Minister of Home Affairs, 1986 (1) ZLR 202, 210.

147. *See, e.g.*, Petrus v. State, [1984] BLR 14, 30 (Bots. Ct. App.) (citing Lord Wilberforce in the *Minister of Home Affairs, Bermuda* case for the proposition, "Botswana is a member of a comity of civilised nations and the rights and freedoms of its citizens are entrenched in its Constitution, a constitution which is binding on the legislature."). In *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General*, the Court drew upon Lord Wilberforce's position for support in overruling a Zimbabwean precedent. 1993 (1) ZLR 242, 258 (Zimb.). "[The Zimbabwean Precedent] preceded the adumbration by Lord Wilberforce . . . of the liberal interpretative technique applicable to constitutional provisions relating to the protection of the individual—an approach that has more than once received the commendation of this court." *Id.* The Court made an additional reference to Lord Wilberforce when citing to a minority opinion in a Jamaican death row case. *See id.* at 269–70 ("[I prefer the minority opinion which] applied the liberal interpretation of fundamental rights recommended in *Minister of Home Affairs v. Fisher* . . . and accords with the evolving standards in any civilised country."). Finally, in *State v. Makwanyane*, the South African Constitutional Court also referred to the Lord Wilberforce opinion for support on methodology of constitutional interpretation. 1995 (3) SALR 391 (CC). "[Section 11(2) of the Constitution] must be construed in a way which secures for 'individuals the full measure' of its protection." *Id.* at 403–04.

> known that this chapter, as similar portions of other constitutional instruments drafted in the postcolonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms.... That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of [chapter] 1 itself, call for a generous interpretation, avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to [in the Constitution].[148]

The Namibian and Botswanan courts that quoted this passage remarked how the heritage and nature of their constitutions and bills of rights resemble those of Bermuda as explained by Lord Wilberforce. In doing so, these courts recognized the common universal heritage of their bills of rights while gathering support for their chosen methodology of looking to international sources for guidance in determining the scope of fundamental rights enshrined in their constitutions.

Finally, several court decisions cited specifically to the Bangalore Principles and other declarations that have emerged from the Commonwealth judicial colloquia on the domestic application of international human rights norms.[149] The courts used these principles to support their project of incorporating international sources into their domestic fundamental rights jurisprudence. This was done despite the fact that such declarations are simply expressions of informal agreement on principles and not binding upon the courts or the States.

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148. Minister of Home Affairs, Bermuda v. Fisher, [1980] A.C. 319, 328–29 (P.C. 1979), *quoted in* Minister of Defence, Namib. v. Mwandinghi, (1991) 91 I.L.R. 341, 348 (Namib.), Dow v. Attorney-Gen., (1992) 103 I.L.R. 128, 160 (Bots. Ct. App.) (citation omitted); *see also id.* at 186 (Bizos, J., concurring) ("The Constitution of Botswana was enacted on 30 September 1966 in substantially similar circumstances as those mentioned by Lord Wilberforce...."). Lord Wilberforce's call to avoid "the austerity of tabulated legalism" has been relied upon for support by the Namibian Supreme Court, without reference to this opinion. Namibia v. Cultura 2000, (1993) 103 I.L.R. 104, 116 (Namib.). In doing so, it combines this image with the purposive approach. "[The Constitution] must be interpreted broadly, liberally and purposively so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulation of the values bonding its people and in disciplining its government." *Id.*

149. *See supra* text accompanying notes 106–115.

The way the authors of these opinions referred to the principles displays a respect for the enterprise of developing a human rights jurisprudence and an eagerness to contribute to this task.[150] For example, in *Dow v. Attorney-General*, Justice Aguda quoted passages of statements made by two non-African Commonwealth justices at the Bangalore colloquium that call for the greater domestic use of international norms. He then commented, "I am prepared to accept and embrace the views of these two great judges and hold them as the light to guide my feet through the dark path to the ultimate construction of the provisions of our Constitution now in dispute."[151] Other courts referenced these principles of the judicial colloquia as support for the legitimacy of applying international human rights norms in their domestic jurisprudence.[152] Lastly, a Nigerian High Court decision cited to the Balliol Statement of 1992[153] for support in a case protecting fundamental rights.[154]

This Section has explored the modes in which common law African judges have turned to comparative jurisprudence and general principles of understanding to establish the propriety of the methodologies of broad, purposive constitutional interpretation and the application of international human rights norms in domestic adjudication. The following Section examines how these methodologies have been used to develop a substantive jurisprudence on the scope of certain fundamental rights.

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150. *But see* Longwe v. Intercontinental Hotels, [1993] 4 LRC 221, 233 (Zambia 1992) (comment on the domestic effect of international treaties and conventions). In that opinion, Justice Musumali distinguished treaties such as the African Charter and CEDAW which have been ratified by Zambia without reservations indicating "the willingness by that state to be bound by the provisions of such a document" from the Bangalore Principles. *Id.* It was determined that "it is a misdirection in law to treat [the Bangalore Principles] as standing at par with treaties and conventions entered into and ratified by the executive wing." *Id.*

151. Dow v. Attorney-Gen., (1992) 103 I.L.R. at 176 (Aguda, J., concurring).

152. *See* Mg'omongo v. Kwankwa & Attorney-Gen. (Tanz. 1992) (Mwalusanya, J.), *reprinted in* 5 AFR. J. INT'L & COMP. L. 703, 706 (1993) (citing the Harare Declaration of Human Rights and the Bangalore Principles as support for the assertion that "it is a general principle of law that the interpretation of our provisions in the Constitution have to be made in light of the jurisprudence which has developed on similar provisions in other international and regional statements of the law").

153. *See supra* note 114.

154. *See* Punch Nig. Ltd. v. Attorney-Gen., (1994) 1 HUM. RTS. L. REP. AFR. 489, 508 (Nig.)(Odunowo, J.) (holding that a military decree in a time of a state of emergency did not suspend the application of the African Charter on Human and Peoples' Rights Ratification and Enforcement Act, but rather necessitated heightened judicial scrutiny of any violations of fundamental rights).

B. *Source of Support for Determining the Substantive Scope of Fundamental and Human Rights Norms*

1. Corporal Punishment as "torture, inhuman or degrading punishment or treatment"

This Section focuses on how four courts in southern Africa have ruled on the constitutionality of statutory provisions that provided for the sentencing of corporal punishment for those convicted of crimes. These cases struggled to determine the scope of the right to be free from "inhuman or degrading punishment." Although the exact wording of each constitutional right varied from country to country, all of these courts reached the same conclusion that corporal punishment infringed the fundamental rights of their citizens. In the first case, the court looked beyond the boundaries of its country and continent to find support for its substantive constitutional determination. Subsequent courts relied not only upon similar international sources but also sought support from neighboring African courts, which had similarly sought to define the scope of fundamental rights provisions.

In *Petrus v. State*,[155] the Botswana Court of Appeal was asked to determine the constitutionality of mandatory sentencing of corporal punishment under section 305(1) of the Penal Code as prescribed in section 301(3) of the Criminal Procedure and Evidence Act.[156] Section 7 of the Constitution of Botswana guarantees protection from torture or "inhuman or degrading punishment or treatment."[157] The statute provided for the following punishment: "four strokes each quarter in the first and last years of his imprisonment . . . administered in traditional manner with traditional instrument."[158] The court determined that this punishment constitutes the "repeated and delayed infliction of strokes."[159]

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155. [1984] BLR 14 (Bots. Ct. App.).

156. *See id.* at 18–19.

157. BOTS. CONST. ch. II, § 7(1), *quoted in Petrus*, [1984] BLR at 18. Section 7 falls under chapter II of the Botswana Constitution that is entitled "Protection of Fundamental Rights and Freedoms of the Individual." The text of section 7 reads:

> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the former Protectorate of Bechuanaland immediately before the coming into operation of this Constitution.

BOTS. CONST. Ch. II, § 7.

158. *Petrus*, [1984] BLR at 25.

159. *Id.* at 29.

In the court's opinion, President Maisels referred to a dictionary definition of the word "inhuman" as "brutal, barbarous, cruel."[160] From there, President Maisels, consciously exercised a "value judgment,"[161] and held that the repeated and delayed punishment under the Criminal Procedure Evidence Act met the standards of this definition of inhuman.[162] By nature, it constituted degrading punishment.[163]

In reaching this decision President Maisels referenced international sources that were raised by counsel before the court.[164] These sources include U.S. case law, a decision of the European Court of Human Rights,[165] a German court decision, the text of the European Convention, a dissenting judgment from a Jamaican case, and articles by Nigerian and South African academics.[166] The opinion simply mentioned these sources without providing a description or a comparison of the type of corporal punishment at issue in those cases or the substantive rights considered by the national courts or international tribunals. It also did not explore the reasoning the foreign courts or academics followed. Nonetheless, President Maisels informed us in his opinion that the repeated and delayed infliction of strokes at issue in this case "would be regarded in the [foreign] countries where the [other] judgments were given and the articles written, as inhuman or degrading."[167]

In a concurring opinion in *Petrus*, Justice Aguda struggled more with the actual language of the fundamental right enshrined in section 7(1). In doing so, he established that the text of section 7(1) prohibits a range of actions: the infliction of torture, inhuman punishment, degrading punishment, inhuman treatment, and degrading treatment on any person.[168] He then revealed that he was persuaded by the argument proffered by counsel that "inhuman and degrading punishment" under the Botswana Constitution contains the same notions as the concept of "cruel and

160. *Id.*
161. *Id.*
162. *See id.*
163. *See id.* at 30.
164. *See id.* at 28–29.
165. The decision cited to is *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978) which is discussed in greater depth by other courts ruling on the constitutionality of corporal punishment. *See infra* text accompanying notes 181–183.
166. *See Petrus*, [1984] BLR at 29. President Maisels introduces these paragraphs canvassing international sources by claiming, "I turn now to deal with the reasons for the court's finding that corporal punishment as prescribed in [§] 301(3) . . . is *ultra vires* and consequently null and void as being in conflict with section 7 of the Constitution of Botswana." *Id.* at 28.
167. *Id.* at 29.
168. *See id.* at 40.

unusual punishment" under the U.S. Constitution[169] and explored how the U.S. Supreme Court has defined "cruel" in its jurisprudence as an informative parallel to the concepts of "inhuman" and "degrading" in the Botswanan provisions.[170]

In neighboring Zimbabwe, the Supreme Court addressed a similar question on the constitutionality of corporal punishment sentencing provisions in *State v. Ncube*.[171] Justice Gubbay began his opinion with a survey of Zimbabwean law, which contained six statutes that authorize the sentence of whipping as a punishment for various crimes.[172] The constitutional provision under consideration by the Court contained precisely the same wording as the provision of the Constitution of Botswana considered in *Petrus v. State*.[173] After his exposition of the state of the law on corporal punishment in Zimbabwe, Justice Gubbay proceeded to establish the legal status of corporal punishment in various countries, canvassing South Africa,[174] the United Kingdom, Canada, Australia,[175] and the United States of America.[176] In this comparative survey, Justice Gubbay sought to establish whether there exists a universal standard on such corporal punishment. He concluded that "[m]odern conceptions of justice and humanity have led most European and Scandinavian countries totally to deny the utility of corporal punishment. And, I believe, the same is true of Argentina, Mexico, India, Ghana, Jamaica, and Belize."[177]

In construing the language of section 15(1) of the Zimbabwean Constitution, Justice Gubbay found that this provision encompasses the range of five types of prohibitions that Justice Aguda found under the identical provision in Botswana in *Petrus*[178] and cites to that case for

169. U.S. CONST. amend. VIII ("excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

170. *See Petrus*, [1984] BLR at 40.

171. State v. Ncube, 1987 (2) ZLR 246 (S.Ct.).

172. *See id.* at 251–52. Many of these statutes limit the number of strokes of a whipping. *See id.* The Prison Act even mandates that whipping must be carried out under medical supervision. *See id.* at 262. These facts are relevant because the court in *Petrus* was careful to limit its decision to the type of repeated and delayed punishment at issue in the case.

173. *Compare* ZIMB. CONST. ch. III, § 15(1) ("No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.") *with* BOTS. CONST. ch. II, § 7(1), *supra* note 157. *See* ZIMB. CONST. ch. III (containing the constitution's Declaration of Rights).

174. Justice Gubbay determined that the punishment of whipping was at the time legal in South Africa, yet cited to a number of South African cases that described corporal punishment as brutal and degrading. *See Ncube*, 1987 (2) ZLR at 253–57.

175. Canada, the United Kingdom, and Australia (with one exception, the state of Western Australia) had passed legislation outlawing corporal punishment. *See id.* at 257–61.

176. Whipping remained legal in certain states of the United States, although it was outlawed as a punishment imposed by federal courts for federal offences. *See id.* at 261.

177. *Id.* at 261–62.

178. *See supra* text accompanying note 168.

support.[179] Additionally, like the Court in *Petrus*, Justice Gubbay found the "inhuman and degrading" constitutional provision similar enough to the "cruel and unusual punishment" provision of the U.S. Constitution to draw upon U.S. case law to explore the scope of the definition of "inhuman and degrading punishment."[180]

Further, Justice Gubbay recognized that the decision in this case ultimately depended on a value judgment of the nature of punishment with regard to the underlying fundamental right. In determining his own opinion on this matter, he was swayed by the emerging consensus of the unconstitutionality of whipping. Here, he relied heavily upon "perhaps . . . the most important . . . decision . . . of the European Court of Human Rights in *Tyrer v. United Kingdom* . . . [which] was concerned directly with article 3 of the European Convention of Human Rights—a Provision worded virtually identically to [section] 15(1) of the Constitution of Zimbabwe."[181] All five cases covering corporal punishment in this subsection cited to the European Court's *Tyrer*[182] opinion as authoritative precedent for their national decisions. This proves the importance of the link between the European Convention, post-independence African bills of rights, the decisions of the European Court of Human Rights, and the emerging human rights jurisprudence of national courts in Africa.[183]

In holding that corporal punishment is unconstitutional, Justice Gubbay revealed that he was most persuaded by his view of the inhuman and degrading character of corporal punishment.[184] He explained that he was also influenced by:

> (i) the current trend of thinking amongst those distinguished jurists and leading academics to whom reference has been made;
>
> (ii) the abolition of whipping in very many countries of the world as being repugnant to the consciences of civilised men;
>
> (iii) the progressive move of the courts in countries in which whipping is not susceptible to constitutional attack, to restrict

179. *See id.* at 264 ("Certainly that was the construction applied to the identical protection by both the European Court of Human Rights in *Tyrer v. United Kingdom* . . . and in *[State] v. Petrus* . . . and I am in respectful agreement with it . . . ." (citations omitted)).

180. *Id.* at 266.

181. *Id.* at 269–70.

182. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 4 (1978).

183. *See generally* Heyns, *supra* note 50; Lovemore Madhuku, *The Impact of the European Court of Human Rights in Africa: The Zimbabwean Experience*, 8 AFR. J. INT'L & COMP. L. 932 (1996).

184. *Ncube*, 1987 (2) ZLR at 274.

its imposition to instances where a serious, cruel, brutal and humiliating crime has been perpetrated; and

(iv) the decreasing recourse to the penalty of whipping in this country . . . .[185]

This quotation serves as a guide to the underlying types of authority that can be gleaned from the international sources surveyed by these African courts: the intellectual consensus of judicial and legal elites, the global trend to prohibit corporal punishment, the progressive judicial activism of courts to limit the reach of legislation, and the local trend toward this practice. The method of Justice Gubbay in *Ncube* typifies the approach of most of these courts: after surveying this wide range of sources, the ultimate basis of the judgment remains unknown.

The Zimbabwean Supreme Court faced the question of the constitutionality of criminal statutes that impose whipping or corporal punishment on juveniles in light of section 15(1) of the Constitution of Zimbabwe two years after the *Ncube* decision. In *State v. A Juvenile*,[186] Chief Justice Dumbutschena wrote for the Court and relied heavily on his own Court's reasoning in *Ncube*. His task in *A Juvenile* was to determine whether corporal punishment is any less inhuman or degrading if applied to juveniles rather than adults.[187] The opinion revisited the European Court's decision in *Tyrer v. United Kingdom* to further explore supportive language from that Court that establishes that corporal punishment, by nature, offends the dignity of a person.[188] Chief Justice Dumbutschena then examined the dissenting opinion in another European Court case, *Campbell v. United Kingdom*,[189] which expressed the view that the nature of corporal punishment is degrading within the meaning of article 3 of the European Convention. Although the facts and context of *Campbell* differed from those of *A Juvenile*, Chief Justice Dumbutschena still voiced his agreement with the dissenter in that case in support of his determination under the Zimbabwean Constitution.[190]

Two aspects of separate opinions in this case are worth noting. First, Justice Gubbay's concurrence revisited the international sources sur-

185. *Id.* at 273–74.
186. State v. A Juvenile, 1989 (2) ZLR 61 (S.Ct.).
187. *See id.* at 72.
188. *See id.* at 73.
189. 48 Eur. Ct. H.R. (ser. A) (1982).
190. *See A Juvenile*, 1989 (2) ZLR at 80–81. As Chief Justice Dumbutschena describes, *Campbell & Cosans* decided that corporal punishment meted out as punishment by a government school must conform to the normal standards set by the Court for article 3 of the European Convention. *See id.* Other international sources referred to in this opinion include a dissenting opinion of Justice White in the U.S. case of *Ingraham v. Wright* as well as the opinion of the European Commission of Human Rights in *Warwick v. United Kingdom*. *See id.*

veyed in his *Ncube* opinion. In recognizing, however, that "there is no explicit reference in international human rights instruments to corporal punishment as a judicial sanction," he nonetheless believed that an "inroad has been made by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice."[191] This citation is worth noting for the persuasive weight placed on this nonbinding international statement of understanding in a national court. Second, in dissenting from the opinion of the Court, Justice McNally placed equal importance on international sources to support his position. He claimed that since the European Court in *Tyrer* did not pronounce that corporal punishment is per se degrading, there is room to find the corporal punishment under question not a violation of the constitutional norm.[192] He associated himself with the dissenting opinion in that case.[193]

Petrus, *Ncube*, and *A Juvenile* established a body of southern African precedent on the constitutionality of corporal punishment that was relied upon by other courts in neighboring countries. The Namibian Supreme Court addressed this issue in a 1991 decision, *Ex parte Attorney-General, Namibia*.[194] In the earlier cases, individual plaintiffs challenged their sentences of corporal punishment. In *Ex parte Attorney-General, Namibia*, the issue presented itself to the Court by way of a petition from the Attorney General. The constitutional provision under consideration, chapter 3, article 8, contains the exact language of those provisions in the constitutions of Zimbabwe and Botswana[195] and the scope of the case covered corporal punishment sanctioned by the judiciary, administrative,

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191. *See id.*, at 91 (citing to rule 17:3, which states that "[j]uveniles should not be subjected to corporal punishment.").

192. *See id.* at 93.

193. *See id.* at 96.

194. *Ex parte* Attorney-Gen., Namib. (*In re* Corporal Punishment by Organs of the State), (1992) 103 I.L.R. 81 (Namib.).

195. *See* NAMIB. CONST. ch. 3, art. 8. The article reads:

> Article 8 Respect for Human Dignity
>
> (1) The dignity of all persons shall be inviolable.
>
> (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
>
> (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Furthermore, although article 24 of chapter 3 governs acceptable derogations in terms of public emergency, national defense, and martial law, article 24(3) lists the articles of the Constitution, including article 8, that are non-derogable. *See* NAMIB. CONST. ch. 3, sec. 24(3). In discussing the scope of article 8, Justice Mahomed makes a point to establish that the government can never derogate from the rights accorded under this article. *See Ex parte* Attorney-Gen., Namib., (1992) 103 I.L.R. at 93.

and quasi-administrative organs, and by government schools through a series of statutes.[196]

Justice Mahomed, writing for the Court, relied heavily upon *Ncube* for several propositions[197] and was aware of the international precedent in the area of corporal punishment under similar constitutional provisions. He wrote, "The provisions of [article] 8(2) of the Constitution are not peculiar to Namibia; they articulate a temper throughout the civilised world which has manifested itself consciously since the 1939–45 war."[198] After listing a series of international conventions and other national constitutions,[199] he continued:

> [i]n the interpretation of such articles there is strong support for the view that the imposition of corporal punishment on adults by organs of the [S]tate is indeed degrading or inhuman and inconsistent with civilised values . . . .
>
> . . . .
>
> In the result there is beginning to emerge an accelerating consensus against corporal punishment for adults throughout the civilised world.[200]

This consensus led Justice Mahomed to conclude that corporal punishment for adults in Namibia is unconstitutional, thereby raising his country's law and policies to conform to the norms of the "civilized" world. As the statutes under consideration provided for such punishment to juveniles as well, Justice Mahomed then turned to *A Juvenile*. In highlighting the international sources discussed in *A Juvenile*,[201] Justice Mahomed found sufficient support to conclude that juvenile corporal punishment also violates article 8(1) of the Namibian Constitution.

The most recent court opinion examined in this Section is the South African Constitutional Court's decision of *State v. Williams*,[202] which addressed the constitutionality of a provision of the Criminal Act that provided for corporal punishment for juveniles. As in the previous cases, the constitutional provision under consideration here involves the scope

196. *See Ex parte* Attorney-Gen., Namib., (1992) 103 I.L.R. at 84–92.

197. For example, Justice Mahomed cites to *Ncube* for a definition of "to degrade" and for the proposition that determining what can be classified as "inhuman and degrading" necessitates a value judgment by the Court. *See id.* at 93.

198. *Id.* at 94.

199. *See id.* Specifically, Justice Malomed refers to article 3 of the European Convention, article 1(1) of the German Constitution, article 7 of the Constitution of Botswana, and article 15(1) of the Zimbabwean Constitution. *Id.*

200. *Id.*

201. *See id.* at 101.

202. 1995 (3) SALR 632 (CC).

of the right to be free from "inhuman or degrading treatment or punishment."[203] This case primarily relied on the southern African cases already discussed in this Section and examined additional international sources.

Of all of the international sources considered, in Justice Langa's opinion, "the decisions of the Supreme Courts of Namibia and Zimbabwe are of special significance. Not only are these countries geographic neighbors, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition."[204] This statement is particularly remarkable for its implications. It recognizes and gives primacy to the authority of the more localized human rights jurisprudence emerging in the region. In doing so, given the foundations of the regional jurisprudence in references to international human rights instruments and global comparative jurisprudence, the South African Court's comment reflects the increasing universalization of this particular human rights norm. In keeping with this policy, Justice Langa relied upon the decisions of *Ncube*, *A Juvenile*, and *Ex parte Attorney-General, Namibia*, as well as *Petrus*, for support. He did so to establish the scope of the language of section 11(2) of the South African Constitution,[205] to describe the inhuman and degrading nature of corporal punishment,[206] and to provide factual support on the status of the legality of corporal punishment around the world.[207]

Following the South African constitutional directive to use international law as an interpretive device, Justice Langa cited liberally to international human rights treaties, comparative national constitutional provisions,[208] and various court decisions adjudicating these provisions. He concluded that "[t]here is unmistakably a growing *consensus* in the

203. S. AFR. CONST. ch. 3, § 11(2) ("No person shall be subjected to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.").

204. *Williams*, 1995 (3) SALR at 642.

205. *See id.* at 639.

206. *See id.* at 645.

207. *See id.* at 644 (drawing from *Ncube*'s survey of the legality of corporal punishment); *see also supra* text accompanying notes 175–177.

208. In Justice Langa's words:

> Whether one speaks of "cruel and unusual punishment", as in the Eighth Amendment of the United States Constitution and in [article] 12 of the Canadian Charter, or "inhuman or degrading punishment", as in the European Convention and the Constitution of Zimbabwe, or "cruel, inhuman or degrading punishment", as in the Universal Declaration of Human Rights, the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgment of society's concept of decency and human dignity.

Id. at 643.

international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity."[209]

2. Capital Punishment, the Death Row Phenomenon, and "cruel, inhuman or degrading punishment"

The phenomenon of using international sources as support for determining the scope of a fundamental right also occurs in cases that challenge the constitutionality of capital punishment and the death row phenomenon. An examination of three cases concerning these issues provides further proof of how referencing regional African and international sources has led to progressive decision making.

The first groundbreaking decision under discussion in this field came from the author of the *Ncube* decision, Chief Justice Gubbay of the Zimbabwean Supreme Court.[210] In *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General*,[211] Chief Justice Gubbay faced the question of whether proceeding with the sentence of execution by hanging for murder convictions violates the "inhuman and degrading punishment" provision of section 15(1) of the Zimbabwean Constitution.[212] The four men received their sentences for capital punishment in 1988 and languished in prison after their appeals had failed. The Ministry of Justice announced their execution suddenly in March 1993.[213]

Essentially, the question before the Court was whether the mental anguish suffered by these prisoners in anticipation of their pending sentences was so severe that proceeding with the sentence of capital punishment would constitute a violation of their fundamental right to be free from inhuman and degrading punishment. As the constitutional provision under consideration was the same one the Court examined in *Ncube* and *A Juvenile*, the Chief Justice cited these Zimbabwean precedents for preliminary guidance as to the scope of the language of this provision.[214] The opinion, however, focused on establishing factual proof of the consequences of the death row phenomenon and surveyed comparative law on the status of the legality of lengthy delays in proceeding

209. *Id.* at 644.

210. Justice Gubbay became the acting Chief Justice of the Zimbabwean Supreme Court in 1991. *See* 2 HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 10, at 315. He was forced to resign as Chief Justice and leave the Court in March 2001 under pressure by President Robert Mugabe. *See* John Jeter, *The 'Endgame' in Zimbabwe? Top Judge's Retirement New Blow to Democracy*, WASH. POST, Mar. 3, 2001, at A1.

211. 1993 (1) ZLR 242 (S.Ct.).

212. *See id.* at 245; *see also* ZIMB. CONST. ch. III, §15(1).

213. *See Catholic Commission*, 1993 (1) ZLR at 244–45.

214. *See id.* at 251.

with executions. Before engaging in this analysis, the Chief Justice first cited to international sources for help in deciding a procedural matter. He referred to two decisions from India and Jamaica to support placing the burden of proof in this case, one in which a fundamental right is asserted, on the party raising the violation of a fundamental right.[215]

The methodology and structure of the *Catholic Commission* opinion follows closely that of its author in *Ncube*. Chief Justice Gubbay first established the widespread recognition of the death row phenomenon by courts of international jurisdictions and by academics, to establish the factual record of the suffering involved in delayed death sentences.[216] The Chief Justice continued with a survey of judicial attitudes toward the constitutionality of executions given a long delay, canvassing precedent in Zimbabwe, India, the United States, and the West Indies.[217] He then engaged in a substantial examination of the European Court's decision in *Soering v. United Kingdom* that blocked the extradition from the United Kingdom of a suspect wanted for trial to the United States. That opinion held that the suffering that the suspect would experience on death row breached the right granted under article 3 of the European Convention.[218] Lastly, he referred to decisions of the United Nations Human Rights Committee considering the Committee's attitude toward the death row phenomenon given States' obligations under article 7 of the ICCPR.[219]

This survey of international sources shows how these opinions do not lend greater deference to treaties or international instruments that are binding on their countries as would be presumed given their status under international law.[220] In this case, for example, the ICCPR and the U.N. Human Rights Committee decisions should have greater force on Zimbabwe. Yet the Court's opinion treated these sources on a par with those of the European Court of Human Rights or other courts of comparative jurisprudence. This indicates that the Court viewed its role primarily as one of elevating its national human rights jurisprudence to the international or civilized standard rather than acting as a locus of judicial review of Zimbabwe's compliance with its obligations under international law.

Strikingly, the survey of international sources by the Court revealed the indeterminate nature of judicial precedent and the lack of consensus

215. *See id.* at 252.

216. In making this point, reference is made to short excerpts of factual findings by the U.S. Supreme Court, a state district court in Massachusetts, and the Supreme Courts of India and Jamaica. *See id.* at 253–56.

217. *See id.* at 256–70.

218. *See id.* at 270–73.

219. *See id.* at 274–75.

220. *See supra* discussion in Section I.A.

on this subject that would likely support a finding of unconstitutionality in the case before the Zimbabwean Court.[221] Nonetheless, Chief Justice Gubbay embraced whatever support he could find to bolster his eventual holding that struck down the pending execution of the prisoners as unconstitutional. This resulted in his reliance on the majority opinions in several Indian cases,[222] the dissenting opinions in a Jamaican case,[223] a Canadian case,[224] and the dissenter in the U.N. Human Rights Committee decision.[225] He even surveyed the opinions of different courts in the United States that have explored the death row phenomenon, including state court decisions from California, Georgia, and Massachusetts, and federal district court and appellate decisions, regardless of their eventual position on this issue.[226] Reaching a landmark conclusion, Chief Justice Gubbay set aside the execution sentences and substituted them with a sentence of life imprisonment.[227]

The one Nigerian case that addressed the issue of the constitutionality of a delayed death sentence involved procedural rather than substantive issues.[228] In *Ogugu v. State*,[229] five prisoners challenged their death sentences directly in the Nigerian Supreme Court. The prisoners, convicted in 1986, challenged their sentences as unconstitutional under the inhuman and degrading treatment provision, section 31(1)(a) of the Nigerian Constitution.[230] The legality of the sentence was also called into question under article 5 of the African Charter.[231] As this case was the first court proceeding at which the appellants raised the constitutional

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221. The Chief Justice found that the U.S. Supreme Court has not ruled on this issue, and other state court opinions shun staying executions as a result of the causation for delay lying with the petitioner's choice to prolong relitigating her case through the legal system as a stalling mechanism, a view that was found to be shared by the Privy Council of the West Indies. *See Catholic Commission*, 1993 (1) ZLR at 274–75.

222. *See id.* at 259–61.

223. *See id.* at 269–70 ("In my respectful view the minority opinion is to be preferred to that of the majority. It applied the liberal interpretation of fundamental rights . . . and accords with the evolving standards in any civilised country.").

224. *See id.* at 274.

225. *See id.* at 275 ("It is this latter approach that I find the more compelling.").

226. *See id.* at 261–66.

227. *See id.* at 284.

228. This is a result of the unique legal framework for human rights in Nigeria given that country's constitutional fundamental rights provisions alongside the legislative implementation of the African Charter. *See* UMOZURIKE, *supra* note 16.

229. [1998] 1 HUM. RTS. L. REP. AFR. 167 (Nig. 1994).

230. *See id.* at 181. The full text of the constitutional provision is never cited in the opinion in *Ogugu*.

231. *See* African Charter, *supra* note 1, art. 5, 21 I.L.M. at 60 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, *cruel, inhuman or degrading punishment and treatment* shall be prohibited.") (emphasis added).

question, the Nigerian Supreme Court first addressed the issue of whether it had jurisdiction to hear this issue. According to section 42(1) of the Nigerian Constitution, "[a]ny person who alleges that any of the provisions of [Chapter IV on Fundamental Rights] has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress."[232]

The Court held that Nigerian procedural rules denied that Court original jurisdiction of the case and dismissed the case without addressing the constitutional questions on their merits. Nevertheless, the appellants, respondents, and the Attorneys General of many Nigerian states who were asked to submit *amici curiae* to the Court made reference to *Catholic Commission* and many of the international sources cited within that decision.[233] The Court never reached the issues on the merits, but it still used international sources for procedural guidance.

The initial procedural question addressed involved the lack of a mechanism to enforce the African Charter and the African Charter Ratification and Enforcement Act. Counsel for one appellant presented two arguments. First, he claimed that the right violated in this case constitutes a fundamental right that is "*intrinsic* to the proceedings of every case and could therefore properly form the basis of *appeals* from those proceedings."[234] Second, he claimed that the Court should assume jurisdiction since the right under article 5 of the African Charter is independent of the fundamental rights in the Constitution. As the African Charter Ratification and Enforcement Act lacks a domestic enforcement process, he urged the Court that the "lacunae in penal and fundamental rights provision were usually interpreted to save jurisdiction."[235]

Justice Bello, writing for the Court, remained unpersuaded by both of counsel's contentions. He concluded that the Nigerian Constitution recognizes two categories of rights. One category comprises rights that must be observed, because they are "*intrinsic* to the *occasion*."[236] These include procedural rights such as the right to a fair trial. If a right in this first category is violated, the issue of its violation can be raised in the Supreme Court on appeal. The other category of substantive rights consists of those that are enforceable in the High Courts as provided in

232. NIG. CONST. ch. IV, § 42(1) (1979), *reprinted in Ogugu*, [1998] 1 HUM. RTS. L. REP. AFR. at 169.

233. A list of the *amici curiae* submissions are listed before the text of the opinion. *See Ogugu*, [1998] 1 HUM. RTS. L. REP. AFR. at 179–80. The arguments of the various parties are summarized at the beginning of Justice Bello's opinion. Some submissions relied on the international sources to argue for a substantive decision on the merits, while others used them simply to raise procedural issues. *See id.* at 182–87.

234. *See id.* at 186.

235. *See id.* at 187.

236. *Id.* at 189.

section 42 of the Nigerian Constitution. Having established these categories, Justice Bello inquired into which of these categories the rights under article 5 of the African Charter belong.

It is in this inquiry that Justice Bello surveyed comparative law. "I think it is germane to the issue to examine the cases on subjection to inhumanity decided by the courts of the common law countries cited by learned counsel and to see the process for their adjudication."[237] He specifically examined *Catholic Commission*, and some of the West Indian, Indian, and Californian and Massachusetts state court decisions[238] that were examined for their substantive determinations in *Catholic Commission*. His survey showed that "in those common law countries the issue similar to the constitutional question in our present appeal was taken in a court vested with original jurisdiction to adjudicate on the matter after the convict, where he had exercised his rights of appeal against conviction, had exhausted the rights."[239] As section 42(2) of the Nigerian Constitution places original jurisdiction over fundamental rights cases in the High Courts of Nigeria, the Supreme Court held that it lacked jurisdiction to address the rights raised in *Ogugu* in the first instance.

The landmark South African decision of *State v. Makwanyane*,[240] well known for its liberal use of international and comparative sources, addressed the constitutionality of the death penalty. The challenge to the death penalty primarily arose under section 11(2), the "cruel, inhuman or degrading punishment or treatment" provision[241] of the South African Constitution, yet was also examined in light of sections 8,[242] 9,[243] and 10.[244] The discussion here only highlights the commonalities of *Makwanyane*'s use of international sources with the other cases discussed in this Section.[245]

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237. *Id.* at 190.

238. *See id.* at 190–92.

239. *Id.* at 192.

240. 1995 (3) SALR 391 (CC).

241. *See* S. AFR. CONST. (Interim Constitution) ch. 3, § 11(2) (1993) ("No person shall be subjected to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.").

242. *See id.* ch 3, § 8(1) (1993) ("Every person shall have the right to equality before the law and to equal protection of the law.").

243. *See id.* ch. 3, § 9 (1993) ("Every person shall have the right to life.").

244. *See id.* ch. 3, § 10 (1993) ("Every person shall have the right to respect for and protection of his or her dignity."); *Makwanyane*, 1995 (3) SALR at 403–05.

245. The use of international sources for interpretive support in *Makwanyane* figures prominently across President Chaskalson's opinion and the ten concurrences. This case has been explored in depth by numerous authors. *See, e.g.*, Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251 (1998); Peter Norbert Bouckaert, *Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa*, 32 STAN. J. INT'L L. 287 (1996); Jeremy Sarkin, *Problems and Challenges Facing South Africa's Constitutional Court: An Evaluation*

First, in a subsection entitled "International and foreign comparative law," President Chaskalson examined capital punishment in the United States and India and canvassed opinions of the U.N. Human Rights Committee and the European Court of Human Rights that focus on the treatment of the rights to dignity, life, and freedom from cruel, inhuman and degrading punishment.[246] This survey was intended to contextualize the South African decision with international attitudes and to offer comparative views on the scope of rights in national views and international forums. At the start of the survey, President Chaskalson warned, "We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."[247] In concluding that a sentence of capital punishment was unconstitutional under the South African Constitution, he anchored his opinion in his view that "the rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [chapter] 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."[248]

Second, the *Makwanyane* opinion relied upon the African case law discussed in this Section. It found these cases to be of equal persuasive authority as the other international sources surveyed in the opinion. *Catholic Commission* is the most prominent case that is mentioned throughout various opinions in this decision, for its description of the death row phenomenon,[249] its definition of the meaning of the Zimbabwean constitutional provision on the right to be free from inhuman and degrading punishment or treatment,[250] Chief Justice Gubbay's transparent exercise of a value judgment in deciding the case,[251] and a strong statement from dicta describing the importance of safeguarding the fundamental rights of prisoners.[252] Concurring judgments in *Makwanyane* make additional references to *Ex parte Attorney-General, Namibia* and *Ncube*.

These cases reveal the general techniques that numerous African courts have used to invoke international sources as interpretive devices and authoritative precedent for determining the scope of fundamental rights enshrined in constitutional bills of rights. African judges invoke provisions of international treaties, even if they have not been

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of Its Decisions on Capital and Corporal Punishment, 113 S. AFR. L.J. 71 (1996); Carol S. Steiker, *Pretoria, Not Peoria:* S v. Makwanyane and Another, 74 TEX. L. REV. 1285 (1996).

246. *See Makwanyane*, 1995 (3) SALR at 412–35.

247. *See id.* at 415.

248. *Id.*

249. *See id.* at 402, 471, 485, 509.

250. *See id.* at 462, 464, 485.

251. *See id.* at 499 (Mokgoro, J., concurring).

252. *See id.* at 507 (O'Regan, J., concurring).

incorporated into the municipal legal order. Yet these judges do not give any interpretive primacy to these treaties over nonbinding instruments or other informal statements of principles.

Furthermore, given the choice of relying upon universalized human rights norms as enshrined in their Western expression in U.N. treaties and the European Convention or their particularized expression in the African Charter, the African Courts have relied more on the universal international treaties than their regional alternative. This could be a consequence of two factors. First, given these judges' evident interest in establishing national human rights norms that are equivalent to the international or civilized standards, relying too heavily on the African Charter and less on the international treaties would contribute less explicitly to that goal. Second, the African Charter has rarely been the subject of national or international scrutiny and interpretation. Consequently, opinions from the European Court and the U.N. Human Rights Committee provide national courts with an established body of jurisprudential precedent to rely upon.

C. *Tensions Between International Norms, Judicial License, and African Traditions*

Although the evidence from the cases analyzed in this Part indicates that judges actively employed international sources as support for adopting a liberal approach to constitutional interpretation and to determine the scope of fundamental rights enshrined in national constitutions, these judges did so not without ignorance of the consequences of their technique. Despite the impression that these opinions wholeheartedly embraced the enterprise of relying on international sources, interspersed throughout these opinions are qualifying comments that indicate an awareness of the groundbreaking nature of what the courts are doing. This Section explores several examples that demonstrate the tension that the internationalist enterprise places on traditions and customary laws or practices. It does so first by analyzing three cases that involve women's rights and second by highlighting passages from various cases that are pertinent to this query.

1. The Challenge of Women's Rights to the Internationalist Agenda

One of the greatest challenges to human rights in Africa is the realization of the right of women to equality before the law and freedom from discrimination, given the traditional roles ascribed to women throughout various countries, cultures, and communities. Several attempts have been made to challenge discriminatory laws and treatment

in African courts. This Subsection examines five such cases, decisions from Tanzania (1990), Botswana (1992), Zimbabwe (1994 and 1999), and Zambia (1992). In order to highlight how these courts deal with the tension between fundamental human rights and traditionalist views and laws on women, this discussion focuses on these courts' references to international sources as they are used to determine the interpretational policy of the court as well as the substance of rights discussed in the opinions.

In *Ephrahim v. Pastory*,[253] the Tanzanian High Court faced the issue of determining the constitutionality of a discriminatory customary law provision on inheritance in light of the provisions of the Tanzanian Bill of Rights that was incorporated into the Tanzanian Constitution in 1984. Holaria Pastory inherited clan land and later sold it to a non-clan member, in direct contravention of a Haya customary law provision that denies women the power to sell clan land.[254] Pastory's nephew sued for a declaration that the sale of the land was void under customary law. The District Court ruled for Pastory, recognizing Pastory's right under the Constitution to sell land.[255] Ephrahim appealed to the High Court to challenge this judgment.

In writing for the court, Justice Mwalusanya recognized that not only was the Haya customary law clear on this matter as it is codified in the Laws of Inheritance of the Declaration of Customary Law,[256] but also that Tanzanian precedent mandated that the courts are "bound by the Customary law" at issue.[257] Nonetheless, he claimed that this precedent must be reexamined in light of the incorporation in 1984 of the Bill of Rights into the Tanzanian Constitution, including the nondiscrimination provision in section 13(4),[258] despite the fact that the Bill of Rights had

253. (1990) 87 I.L.R. 106 (Tanz. High Ct.).

254. *See id.* at 107.

255. *See id.* at 109.

256. *See id.* at 107–08.

257. Bi Verdiana Kyabuje v. Gregory, (1968) HCD No. 499, *quoted in Ephrahim*, (1990) 87 I.L.R. at 108 ("Thus, if a customary law draws a distinction in a matter of this nature between males and females, it does not fall to this Court to decide that such law is inappropriate to modern development and conditions. That must be done elsewhere than in the courts of law.") Justice Mwalusanya cited three additional Tanzanian cases that upheld the discriminatory customary law denying women the power to sell clan land. *See id.*

258. The Tanzanian High Court decided *Ephrahim* in 1990. It did not provide the full text of the constitutional provisions at issue in its decision. Despite minor editorial changes, the constitutional provisions before the *Ephrahim* court in 1990 resemble those in today's constitution. The current text of the Tanzanian antidiscrimination provision reads: "No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any [S]tate office." TANZ. CONST. § 13(4) (1992). This provision specifies the role of the courts and other State agencies to protect the fundamental rights in the Tanzanian Constitution. *See also* TANZ. CONST. § 13(3) (1992) ("The civil

been deemed by some to be a "dead letter."[259] Justice Mwalusanya proceeded to list the international human rights instruments ratified by Tanzania,[260] that also guarantee nondiscrimination. Having established Tanzania's commitment to international human rights norms, he concluded:

> The principles enunciated in the above named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as international conventions to which we are signatories.[261]

Having determined that the Haya customary law provision is unconstitutionally discriminatory, Justice Mwalusanya turned to deciding the appropriate action of the court. Section 5(1) of the Tanzanian Constitution, added after the constitution was amended to include the Bill of Rights, mandates that "*the courts* will construe the existing law, including customary law . . . with such modification, adoptions, qualifications and exceptions as may be necessary to bring it into conformity with [the Bill of Rights]."[262] Adopting the purposive approach to statutory interpretation, he determined that the Parliament's intention behind section 5(1) and the Bill of Rights was to "do away with all oppressive and unjust laws in the past."[263] He then drew upon the judicial experience in Zimbabwe after that country adopted a bill of rights. Having drawn this parallel, he concluded, "the above case from Zimbabwe is persuasive authority for the proposition of law that any existing law that is inconsistent with the Bill of Rights should be regarded as modified such that the offending part of the statute or law is void."[264] Consequently, he ruled the Rules of Inheritance modified and qualified to give equal rights to men and women to sell clan land.[265]

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rights, duties and interests of every person and community shall be protected and determined by the courts of law or other [S]tate agencies established by or under the law.").

259. *See Ephrahim*, (1990) 87 I.L.R. at 110.

260. Justice Mwalusanya refers to CEDAW, article 18(3) of the African Charter, article 26 of the ICCPR, and article 7 of the Universal Declaration. *See id.* Section 9(f) of the Tanzanian Constitution makes an explicit reference to the Universal Declaration, "[T]he [S]tate authority and all its agencies are obliged to direct their policies and programmes towards ensuring— . . . that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights." TANZ. CONST. § 9(f) (1992).

261. *Ephrahim*, (1990) 87 I.L.R. at 110.

262. *Id.* at 113.

263. *Id.* at 115.

264. *Id.* at 116.

265. *See id.* at 119. Justice Mwalusanya concluded his opinion with a rather powerful statement on women's rights:

In sum, the *Ephrahim* court, faced with the recent incorporation of a bill of rights that guarantees nondiscrimination and equal treatment before the law, determined its role as the judiciary to modify and qualify customary law to realize the essence of the rights of women under the Tanzanian Constitution. It did so with little hesitation. In Justice Mwalusanya's eyes, when a tension between customary law and fundamental rights exists, the international standards of the fundamental rights must prevail at the expense of the traditional rules.

Two years later, the Botswana Court of Appeals reached a similar decision in *Dow v. Attorney-General*,[266] upholding fundamental rights for women over discriminatory national laws. In this case, the Attorney-General of Botswana appealed a decision of the High Court, which struck down provisions of the Citizenship Act challenged by petitioner Unity Dow as unconstitutionally discriminatory. Unity Dow, a citizen of Botswana had three children of an American father. Their first child, born out of wedlock, was entitled to Botswanan citizenship, yet the two born after their marriage, were denied citizenship under the Act, which confers citizenship in mixed marriages to children of Botswanan fathers only. Dow challenged the Act as violative of sections 3 and 14 of the Botswana Constitution.[267]

The Court of Appeal, through Justice Amissah, framed its analysis of the case as a question of constitutional construction and nondiscrimination. First, Justice Amissah established that the court must adopt a liberal approach in construing the Constitution. He cited two Botswanan cases as precedent for this policy of constitutional interpretation, and stated that "[w]ith such pronouncements from our own court as a guide, we do not really need to seek outside support for the views we express. But just to show that we are not alone in the approach . . . towards constitutional interpretation, I refer to . . . dicta of judges from various jurisdictions."[268]

> From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their father's is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field but not the elite women in town who change jejune slogans years on end on women's lib but without delivering the goods.

Id.

266. (1992) 103 I.L.R. 128 (Bots. Ct. App.).

267. *See* BOTS. CONST. ch. II, §§ 3, 14(1). Section 3 provides, "every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex. . . ." Section 14(1) provides, "No person shall be deprived of his freedom of movement. . . ."

268. *See Dow*, (1992) 103 I.L.R. at 139.

Next, Justice Amissah turned to an analysis of the substantive rights at issue, deciding to analyze the Citizenship Act in light of section 15, the Botswana Constitution's antidiscrimination provision.[269] This provision does not explicitly guarantee freedom from discrimination based on sex. Nevertheless, Justice Amissah read section 15 in conjunction with section 3 to hold that the Constitution prohibits discrimination based on sex.[270] In reaching this conclusion, he drew a parallel to the scope of the Fourteenth Amendment of the U.S. Constitution, which has been read to cover discrimination despite the fact that the text refers to "equal treatment" rather than discrimination.[271]

As for the tension between custom and fundamental rights, Justice Amissah proclaimed: "A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is custom not the Constitution which must go."[272] In reaching this conclusion, Amissah also contended that the court's decision is bringing Botswanan law in compliance with his country's international obligations under the Universal Declaration and the African Charter.

The Attorney General, however, argued before the Court of Appeal that the High Court's use of international sources in striking down the Citizenship Act was inappropriate. To counter this contention, Justice Amissah relied on the Interpretation Act of 1984, which states that "as an aid to the construction of the enactment a court may have regard to . . . any relevant international treaty, agreement or contention,"[273] and reiterated that it is the court's duty to interpret legislation in order to comply with international obligations.[274] Justice Aguda, agreeing with this approach, engaged in a substantial survey of international sources in his concurring opinion.[275]

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269. *See* BOTS. CONST. ch. II, § 15(1) ("[N]o law shall make any provision that is discriminatory either of itself or in its effect."). Importantly, the definition in that section of what is discriminatory does not include sex. *See* BOTS. CONST. ch. II, § 15(3) ("[T]he expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed. . . .").

270. *See Dow*, (1992) 103 I.L.R. at 142. Justice Amissah emphasizes continually that section 3 of the Botswana Constitution "confers on the individual the right to equal treatment of the law . . . irrespective of the person's sex." *Id.* at 150.

271. *See id.*

272. *Id.* at 145. He also posits, "[c]ustom and tradition have never been static." *Id.* For an example of how attitudes change, he cites to how the U.S. Supreme Court once sanctioned discrimination on the ground of race in *Dred Scott v. Sanford*, a position overturned and scorned given evolving attitudes toward race. *See id.* at 156.

273. *Id.* at 159.

274. *See id.* at 161–62.

275. *See id.* at 175–79. References in his concurring opinion include quotes from *Trop v. Dulles*, 356 U.S. 86 (1958); *Ex parte* Attorney-Gen., Namib. (*In re* Corporal Punishment by

The leading opinions in *Dow* give the impression that the Court of Appeal overturned Botswanan customary norms in light of fundamental rights without hesitation. This is not the case as it was in *Ephrahim*. Two dissenters in *Dow* concluded that the Citizenship Act did not unconstitutionally discriminate. In the opinions of Justice Schreiner and Justice Puckrin, the text of section 15 clearly excludes sex from its definition of discrimination. Justice Schreiner expressed that adopting a liberal interpretational approach in cases like *Ex parte Attorney-General, Namibia, Petrus*, and *Ncube* was justified only on account of the fact that the Justices were addressing the "vexed question of corporal punishment,"[276] and hence such a liberal approach would be unjustified in cases involving discrimination. Furthermore, he believed that it is beyond the acceptable role of the court to "speculate or to express [its] own view" on the content of customary law.[277] Justice Puckrin disagreed with the approach of the court disdainfully, "I do not perceive that it is my duty as a judge of this court to impose my personal convictions upon an interpretation of the Constitution."[278]

Unity Dow nevertheless won her case and the Citizenship Act was declared unconstitutional in its form at the time. Thereafter, the Botswanan legislature amended the Act and passed the Citizenship (Amendment) Act No. 14 of 1995 to conform to *Dow*.[279]

The Supreme Court of Zimbabwe considered a similar case to *Dow* in 1994. In *Rattigan v. Chief Immigration Officer, Zimbabwe*,[280] three women citizens of Zimbabwe married to foreign husbands challenged the constitutionality of the Zimbabwean Immigration Regulations which placed restrictions on residence permits so that the mixed-marriage couples were unable to establish residency in Zimbabwe.[281] Although the Court considered the Regulations in light of the privacy and freedom of movement provisions of the Zimbabwean Constitution,[282] it relied

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Organs of the State), (1992) 103 I.L.R. 81 (Namib.); speeches given at the Judicial Colloquium at Bangalore; and provisions from CEDAW and the African Charter. *See Dow*, (1992) 103 I.L.R. at 174–79. In his view, judges in Commonwealth countries "have started to express the opinion that they have an obligation to ensure that the domestic laws of their countries conform to the international obligations of those countries." *Id.* at 176.

276. *Id.* at 191.

277. *Id.* at 196.

278. *Id.* at 198.

279. *See* 2 HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 10, at 129.

280. (1994) 103 I.L.R. 224 (Zimb.).

281. *See id.* at 226–67. The policy states "the principal applicant for a family residence permit should always be the husband unless the wife is a highly qualified professional . . . ." *Id.* at 227.

282. *See* ZIMB. CONST. ch. III, §§ 11, 22 (Section 11: "[E]very person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual . . . (c) protection for the privacy of his home"; and section 22(1): "No person shall be deprived of his freedom of

heavily upon decisions by international bodies concerning the rights granted under article 17 of the ICCPR and article 8(1) of the European Convention, which protect and promote the primacy of family life.[283] Based on these parallels, the Constitutional provisions, the fundamental importance of marriage,[284] and an analogy to facts of the *Dow* case,[285] the Zimbabwean Court struck down the Immigration Regulations as unconstitutional.

The decision by the *Rattigan* Court was unanimous. Though the language of the opinion did not speak of women's rights per se, the effect of the decision clearly achieved a development in the equality of treatment of women before the law in a particular instance, a development achieved by the judiciary without any counterforce. Zimbabwean political forces frowned upon this decision, however, and preempted the consequences of the *Rattigan* decision through constitutional amendment.[286] An exception to the freedoms guaranteed in section 22(1) was added. Section 22(3)(d) now reads:

> (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision . . .
>
> (d) for the imposition of restrictions on the movement or residence within Zimbabwe of persons who are neither citizens of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe . . . .[287]

The short-lived effect of the *Rattigan* Court's decision may have presaged a more recent development in Zimbabwe in the area of women's rights. In 1999, the Zimbabwean Supreme Court heard the case of *Magaya v. Magaya*,[288] a decision that embodies the tension between

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movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe.").

283. *See Rattigan*, (1994) 103 I.L.R. at 232–33.

284. To stress the importance of marriage, Chief Justice Gubbay quotes passages from two U.S. cases, including *Loving v. Virginia*, among other sources. *See id.* at 231.

285. *See id.* at 231–32.

286. *See* 2 HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 10, at 317.

287. ZIMB. CONST. ch. III, § 22(3)(d).

288. Magaya v. Magaya, [1999] 3 LRC 35 (Zimb.). For commentary on this case and its significance for women's rights and human rights jurisprudence in Zimbabwe see generally David M. Bigge & Amélie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in* Magaya v. Magaya, 13 HARV. HUM. RTS. J. 289 (2000); Simon Coldham, *The Status of Women in Zimbabwe:* Veneria Magaya v. Nakayi Shonwhiwa Magaya (SC 210/98), 43 J. AFR. STUD. 248 (1999); Canaan F. Dube, *Addressing the Gap Between Customary and Statute Law and International Conventions: Zimbabwe's Twists and Turns*, 12 LEGAL F. 11, 12–13 (2000); Amy Shupikai Tsanga, *Criticisms Against the* Magaya *Decision: Mudo Ado About Something*, 11 LEGAL F. 94 (1999).

fundamental rights and customary law. In *Magaya*, contrary to the decisions of the Tanzanian and Botswanan courts, the Zimbabwean Supreme Court held that customary law prevails over the rights embodied in the Zimbabwean Constitution.

In this case, Venia Magaya, the appellant, challenged a magistrate's decision that granted heirship of her father's estate to her half-brother, the son of her father's second wife. Venia Magaya's father married two wives according to customary law and Venia was the only child of her father's first wife. The Magistrate based his determination of heirship on customary law, declaring "Venia is a lady [and] therefore cannot be appointed to [her] father's estate when there is a man."[289] The issue the Court faced was whether customary heirship rules violate the nondiscrimination provision of the Zimbabwean Constitution.

The constitutional provision under scrutiny was section 23. Section 23(1) establishes the general prohibition of discriminatory laws and section 23(2) delineates the definition of what is to be considered discriminatory. Like the provision of the Botswana Constitution that was analyzed in *Dow*, section 23(2) does not include sex.[290] Justice Muchechetere, resonating the views of the dissenters in *Dow*, flatly declared, "it seems to me that these provisions do not forbid discrimination based on sex."[291] Justice Muchechetere continued with one of the very few references to international human rights in his opinion, "But even if they did on account of Zimbabwe's adherence to gender equality enshrined in international human rights instruments, there are exceptions to the provisions."[292] The exception referred to is enshrined in section 23(3), which excludes matters of personal law and the "application of African customary law in any case involving Africans . . ."[293] from the prohibition of discrimination in section 22(1)(a). Additionally, section 89 grants a general sanction for the application of customary law in Zimbabwe.

Having so readily concluded that the Zimbabwean Constitution permits derogations from the fundamental rights provisions when customary law is implicated, Justice Muchechetere proceeded to analyze the customary law rules in light of a statute entitled the Legal Age of Majority Act. In so doing, he concluded that the legislative intent behind the statute was to guarantee greater rights for women, but not at the

289. *Magaya*, [1999] 3 LRC at 40.

290. *See* ZIMB. CONST. ch. III, § 23(2) ("[A] law shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced . . . .").

291. *See Magaya*, [1999] 3 LRC at 41.

292. *Id.*

293. ZIMB. CONST. ch. III, § 23(3)(b).

expense of upsetting customary law.[294] Furthermore, the courts in *Ephrahim* and *Dow* dismissed arguments that customary law should be upheld because of its traditional role in African society in favor of advancing fundamental rights for women in order to join the ranks of civilized nations. In stark contrast, Justice Muchechetere made a strong statement in his opinion that great pains should be taken to preserve customary law rules:

> Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still . . . conduct their lives in terms of customary law. . . . [I]t will not readily be abandoned. . . .[295]

Furthermore, Justice Muchechetere expressed his view that it is his role to apply customary law when it is appropriate and that it is the legislature's role to change the law if that is their intention.[296]

The only instance in this opinion in which a specific international instrument was cited was in two block quotations from a scholar, T.W. Bennett, author of a book on human rights and customary law in South Africa.[297] In this quotation, Bennett stresses the importance of the family in African society, which he claims is buttressed by the references to the African family in the African Charter, particularly the duties enumerated in chapter 2 of the African Charter of individuals vis-à-vis their families.[298] This quotation is interesting as it is the only citation to an international human rights instrument, the African Charter, that is used to support a decision that perhaps in the eyes of Justices Mwalusanya, Amissah, and Aguda works counter to the fundamental right to equality enshrined in that very same instrument. What it evidences is the manipulability of the African Charter given its potentially conflicting mandates of promoting human rights while upholding African traditions.[299] In this instance, because the African Charter was employed to uphold the tradi-

294. *See Magaya*, [1999] 3 LRC at 47–48.

295. *Id.* at 48. The two additional reasons Justice Muchechetere cites are on the one hand the constitution's recognition of the customary law system and on the other the fact that the application of customary law is voluntary. *See id.* at 49.

296. "I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts." *Id.* at 49.

297. *See id.*; *see also* T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION (1995).

298. *See* BENNETT, *supra* note 297, at 6, *quoted in Magaya*, [1999] 3 LRC at 49.

299. *See generally supra* discussion in Section I.C.

tionalist stance to the detriment of the antidiscrimination principle, it is not surprising that Justice Muchechetere avoided invoking other international human rights instruments. It is surprising however that Justice Gubbay, the author of the *Ncube* decision and outspoken proponent on human rights,[300] silently joined such an opinion as he did. This decision certainly indicates that justices are less willing to adopt liberal interpretations of fundamental rights based on international norms when less "vexing" questions[301] are at stake, such as women's rights.

A last example of a women's rights case is the Zambian decision of *Longwe v. Intercontinental Hotels*, decided by the Zambian High Court in 1992.[302] Juxtaposed with the recent *Magaya* decision it illustrates how judicial activism through broad constitutional interpretation can lead to extremely radical results on different sides of a spectrum. This case held that the antidiscrimination and gender equality provisions of the Zambian Constitution apply equally "to everybody: public or private persons unless the context otherwise dictates."[303] Concretely, the court held unconstitutional the acts of the Intercontinental Hotel in denying a woman access to the bar on the hotel premises. In reaching this decision, the court cited to articles 1–3 of the African Charter and articles 1–3 of CEDAW,[304] using the Charter in this instance to uphold article 2's promise of the guarantee of the enjoyment of rights without distinction of any kind, including gender.

2. Visible Tensions in the Exercise of Judicial Discretion in African Human Rights Jurisprudence

Given the breadth of the use of international sources by the common law judges examined in this Part, this Subsection examines certain judges' awareness of the tension between adopting universalist human rights norms without hesitation to the detriment of either particular African practices in customary laws or a more general concept of a local or indigenous value structure. The language of these judges reveals that despite the awareness of the tension, most judges end up grafting universal norms onto their indigenous norms.

Courts have faced the tension between universalism and particularism when addressing arguments proffered by counsel, often for the governmental parties whose practices are being challenged by individual litigants. These counsel argue against seeking support from international

300. *See* Gubbay, *supra* note 120.

301. *See* Dow v. Attorney-Gen., (1992) 103 I.L.R. 128, 189–98 (Bots. Ct. App.) (Schreiner, J., dissenting).

302. [1993] 4 LRC 221 (Zambia 1992).

303. *Id.* at 231.

304. *Id.* at 227–28.

sources and embracing universalist norms in favor of upholding something unique in either a local or a broader African culture. This phenomenon can be seen in one of the cases on corporal punishment, *Petrus v. State*, in which the Court forthrightly rejected counsel's relativist stance on the role of corporal punishment in African society. In *Petrus*, the counsel for the government, defending the State practice of whipping as judicial punishment, posited that "every African" is aware of the deterrent functions of whipping.[305] Justice Aguda flatly rejected counsel's position by commenting, "[t]he assertions in this and in other submissions of [counsel for the government] which tend to portray the Africans as a different species of humanity different from all others, are not only unwarranted as being degrading, but to put it very mildly most unfortunate."[306]

In this instance, the Botswanan Court resisted accepting that certain practices, such as corporal punishment, were somehow acceptable for Africans whereas the consensus of "civilized nations" had repudiated such treatment as a violation of fundamental rights. In the end, President Maisels rested his opinion on his value judgment of the scope of the fundamental right under question.[307]

Several opinions reveal that a consensus does not yet exist as to *whose* values are to be taken into account. The widespread use of international sources and the repeated statements calling for joining the ranks of civilized nations indicate that many of the judges of the opinions considered in this Article were willing to base their own normative judgments in light of the trend as evidenced in civilized nations. Some judges, however, were more reluctant, in their rhetoric at least, to favor international sources and universal norms at the expense of national or local value systems. A survey of several of these statements indicates, however, that despite certain judges' sensitivities to taking particular or national value systems into account, these judges still embraced universal values because such universal values were gaining acceptance at the national level.

For example, in the Namibian Supreme Court's decision outlawing corporal punishment, Justice Mahomed cited to the Zimbabwean case on the legality of corporal punishment under the Zimbabwean Constitution for its statement on the necessity of rendering a value judgment in the area. He then stressed the importance of taking national norms into consideration in this process, "regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as ex-

305. Petrus v. State, [1984] BLR 14, 43 (Bots. Ct. App.).
306. *Id.* at 44.
307. *See supra* note 161.

pressed in its national institutions and its Constitution . . . ."[308] Yet regard for such national norms, in Justice Mahomed's view, entails "further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share."[309] This passage indicates how universal norms have been transplanted, in the view of this Justice, into his country's national value structure, given its aspirations for joining the comity of civilized nations.

The Constitutional Court of South Africa must balance between following its constitutional mandate to refer to international law in determining rights under the South African Constitution and grounding its decisions in a context unique to South Africans.[310] Several concurring opinions in *State v. Makwanyane* show their awareness of this tension.

Justice Madala, for example, noted the absence in the Court's opinion of the consideration of "traditional African jurisprudence" and the values inherent in this jurisprudence when determining the constitutionality of the death penalty.[311] Such traditional African jurisprudence, in his view, includes not only South African values, but also those of "Africa in general."[312] Justice Sachs in his concurring opinion voiced a similar view of the need to consider traditional African jurisprudence in determining the scope of the South African Constitution.[313] In Justice Sachs's opinion, the South African Constitution mandates that the Constitutional Court adopt the broadest possible vision in order to give meaning to its aspirations of justice and equality.[314] These provisions mandate "giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice."[315]

Justice Mokgoro shares a similar view. In her concurrence in *Makwanyane*, she expressed her view of the important role that "indigenous South African values" can play in ensuring that the courts promote the values as mandated in section 35 of the South African Constitution.[316] In her view, section 35 "seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising

308. *See Ex parte* Attorney-Gen., Namib. (*In re* Corporal Punishment by Organs of the State), (1992) 103 I.L.R. 81, 93 (Namib.).

309. *Id.* at 93–94.

310. The South African Constitution encourages the Constitutional Court to take into consideration the concept of *ubuntu*, the South African worldview, or conception of humanity. For a discussion on the definition of *ubuntu* and its role in the South African Constitution, see Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 15 (1998).

311. State v. Makwanyane, 1995 (3) SALR 391, 486 (CC) (Madala, J., concurring).

312. *Id.* at 487.

313. *See id.* at 516 (Sachs, J., concurring).

314. *See id.* at 514.

315. *Id.*

316. *Id.* at 498 (Mokgoro, J., concurring).

considering the repressive nature of the past legal order."[317] Given this paucity, she contended, the Courts must look to international sources for guidance. Nonetheless, she continued, "However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality."[318]

Almost paradoxically, she then cited to a European Court of Human Rights opinion that stresses the importance of taking the "moral consensus of the community" into consideration so as to facilitate the community's acceptance of a law.[319] She continued, "[i]n interpreting the Bill of Fundamental Rights and Freedoms . . . an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence,"[320] and then proceeded to examine the scope of the value of *ubuntu*[321] in South African society. In conclusion, she found that *ubuntu* espouses notions of human dignity, which would form an indigenous basis for the Constitutional Court to find the death penalty unconstitutional.[322]

Throughout the opinions examined in this Section lies the fundamental tension between the progressive narrative of adopting universal human rights norms and the redemptive exercise of grounding norms in a localized expression. The extent of the debate between the human rights universalists and the African rights particularists examined in Part I suggests that African courts would exercise more caution and restraint in embracing the internationalist discourse. Most of the cases examined here go against this conclusion. However, the Zimbabwean decision in *Magaya* raises the question of whether this decision augurs a new trend of refraining from realizing international norms when they come in direct conflict with traditional laws and practices.

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317. *Id.* at 499.

318. *Id.*

319. *See id.* (quoting *Dudgeon v. United Kingdom*, 4 EUR. H.R. REP. 149, 184 (1982)).

320. *Id.* at 500.

321. *See supra* note 310.

322. *Makwanyane*, 1995 (3) SALR at 503. In reaching this conclusion by surveying the indigenous South African values behind the notion of *ubuntu*, however, Justice Mokgoro still examines comparative jurisprudence on the concept of human dignity. In doing so, she considers American and Hungarian jurisprudence, and makes references to human dignity in international law, in the form of the preamble to the ICCPR. "In international law . . . human dignity is generally considered the fountain of all rights." *Id.* at 501. The point of this international survey, however, like in the Namibian decision, is to draw the links between indigenous values and international norms. "Central to this . . . is the need to revive the value of human dignity in South Africa, and in turn re-define and recognise the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings . . . ." *Id.* at 502.

Perhaps the area of women's rights is particularly susceptible to such relativist contextualization. Either the *Magaya* decision will prove to be an anomaly or the increased application of human rights norms in Africa will awaken the relativist sensitivities of the populace or the courts. If the latter scenario prevails, then the internationalist agenda of the courts in *Ephrahim* and *Dow* can be seen as strained eagerness to conform with the status of international norms or a fleeting fancy. Alternatively, the approaches adopted in these decisions could prove to be the sustainable judicial project of these courts. Only future jurisprudence will decide, against the backdrop of these decisions as precedent nonetheless.

CONCLUSION

The cases studied in this Article evidence a nascent African human rights jurisprudence, significant for the novel ways in which the African courts rely on international and comparative law to support their fundamental rights jurisprudence. Together, they highlight the potential for African judiciaries to enforce the respect for international human rights norms in their countries and engage in the debate of the scope of these rights in the historical and cultural context in Africa.

African courts' use of international and comparative case law as persuasive authority in their jurisprudence challenges the framework in which traditional scholars of international law and human rights in Africa have foreseen the role of such international norms in the national context. Part II's textual analysis demonstrates that the traditional model of the status of international law in domestic courts does not account for the actual ways in which international sources and comparative case law have been used in African fundamental rights jurisprudence.[323] Classic dualism of common law systems should serve as a barrier to the invocation of international human rights norms in national courts in Africa. But the courts studied here defy these constraints. Even though litigants before these courts plead their claims in terms of violations of fundamental rights found in their national constitutions, the courts draw parallels to international human rights norms, as expressed in treaties or statements of principles, and the pronouncements of foreign courts regarding these rights in order to determine the scope of their national constitutional guarantees. Most striking is that the courts do so seamlessly, without

323. For an example of how constraining the traditional model of international law in domestic courts can be when analyzing the practice of national courts in Africa, see generally TSHOSA, *supra* note 21, at 259–79.

noting or explaining the binding nature or level of persuasive authority of these international and comparative sources.

The cases examined here also provide interesting insights into the debate between the universality and cultural relativity of human rights norms in the African context. That individuals initiate litigation to challenge violations of their civil rights and liberties supports the argument for the existence of a core set of human rights, predominantly in the civil and political realm, that is universal.[324] The conflicting court rulings in the realm of women's rights, however, reveal that African courts continue to struggle with the coexistence of traditional cultural norms and human rights, drawing the line on a case-by-case basis.

African courts face the challenge of overcoming their colonial pasts and finding their own voices in legitimating human rights and rendering them more accessible at the national level. To be sure, progressive judicial decisions do not necessarily produce direct improvements in the protection and enforcement of human rights. Nevertheless, these courts play a significant role in establishing a framework for the growth of an indigenous human rights culture, even if such a framework is based upon the universalized discourse of international human rights norms.

In the absence of domestic precedent, African courts have looked beyond their borders for persuasive authority to determine the scope of their constitutional rights guarantees. Indeed several of the opinions examined here reveal that African judges view their role as one of bringing their own domestic fundamental rights jurisprudence in line with prevailing international norms. Furthermore, that several judges articulate their concern over the perceived activist nature of their process of adjudication indicates that the future of progressive fundamental rights jurisprudence drawing upon international and comparative sources is not guaranteed. However, by referencing international norms and preexisting comparative jurisprudence, these courts help temper criticism that they are merely legislating through judicial decision making.

To conclude that these cases evidence an emerging human rights jurisprudence in Africa might seem ambitious. The number of cases that employ international and comparative sources in their fundamental rights jurisprudence is admittedly small and the reasoning of the courts in these decisions is insufficiently developed to deduce what drives this phenomenon. Given the practical challenges facing lawyers and judges in Africa, the future of this human rights jurisprudence is uncertain. The better versed African lawyers are in international law and comparative case law, the more frequently they will draw parallels between their na-

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324. *See* Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 838–89 (2000).

tional fundamental rights and international human rights norms. African courts will therefore have further occasion to deliberate over the persuasive authority of these international sources in their national jurisprudence. In addition, the more resources are invested in the publication and diffusion of African jurisprudence, the more likely African court fundamental rights cases will form the foundation of national jurisprudence.

In bringing to light this sample of African fundamental rights jurisprudence, this Article seeks to moderate the simplistic but dominant image of the African State as a violator of human rights. By focusing on the creative and progressive dialogue African courts have engaged in with international and comparative law sources, this Article hopes to increase the attention and respect that is due to these courts and identifies African courts as participants in the current era of judicial dialogue and global constitutionalism.