CONTENTS

Remarks

Feature Articles

SOCIOECONOMIC RIGHTS IN THE AFRICAN CONTEXT: PROBLEMS WITH CONCEPT AND ENFORCEMENT

Lecture by Justice Professor Modibo Ocran[†]

The current development agenda in Ghana and many other African countries revolves around three key focal points:

1.) human resource development;

2.) private sector development; and

3.) good governance.

A key component of good governance is access to justice. Individuals and communities within any country must have access to the broad opportunities that make life meaningful. On a daily basis, the majority of children, women, men, communities, companies, and institutions in some African countries are denied access to justice, social services, and other essential functions of government. Often these citizens and organizations have no one to whom they can turn. Whenever justice is inaccessible, the result is injustice. Injustice leads to bitterness, anger, revolt, and ultimately political and social disintegration. In this regard, there is a real, compelling, and immediate need to eliminate barriers blocking access to justice throughout Africa. In this presentation, I shall focus on access to socioeconomic rights as an aspect of human rights.

I. Conceptual Framework of the Discussion

For most practical purposes, the thorny problem of finding a conceptual basis for the existence of human rights was resolved with the adoption of the 1948 Universal Declaration of Human Rights, along with all the other spin-off covenants, treaties, and declarations that have followed that landmark document. However, whenever we face an intellectual challenge as to why certain rights are covered, or not covered, or ought not to have been covered by these documents, we are thrown outside the confines of these instruments and must look elsewhere to justify these human rights, or at least aspects thereof.

Human rights have, for the most part, been justified in terms of natural law and natural rights theories. But I prefer to free human rights from natural law and to ground the philosophical basis of human rights along the lines of Immanuel Kant's moral idealism, epitomized by the maxim that "man is to be treated as an end in himself, not as a means to an end."[1] In this sense, human rights constitute an appeal to treat humans in a certain way, and not to treat them in certain

[†] Justice of the Supreme Court of Ghana; Emeritus Professor of Law, University of Akron School of Law; Adjunct Professor of Law, University of Ghana, Legon-Accra; LL.B, B.L.(Ghana); MLI (Comp. Law), PhD (Law & Development) Wisconsin, Madison. This lecture was given as the Keynote Speaker on *The Rule of Law and Delivering Justice in Africa*, Loyola University Chicago International Law Review Symposium, Feb. 15, 2007.

[1] IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 95 (Becktrans 1949) (1788).

other ways, solely on the basis of their humanity. To this Kant added his categorical imperative as the ultimate ethical doctrine of fairness: "[A]ct according to a maxim which can be adopted at the same time as a universal law of human conduct."[2] Other non-Kantian formulations, such as the contractarian theories of John Locke or Bruce Ackerman, or the utilitarian conceptualizations of Jeremy Bentham and John Stuart Mill, also offer respectable justificatory models outside natural law.

In regards to socioeconomic aspects of human rights in particular, I see them as part of the overall fight for social justice. In the words of David Miller, the British moral philosopher, "[s]ocial justice. . .concerns the distribution of benefits and burdens throughout a society, as it results from the major social institutions - property systems, public organizations, etc." It deals with such matters as the regulation of wages and profits, the allocation of housing, medicine, welfare benefits, etc., through the proper allocation of the public budget.

In the received learning on human rights, socioeconomic and cultural rights typically consist of the following: the right to education; the right to work and earn a living; the right to basic medical services; the right to social security; the right to fair housing; and the right to cultural life.

The ambit of human rights, and more particularly of socioeconomic rights, has expanded considerably since the premier instrument in international human rights, the Universal Declaration of Human Rights, was adopted in 1948. It should be noted that this document contained only four articles devoted to socioeconomic rights, Articles 23 through 26.[3] However, by the 1960s, the world community had begun to pay more attention to the socioeconomic dimension of human rights. The UN Covenant on Economic, Social and Cultural Rights, adopted in 1966 as a twin instrument to the UN Covenant on Civil and Political Rights, contained 25 substantive articles on socioeconomic rights.[4] Several regional instruments were also adopted on various aspects of human rights. On the African continent, the erstwhile Organization of African Unity in 1981 adopted the African Charter on Human and Peoples' Rights, containing several articles on socioeconomic rights as well as a people's right to self-determination and to cultural autonomy.[5]

Yet in spite of the growth in the public consciousness of socioeconomic rights, the international community, particularly the United States, has displayed a disappointingly low-grade commitment to these rights. To some, particularly in the heyday of the ideological war between capitalism and communism, socioeconomic rights had a communistic flavor and were therefore dismissed as ideologically unacceptable. To others, the opposition to socioeconomic rights was

---

[2] *Id.* at 63.

[3] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, arts. 23-26, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

[4] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc A/2200A (Dec. 16, 1976).

[5] Organization of African Unity, African Charter on Human and Peoples' Rights (ACHPR), June 27, 1981, 21 I.L.M. 58, *available at* http://www.achpr.org/english/_info/charter_en.html [hereinafter ACHPR].

jurisprudential in that they asserted that these so-called rights were not rights at all, but mere entitlements or privileges. I shall address these arguments later on.

The absence of a common language with respect to socioeconomic rights meant in theory that it was possible for the governments concerned to deny responsibility for delivering public goods and services - often without political and legal consequences. In the United States, as recently as 1993, no less a person than the former executive director of Human Rights Watch, was bold enough to state, "I am on the side of the spectrum which feels that the attempt to describe economic concerns as rights is misguided. I just don't think that it's useful to define them in terms of rights."[6] Happily for us all, Human Rights Watch subsequently embraced the principle of the indivisibility of human rights.

You can already see why the enforcement of socioeconomic rights has been particularly difficult. However, efforts are being made around the globe to make the enjoyment of such rights a reality, and to put them on par with the status civil and political human rights are afforded. This is an important crusade, as most of the rights of the seriously disadvantaged in our society - women, children, the physically challenged - fall into the category of socioeconomic rights.

Let me now confront the notions that first, so-called socioeconomic rights are not rights at all, but mere entitlements, privileges, or aspirations; and second, that because they are not rights, one cannot pursue them in the courts or quasi-judicial bodies. In other words, they are not justiciable.

I am sure some of you lawyers and law students, in your jurisprudence courses, will remember Wesley Hohfeld's tortuous analysis of fundamental legal conceptions as applied in judicial reasoning, including the true meaning of rights, in his book, Fundamental Legal Conceptions as Applied in Legal Reasoning.[7] Hohfeld thought of fundamental legal conceptions in terms of their opposites and correlatives. In the case of rights, he claimed that there could be no true right, *right stricto sensu*, without a correlative duty on some other person or entity to recognize and enforce that right, or at least to allow its vindication. If no such duty could be discerned, then the so-called right is not really a right, but a mere privilege whose correlative is a no-right. Hohfeld was determined to make these distinctions because, in his own words, "chameleon-hued words are a peril both to clear thought and to lucid expression."[8] The term "right" could, in his view, be a chameleon-hued word or mere rhetoric.

The confinement of rights to Hohfeldian rights, or rights *stricto sensu*, could pose conceptual problems for the enforcement of rights such as the collective right to the environment, and for individual socioeconomic rights. In these areas, the nature or extent of the Hohfeldian duty borne by the other party might be unclear or even unknown. What is worse, the identity of that other party might itself be in question.

---

[6] Aryeh Neier, Remarks at the Harvard Law School East Asia Legal Studies & Human Rights Symposium: Human Rights and Foreign Policy (May 8, 1993).

[7] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING (W.W. Cook ed., 1923).

[8] *Id.* at 35.

As a former professor of jurisprudence, I concede that Hohfeld's analytical jurisprudence might have utility in some contexts. However, as a judge, I am now tempted to collapse his distinction between rights and privileges into a composite test of justiciability, with the judge serving as the determiner of justiciability in concrete situations. In other words, it is my hypothesis that a claimed right embodied in an instrument might be deemed as justiciable even if it sounds like a privilege (a "no-right") or an entitlement in Hohfeldian terms.

Justiciability is concerned with the amenability of a cause or matter to litigation; for example a determination that a claimed right is cognizable in the courts or quasi-judicial bodies, and with the willingness of the legal system to protect that claimed right using the normal procedures of litigation. Black's Law Dictionary defines a justiciable controversy as "a question as may properly come before a tribunal for decision. . .a real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character."[9] In the case of human rights enforcement, I consider it appropriate to widen justiciability in order to include the possibility of bringing complaints before international quasi-judicial organs such as the African Union Human Rights Commission under the African Charter of Human and Peoples' Rights, and the Human Rights Committee under the UN Covenant on Civil and Political Rights, using the formal procedures laid down by those bodies.

With regards to socioeconomic rights, the basic dilemma facing its justiciability stems from two problems; a problem of measurement, and a more general problem of material means for the rights realization. For example, how does one measure decent shelter for child and mother so as to make such a right enforceable in a court of law? What index of decency should a court use? Secondly, if the implementation of state or community obligations, such as the provision of basic education and health care, simply assumes the existence of the material means of the state, can one responsibly encourage litigation against the state based on the non-realization of such rights in conditions of slow economic growth, no growth, or sustained underdevelopment?

I believe that these rights may be justiciable under certain circumstances. First, the potential beneficiaries of concrete programs or projects underwritten by a statute or subsidiary legislation, such as a new school building or basic children's hospital, may be able to show that material means are indeed available within the system, but the authorities are either sitting on the funds or diverting them to their preferred projects or programs, such as the refurbishment of a first-class university research hospital. Under such circumstances, it may be appropriate for a judicial or quasi-judicial body to ask the authorities to show cause why that particular school or hospital cannot be built within the expected time frame.

In the second circumstance, where a socioeconomic right is expressed in the Constitution, it is not simply a duty or aspiration or a mere policy guidance for state authorities as might be the case in some Directive Principles of State Policy, but a substantive provision of fundamental human rights, such as Article 25(1)(a)

[9] BLACK'S LAW DICTIONARY 865 (6th ed. 1990).

of our Constitution which guarantees a right to free basic education for all.[10] In this circumstance, there arises a constitutional duty which is enforceable like any other legal duty. Thus, it will be no justification in constitutional terms to say that there are no funds for that commitment. It would most likely mean that there is a duty to find the money through the budgetary process in order to start such a program, and to improve upon it on a progressive and consistent basis. This is the notion of the progressive realization of justiciable socioeconomic rights and collective rights, which allow aggrieved persons to make their claim and at the same time provide an opportunity for state officials to demonstrate in a judicial setting the constraints preventing them from implementing the plaintiffs' claim.

In this regard, I consider the South African Constitution of 1996 as having been drafted skillfully. For example, Articles 26 and 27 state that:

> 26(1) Everyone has the right to have access to adequate housing; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right . . .[11]
>
> 27(2) The state must take reasonable legislative and other measures, within available resources, to achieve the progressive realization of each of these rights.[12]

Indeed, we often forget that there are aspects of socioeconomic rights enforcement that do not require any extra financial outlay by the state. Sometimes, all that is required is a duty of forbearance on the state's part, or, in other words, a negative duty to refrain from taking certain adverse actions. One example would be the negative dimension of the right to education through the freedom from arbitrary expulsion or exclusion from school. Similarly, the negative aspect of the right to health would simply be freedom from non-interference with one's own health. Quite clearly, the Covenant on Civil and Political Rights imposes negative duties of forbearance and positive duties of performance on States. Thus, the guarantee of humane treatment in detention embodied in Article 10(1) arguably necessitates the construction of a sufficient number of detention centers by the state to prevent overcrowding.[13]

In the context of environmental rights understood as a group right or collective right, I see the same problem with justiciability as I do with the more individualized socioeconomic rights such as the right to education, to social security, to basic medical services, to cultural life, and the right to work and earn a living. But I also see a way out for the benefit of aggrieved persons.

It is clear that some aspects of environmental rights can be enforced simply by ensuring that would-be violators cease and desist from their acts of nuisance and other acts that endanger the community, coupled with an action for damages or compensation, if called for, under the general law of torts or specific statutes on

---

[10] GHANA CONST. art. 25, §1, cl. a.

[11] S. AFR. CONST. 1996 s. 26, §1.

[12] *See id.* s. 27, §2.

[13] International Covenant on Economic, Social, and Cultural Rights, *supra* note 4, at art. 10(1).

conservation, mining, and environmental standards. Those are certainly justiciable acts.

Further, in appropriate cases action can be taken to prevent the creation of hazardous or unacceptable environmental conditions through investment projects or undertakings by insisting upon environmental impact statements and periodic monitoring by independent environmental agencies. Most modern environmental legislation now provides for this, and there should be no problem with justiciability in this instance. Indeed, I will couple this concept with the use of the well-known action of mandamus to compel the diligent performance of an environmental agency's statutory duties.

Finally, where the enjoyment of an aspect of environmental rights requires fresh governmental budgetary outlays during times of financial scarcity, the court could adopt the same approach advocated above for the realization of individualized socioeconomic rights. If the entire financial outlay is not available for the resettlement of communities affected by mining activities or the construction of dams, or for the provision of boreholes to replace drinking water sources contaminated by careless investment activities, there could be an enforceable duty to find such monies through the budgetary process. These monies could be used to start the ameliorative program and to improve upon the level of financial outlay in an incremental, but progressive and objectively verifiable, fashion. That would be the extent of the justiciability of the matter.

It would seem wrong for a judge to declare suits such as these to be totally unjusticiable on the grounds that the entire financial outlay was unavailable for implementation at the time of the suit. Moreover, a suit might be quite justiciable even though in the end a court might decide that the state or other community actor had not violated any constitutional or statutory provision and had complied with its constitutional obligation in the particular case.

Allow me at this point to refer to a decision of the South African Constitutional Court in a case brought under the South African Constitution of 1996, and to repeat the wise remarks of the judge in this difficult and slippery area of constitutional law. The case was based on Article 26 of the 1996 Constitution addressing the right to adequate housing.[14]

In the case of *Gov't of the Republic of S. Afr. & Others vs. Grootboom & Others.*, the South African Constitutional court dealt with the right to adequate housing.[15] In the course of his opinion, Judge Yacoob made the following remarks, "I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution, which expressly provides that the state is not obliged to go beyond available resources or to realize these rights immediately. I stress, however, that despite all those qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce."[16]

---

[14] S. AFR. CONST. 1996 s. 26.

[15] *Gov't of Republic of S. Afr. & Others v Grootboom & Others* 2000 (1) SA 46 (CC) (S. Afr.).

[16] *Id.* at 93-94.

While bemoaning the difficulties in the enforcement of socioeconomic and group rights, I need to mention that quite often we ourselves make enforcement formalistically difficult either by the way we draft our legal instruments or by our general treatment of important sources of law in our legal systems. Take the treatment of the so-called group right to a healthy environment under the 1992 Constitution of Ghana.

This constitution does not really mention a right to a healthy environment as among the fundamental human rights and freedoms dealt with in Chapter 5.[17] This means that the right to a clean environment is not a human right, or that while it is a human right, it is not a fundamental human right of the same order as, let us say, the right to life (Article 13)[18] or the right to personal liberty (Article 14)[19] or even the socioeconomic rights mentioned in Articles 24 through 30.[20]

The reference to the environment is actually located in the Directive Principles of State Policy, Article 36(9), and deals with the Economic Objectives of those Principles.[21] Regrettably, that constitutional provision is not couched directly in terms of the right to a clean environment. Rather, it is formulated in terms of the protection of the environment for inter-generational justice, as well as the need for interstate cooperation in the protection of the global environment as the common heritage of mankind - the so-called global commons. Moreover, the location of that provision in the Directive Principles, rather than in Chapter 5 of the Constitution dealing with fundamental human rights may well raise an issue as to its constitutional stature.

Allow me to make some general comments on the tenor and formulation of the Directive Principles embodied in Chapter 6 of the Ghana Constitution, which does have the effect of undermining a possible claim that there is a constitutional right to a clean environment in Ghana.

Note that Article 34(1) of the 1992 Constitution, the operative article on implementation of the Directive Principles, emphasizes what is generally perceived as the main significance of directive principles in the constitutional settings – postulating "duties of aspiration" for the state and the community at large rather than imposing direct duties on them.[22] Article 34(1) states that the Directive Principles "shall guide" our application and interpretation of the Constitution or any other law, and in "taking and implementing any policy decisions, for the establishment of a just and free society."[23] If they are merely guiding principles of interpretation and action, one wonders why all the subsequent substantive Articles in Chapter 6, such as Articles 35 through 41, are couched in the normally mandatory language of "shall" rather than "shall endeavor to" or "is expected to" as might seem appropriate.

---

[17] GHANA CONST. ch. 5.

[18] *See id.* art. 13.

[19] *See id.* art. 14.

[20] *See id.* art. 24-30.

[21] *See id.* art. 36, §9.

[22] *See id.* art. 34, §1.

[23] *Id.*

But perhaps this also betrays ambivalence in the legal status of "rights" such as the so-called right to clean environment. These principles may portray our wish on the one hand that these rights be viewed as real rights, but at the same time our awareness that we might not have the resources available for their realization over the short term.

Our domestic law is not the only place we should look to when searching for the right to a clean environment and other socioeconomic rights. Ghana is a party or signatory to some important and relevant international instruments and there should be an interface between domestic law and international legal instruments.

But this introduces our second formalistic problem, namely, the treatment of the sources of law in our Constitution. With our penchant for participation in treaty negotiations and signatures, our Constitution makes no explicit reference to international law as a source of law in our legal system. There is an oblique reference under the Directive Principle of State Policy Article 40(c) to the government's duty in international relations to promote respect for international law and treaty obligations.[24] But Article 11, which deals with the sources of law in Ghana proper, does not even mention international law either in its customary law or treaty law mode.[25]

This is in sharp contrast with other constitutional systems, such as that of the United States, where treaties are named specifically as a separate and distinct sources of law, co-equal in the U.S. with federal statutory law under Article VI (2) of its constitution.[26] Constitutions such as the 1949 German Constitution, as amended, go even further by explicitly providing for the applicability of customary international law and for the supremacy of its rules over statutes.[27]

The consequential problem that we face in Ghana is that we subscribe to the dualist view of treaty law application according to which norms of international law acquire applicability in the domestic legal system only when a domestic legislature has transformed or reduced these treaties into domestic legal instruments, such as a statute or an annex to a statute. This is in contrast with legal systems where international treaties are named as one of the sources of law, as is the case in the United States, or where treaties after ratification are said to be directly applicable without the additional measure of passing a legislature measure - the so-called self-executing treaties.

The treatment of international law in the 1992 Constitution does not of course suggest that the international law of socioeconomic rights is inapplicable in our domestic legal system, or that an aggrieved person cannot make a claim in our courts based on international legal norms. But it does mean that the plaintiff or applicant would have to unravel, or point to, an international legal right embedded in one of the sources of law specifically named in Article 11. For example, in the case of a treaty-based right, one might point to a constitutional provision or

---

[24] *See id.* art. 40, §c.

[25] *See id.* art. 11.

[26] U.S. CONST. art. VI, §2.

[27] GRUNDGESTEZ [GG] [Constitution] art. 25 (F.R.G.).

to a parliamentary enactment giving it direct force in the legal system. For a right based on customary international law, one might with some luck find the norm in the common law or other existing law in the form of case law or convince a court in an ongoing case that a certain legal proposition is a rule of customary international law.

We really ought to remind our legislature, the legal officers from the treaty sections of our Attorney General's Department, and the Ministry of Foreign Affairs, that there is the constant need to ensure not just the parliamentary ratification of signed treaties, but also their enactment into statutes as Annexes, Schedules, or Appendices, so that the treaty rights and obligations of our citizens will become meaningful.

II. The Justiciability of Economic and Social Rights in Courts and Other Institutions

I will now make brief references to attempts to enforce socioeconomic rights under the African Charter on Human and People's Rights, as well as the domestic law of selected African countries.

1. Regional and Subregional Institutions

In 1981, the Assembly of the Heads of Government of the Organization of African Unity ("OAU"), now replaced by the African Union ("AU"), adopted the African Charter on Human and Peoples' Rights ("ACHPR").[28] The ACHPR forms the cornerstone of the African regional human rights system. Article 30 of the Charter establishes an African Commission on Human and Peoples' Rights, which in turn constitutes the fulcrum for the attempts at human rights enforceability under the Charter.[29] Article 45(2) mandates the protection of the Charter rights.[30] Complaints of human rights violations are embodied in what is referred to in the Charter as communications.

Under Articles 47 through 53, if a state party reasonably believes that another state party has violated the provisions of the Charter, it may write to the State to draw attention to the matter.[31] If the matter is not settled within three months, the matter may be referred to the Commission which will then conduct its own investigation and make findings.[32] The report is then submitted to the Assembly of Heads of State and Government, with recommendations for appropriate action.[33] It is also possible under Article 55 for public interest groups and others to submit communications at the discretion of the Commission.[34]

---

[28] ACHPR, *supra* note 5.

[29] *See id.* art. 30.

[30] *See id.* art. 45(2).

[31] *See id.* art. 47-53.

[32] *See id.* art. 48.

[33] *See id.* art. 52-53.

[34] ACHPR, *supra* note 5, art. 55.

It is apparent that the Charter paradigm was essentially an intergovernmental arrangement for the invocation of the remedial process, as well as its enforcement. This has probably introduced an unacceptable level of politicization into the process. However, on a continent with a history of massive violations of human rights, until recently this was a good start. The representatives of the African Union, meeting in Banjul, Gambia on June 9, 1998, moved a step further and adopted the Protocol to the African Charter on Human and People's Rights On the Establishment of an African Court on Human and People's Rights.[35] The Protocol came into force on January 1, 2004.[36] With the establishment of this Court, we should do a better job at acknowledging the justiciability of socioeconomic rights and of their enforcement for the benefit of aggrieved individuals.

Nonetheless, I should like to indicate some sense of how these communications regarding socioeconomic rights that have been handled under the old Charter system.

a. The Right to Work

Annette Pagnoulle ex rel. Abdoulaye Mazou v Cameroon (1996/97) was a case involving the right to work, based on Article 15, which provides that "every individual has a right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."[37]

The right to work is understood as the right of everyone for an opportunity to gain a living by work that he or she freely chooses or accepts. The Commission held that the dismissal from employment or non-reinstatement of Mazou, a magistrate, who had been unlawfully detained and removed from his former position, constituted a violation of the right to work under Article 15, thusly entitling the employee to compensation.[38]

b. The Right to Health (ACHPR)

Article 16(1) of the Charter states, "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health."[39] There are other health-related rights guaranteed under the Charter, including prohibitions against inhuman or degrading punishment and treatment (Article 5) and non-consensual medical treatment and experimentation.[40]

In regards to prisoners, the Commission has stated that the Charter obliges states to provide detainees access to medical care. In *Media Rights Agenda v Nigeria*, the Commission held that denying a detainee access to a doctor, thereby

---

[35] Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc.

[36] *Id.*

[37] *Pagnoulle ex rel. Mazou v Cameroon,* 10th Annual Activity Report of the African Court for Human and Peoples' Rights (1996-1997).

[38] *Id.*

[39] ACHPR, *supra* note 5, art. 16(1).

[40] *See id.* art. 5.

leading to a deterioration in health, violates the prisoner's right to health.[41] Similarly, the starvation of prisoners and the denial of blankets, clothing, and health care have been found to be in violation of Article 16 in addition to violating the prohibition against torture and other cruel, inhuman, and degrading treatment under Article 5.[42]

The Commission has also found, *inter alia,* a violation of Articles 16 and 24 by Nigeria through its oil production operations that caused environmental degradation and resultant health problems among the Ogoni people.

c. *The Right to Education*

The right to education, guaranteed in Article 17(1), simply states "Every individual shall have the right to education."[43] The Article is not sufficiently detailed to give a clear understanding of the nature and scope of the right guaranteed, or to ascertain the obligations of state parties in relation to education. For example, it is uncertain as to which education one has a right to. Some guidance may be derived from the Commission guidelines for national periodic reports on the right to education under Article 17(1) of the African Charter.

2. Domestic Courts

For the domestic litigation of social and economic rights, I will first make reference to three South African cases brought to court under that country's current Constitution. The first is a right to health case, *Soobramoney v Minister of Health, KwaZulu Natal.* In this case, the applicant sought an order to compel the KwaZulu-Natal health department to provide him with access to extremely expensive dialysis treatment at a time when many poor people in that province had little or no access to even primary health care services.[44] The Court found the case justiciable but did not find any violation of Article 27(3) dealing with the right to health, due perhaps to the opportunity cost of acceding to the applicant's request.[45]

The second case, *Gov't of the Republic of S. Afr. & Others v Grootboom & Others*, deals with the right to housing. In *Grootboom*, to which I made reference earlier, the South African Constitutional Court upheld the plaintiff's claim that the state's housing policy in the area covered by the Cape Metropolitan Council had failed to make reasonable provisions within available resources for

---

[41] *Media Rights Agenda & Others v Nigeria*, 14th Annual Activity Report of the African Court for Human and Peoples' Rights (2000-2001).

[42] *See generally Malawi African Ass'n v Mauritania*; *Amnesty Int'l v Mauritania*; Diop, *Union Interafricaine de Droits de l'Homme and RADDHO v Mauritania*; *Collectif de Veuves et Ayants-driot v Mauritania*; *Ass'n Mauritanienne de Droits de l'Homme v* Mauritania, 13th Annual Activity Report of the African Court on Human and Peoples' Rights (1999-2000).

[43] ACHPR, *supra* note 5, art. 17(1).

[44] *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) (S. Afr.).

[45] *Id.*

the people in that area.[46] These people had no access to land, nor roofs over their heads, and were living in intolerable conditions.[47]

The final South African case, *Minister of Health & Others v Treatment Action Campaign & Others*, concerns the right to health in the context of the AIDS epidemic. Here, the applicants sought to challenge a government policy on accessibility to a drug called nevirapine, which is designed to prevent the risk of mother-to-child transmission of HIV.[48] The policy restricted the provision of a single dose of nevirapine to mothers and their newborn children at only limited designated research and training sites, thereby eliminating its availability at any other public health institutions outside the designated sites.[49] The result was that doctors in the public sector, who did not work at these sites, were unable to prescribe the drug to their patients, even though the manufacturers of nevirapine offered to make it available to the South African government free of charge for a period of five years.[50]

The question in the case became whether the measures adopted by the government fell short of its obligations under the Constitution.[51] The Constitutional Court found that this was indeed the case, and ordered the Government to remove the aforementioned restrictions.[52]

It should be noted that in all these cases there was no problem with justiciability as the Court had determined earlier that they were justiciable. Thus the Court's remaining task was to determine whether the South African state had complied with its constitutional obligations relating to particular social and economic rights.

Finally, I will refer to a short but interesting case from Ghana, which, even though not presented to the Court directly as a constitutional right to health, was brought in that vein. In *Republic v Chief Admin. Officer, La Polyclinic, La-Accra, Minister of Health, Att'y General and Minister of Justice*[53], an application was brought by a public interest law firm on behalf of a 25 year-old woman who had delivered a baby in a polyclinic in the capital city of Accra. She was clearly an indigent young woman, unemployed, and living on the generosity of her mother. She was presented with a bill of Cedis 1,500,000, roughly $150 U.S. dollars at the time, which was a rather stiff amount considering her economic status. She was clearly in no position to pay, but the polyclinic authorities detained her and her child until settlement of the bill. At the time of bringing the suit, she and her child had been in hospital detention for at least eighteen days.

---

[46] *Grootboom, supra* note 12.

[47] *Id.*

[48] *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) (S. Afr.).

[49] *Id.*

[50] *Id.*

[51] *Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.).

[52] *Id.*

[53] *Republic v Chief Admin. Officer*, La Polyclinic, La-Accra, Minister of Health, Att'y General and Minister of Justice, (High Ct. 2003) (Ghana), unreported (copy on file with author).

The applicant, through a public interest law firm, sued for the release of herself and her child on the writ of habeas corpus and on alleged violation of Article 14 of the 1992 Constitution of Ghana, which guaranteed the right to personal liberty subject to certain well-known exceptions. The High Court Judge, in his ruling on March 3, 2003, ordered that the applicant be released and brought before him.

III. Conclusion

I will conclude this presentation by restating the following postulates. First, socioeconomic rights are to be presumed to be rights in the legal sense if they are described as rights in the relevant Constitution, or in treaty provisions made enforceable within the municipal legal system, or in statutory law, whether or not they constitute rights in the narrow Hohfeldian sense. Second, claims based on such rights could be justiciable in the courts even if the total resources for their implementation are not immediately at the disposal of the state or other community actors. Third, the notion of progressive realization of justiciable socioeconomic rights, as exemplified by the South African Constitution of 1996, affords the state and other authorities a constitutional breathing space when they cannot reasonably go beyond available resources at the time of the suit.

While these may serve as useful postulates, the ultimate determinants in the enforceability and actual enforcement of socioeconomic rights include what the state is willing to implement in good faith at the domestic level, the willingness of the judiciary and other national quasi-judicial institutions to break new ground in the expansion of justice delivery, and the courage and commitment of the legal profession and nongovernmental legal aid organizations to engage in public interest litigation, among other measures such as public education and political lobbying.

"DEMOCRACY STOPS AT MY FRONT DOOR"[1]: OBSTACLES TO GENDER EQUALITY IN SOUTH AFRICA

Penelope Andrews[†]

Introduction

> *Faced with an ever-increasing prevalence of rape and other forms of violence against women in South Africa, we are challenged like never before to revisit deeply buried stereotypes that inform our views of women in relation to men. . . in the same way we confront our hidden view of blacks in relation to Whites. . .Just as racism increases the potential of violence against Black people, sexism has a similar effect on women.*[2]

I frequently travel to South Africa, and I also maintain regular e-mail and telephone contact with friends and family there. Certainly during the decades leading up to 1994 (when the first democratic elections were held), the preoccupation was with ending apartheid and establishing a constitutional democracy. Over the last few years, however, I've been struck by two dominant concerns of the society at large.[3] The first has to do with the level and severity of crime, and in particular, sexual crimes against women and girls, although increasingly men and boys are also becoming victims of such crimes.[4] The second concern relates to the alarming escalation of the HIV/AIDS epidemic throughout the country.[5] Both of these concerns embody several themes, including the ubiquity and vio-

[†] Visiting Professor, Valparaiso University School of Law (on leave from the City University of New York School of Law) B.A. LL.B (Natal) LL.M. (Columbia).

[1] Helen Moffett, *The Political Economy of Sexual Violence in Post-Apartheid South Africa* 16 (Unpublished paper on file with the author). This is a direct quote from a member of South Africa's Parliament, who "saw no contradiction between his . . . endorsement" of equality and his "repeated insistence that at home, he was the master".

[2] MMATSHILO MOTSEI, THE KANGA AND THE KANGAROO COURT: REFLECTIONS ON THE RAPE TRIAL OF JACOB ZUMA (2007) at 19.

[3] These are by no means the only concerns that people raise. The continuing poverty and economic inequalities probably rate as the primary concern of most South Africans. *See* Marius Pieterse, *Rescuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services,* 22 S. AFR. J. ON HUMAN RTS 473 (2007); *see also* EBRAHIM KHALIL HASSEN, FIGHTING POVERTY IN SOUTH AFRICA: A CIVIL SOCIETY READER, *available at* http://www.naledi.org.za/fighting_poverty/book.htm.

[4] Charlene Smith, *Rape has Become a Sickening Way of Life in our Land,* SUNDAY INDEPENDENT, Sept. 26, 2004, *available at* http://www.sundayindependent.co.za/index.php?fSectionId=1042&fArticleId=2238856.

[5] *See* R. DORRINGTON *et al,* THE DEMOGRAPHIC IMPACT OF HIV/AIDS IN SOUTH AFRICA: NATIONAL AND PROVINCIAL INDICATORS FOR 2006, 2006, *cited in* Nathan Geffen, *Encouraging Deadly Choices: AIDS Pseudo-Science in the Media* 3-4 (Ctre for Soc. Sci. Research: AIDS and Soc'y Research Unit, Working Paper No. 182, 2007), *available at* http://www.aidstruth.org/aids-pseudo-science-in-the-media.pdf.

lent characteristics of crime, the inability of the police to curtail the prevalence of crime, and the palpable fear of crime to which all communities are subjected.[6]

Beyond the actual rapid spread of the virus, the unwillingness of South Africans to alter their sexual conduct in the face of the HIV/AIDS epidemic is quite perplexing.[7] One overarching theme that embodies South Africa is the alarming sense of official denial, whether it's governmental denial about crime statistics,[8] the numbers of HIV/AIDS cases, or even the causal connection between the HIV virus and full-blown AIDS.[9] Although the South African government appears to have finally discarded its reticence in acknowledging the causal connection between the HIV virus and full-blown AIDS, its response to providing treatment for HIV/AIDS sufferers suggests an underlying sense of reluctance, and some would argue, denial of the contemporary reality of the epidemic in South Africa.[10]

My paper addresses this question of denial, and locates it within the current project of formal gender equality underway in South Africa. This official commitment to gender equality is encapsulated in South Africa's impressive Constitution and Bill of Rights, in which equality and dignity underpin the formal constitutional arrangement.[11] This commitment to equality is not just incorporated in the constitutional text,[12] but is also reflected in an admirable constitutional jurisprudence emanating from the Constitutional Court that eschews formal equality for a more substantive version.[13]

In addition, post-apartheid legislation promulgated in pursuit of the constitutional commitment to equality demonstrates that the government, at least at the formal level, is committed to a comprehensive democratic framework that promotes equality. Statutes such as the Promotion of Equality and the Prevention of Unfair Discrimination Act,[14] the Prevention of Domestic Violence Act,[15] and the Black Empowerment Act,[16] amongst others, attest to the commitment of such a vision. In addition, statutes such as the Recognition of Customary Marriages

---

[6] *See* SOUTH AFRICAN GOVERNMENT CRIME STATISTICS (2006/2007), *available at* http://www.info.gov.za/issues/crime/crimestats0607.pdf.

[7] Frederik le R. Booysen, *HIV/AIDS: Poverty and Risky Sexual Behaviour in South Africa,* 3 S. AFR. J. OF AIDS RESEARCH 57 (May 2004).

[8] Mpumelelo Mkhakebela, *Mbeki Finds Politicking by Stats a Tricky Game,* SUNDAY TIMES, Aug. 12, 2007, *available at* http://www.thetimes.co.za/PrintEdition/BusinessTimes/Article.aspx?id=537145.

[9] *See* Geffen, *supra* note 5.

[10] *See* TREATMENT ACTION CAMPAIGN, *Let them Eat Cake: A Short Assessment of Provision of Treatment and Care 18 Months After the Adoption of the Operational Plan* (June 2005).

[11] S.AFR. CONST. 1996.

[12] *Id.* at ch. 2.

[13] For a discussion of South Africa's equality jurisprudence, *see* Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa,* 26 N.C. J. INT'L. L. & COM. REG. 693 (2001); *See also* Saras Jagwanth and Christina Murray, *'No Nation Can Be Free When One Half of it is Enslaved': Constitutional Equality for Women in South Africa,* in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 230 (Beverly Baines and Ruth Rubio-Marin eds., 2004).

[14] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[15] Domestic Violence Act 116 of 1998.

[16] Broad-Based Black Economic Empowerment Act 53 of 2003.

Act,[17] which purports to protect women in polygamous African customary unions, suggest that the South African Parliament is deeply committed to recognizing the rights of those in indigenous communities who prefer to regulate their private lives according to indigenous principles.[18] This is so even though those principles might at first glance contradict majoritarian notions of equality, as polygamy arguably does.[19]

The South African situation therefore raises the central question: How can a country with such a wonderful and expansive constitution, in which gender equality is embraced comprehensively, evince such widespread and systemic violence against women? In addition, what accounts for a democratic government, seemingly committed to the principle of equality in the public sphere, demonstrating such reluctance to decisively confront the egregious consequences of public and private violence against women? It is my thesis that despite the formal embrace of gender equality in the Constitution, and despite attempts by all branches of government to address the legacy of racism, sexism, and patriarchy, the interlocking cultural underpinnings of sexism and patriarchy were never dislodged.[20] Moreover, a formal vision of equality was unequivocally endorsed across all sectors of South African society with respect to the eradication of racism, but this universal endorsement was absent with respect to gender equality. Indeed, patterns of violence that incubated during the years of apartheid were unleashed as the society became more open and democratic. Ironically, the transparency of the new democratic order revealed the underbelly of apartheid violence, a very public violence as described in the final report of the Truth and Reconciliation Commission.[21] But this transparency has also highlighted the chronic reality of private violence, particularly against women.[22] It was this violence that apartheid never fully revealed, and that has come to be a major impediment to women enjoying the human rights encapsulated in the South African Bill of Rights.[23]

In this paper, I argue that the impressive array of legislative enactment and "transformative constitutional jurisprudence"[24] masks the underlying reality of an "unacknowledged gender civil war"[25] in which hundreds of thousands of South

---

[17] Recognition of Customary Marriages Act 120 of 1998.

[18] *See* Penelope Andrews, *Big Love? The Recognition of Customary Marriages in South Africa,* 64 WASH. & LEE L. REV. (forthcoming 2008).

[19] *Id.*

[20] Helen Moffett argues that, "[t]he women's movement in South Africa. . ..had arguably failed to deconstruct the multiple overlapping and entrenched forms of patriarchy that had flourished under apartheid." Moffett, *supra* note 1, at 16.

[21] *See* FINAL REPORT OF THE TRUTH & RECONCILIATION COMMISSION (2004).

[22] *See* Usha Roopnarain, *A Gendered Perspective on Violence in South Africa,* 2 FEMINISTA No. 11, *available at* http://www.feminista.com/archives/v2n11/roopnarain.html.

[23] *Id.*

[24] Karl E. Klare, *Legal Culture and Transformative Constitutionalism,* 14 SAJHR 146 (1998).

[25] Moffett, *supra* note 1, at 2.

African women are victims of rape and domestic violence.[26] The government's persistent questioning and denial of the high incidence of sexual violence (and overall crime) in South Africa is a symptom of a ubiquitous masculinity, one that Judge Sachs has referred to as the "only truly non-racial institution in South Africa."[27] This reality demonstrates the limits of legal equality in the face of deeply embedded patriarchal norms, a perennial concern of feminists, critical scholars, as well as legal advocates.

This paper focuses on the underlying interlocking cultures of masculinity and the impediments they generate towards the attainment of gender equality. Yet it recognizes that the enforcement of rights, for example, through aggressive governmental campaigns, vigilant policing efforts, or widespread educational campaigns that teach citizens how to access legal rights, all perform important functions in eradicating violence against women. These are important processes and they play a vital role in the assessment of methods that can stem the tide of violence against women. For the purposes of this paper, I am centrally concerned with how the contemporary social, political, and economic reality of South Africa creates conditions for the pervasive and chronic statistics of violence against women, and how these conditions impede legal redress. In particular, I am interested in examining why the constitutional paradigm of rights and gender equality fails to be internalized across the society.

Violence Against Women: The Problem

Two rape cases in the past decade, and their aftermath, serve as an illustration of the contradiction between constitutional norms of dignity and equality on one hand, and the chronic problem of violence against women on the other. In both of these cases, the alleged rapists were high profile, powerful black men, and their victims were powerless women. One of the accused was a sports icon, the other a prominent political figure.

The events surrounding the trials, including the popular and legal discourse as well as popular response to the victims, say much about the gap between formal equality and reality on the ground. In both cases, the widespread vilification of the victim was especially startling.

In 1999, Makhaya Ntini, a star member of South Africa's national cricket team, was charged and convicted in a trial court of the rape of a female domestic worker. On appeal, his rape case was overturned, the appellate court finding too many deficiencies in the state's case.[28] In 2005, Jacob Zuma, the former deputy-

---

[26] Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425 (1999).

[27] Albie Sachs, *Judges and Gender: The Constitutional Rights of Women in a Post-Apartheid South Africa*, 7 AGENDA 1, 1 (1990).

[28] Peter Dickson, *Ntini wins Rape Appeal*, WEEKLY MAIL & GUARDIAN, Oct. 29, 1999, *available at* http://www.mg.co.za/articledirect.aspx?articleid=166910&area=%2farchives%2farchives_online_edition%2f.

President, was also charged with the rape of a young woman who had been a guest in his home. He was acquitted at trial.[29]

A few things stand out about both trials. The treatment of the victims and the consequences for the accused are particularly significant. Also significant was the public response to the rape victims and the anxiety the victims experienced as a result of their public castigation for accusing prominent men. The woman who accused Ntini stated that, "[a]t first, I felt reporting the rape was a mistake. Everyone hated me, blaming me for ruining [Ntini's] life. Now he has been found guilty, I am glad that I had the courage to stand up for my rights."[30]

Zuma's accuser was regularly vilified by crowds of his supporters outside the courtroom. Some suggested that because she is HIV positive, she must be a prostitute.[31] Others referred to her as a witch, and on one occasion Zuma supporters burned an effigy of her outside the courtroom.[32]

What was most profound about both trials, however, was the lack of consequences for the accused. In a poll conducted in South Africa in 2006, Ntini was (for the second year) ranked as South Africa's most popular sports personality among adults.[33] Zuma's popularity was also unaffected by his rape trial. Indeed, it is arguable that his claims on the office of the presidency remain quite conceivable.[34]

Nothing in my comments is meant to suggest that South Africa is unique with respect to these issues. In the United States and other democratic societies, powerful men also engage in sexual misconduct towards women and do not appear to be widely stigmatized by the consequences of their conduct. But in this and other democratic societies, widespread public opprobrium often leads to legislative and other societal changes as a result of concerted agitation by human rights advocates, particularly women's groups. One such campaign comes to mind—the issue of sexual harassment after Anita Hill's testimony on Capital Hill of sexual harassment claims against Justice Clarence Thomas.[35] Despite Justice Thomas' successful nomination to the U.S. Supreme Court, Hill's testimony captivated the country and spotlighted the problem of sexual harassment in the

---

[29] *See State v Jacob Gedleyihlekisa* 2006 (7) BCLR 790 (W) (S. Afr.).

[30] Nomangezi Matokazi (Age 22), after the East London Magistrate's Court found national squad cricket player Ntini guilty of raping her. *Verbatim*, WEEKLY MAIL & GUARDIAN, Apr 30, 1999, *available at* http://www.mg.co.za/articledirect.aspx?articleid=211216&area=%2farchives__print_edition%2f.

[31] *See* MOTSEI, *supra* note 2 (a compelling account of the Zuma case).

[32] *Id.* at 117.

[33] See *Ntini Takes Top Spot in Popularity Stakes*, WEEKLY MAIL & GUARDIAN, Dec. 23, 2006, *available at* http://www.mg.co.za/articlePage.aspx?articleid=294475&area=/breaking_news/breaking_news__sport/#.

[34] A Zuma supporter said this about the trial "Zuma for president, no matter what. This young girl is crazy and does not respect older people. She has insulted all women in this country, even those supporting her. She's a bitch and deserves to be jailed for dragging Zuma's name in the mud." MOTSEI, *supra* note 2, at 117.

[35] *See generally* TIMOTHY PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL & THE-BEHIND-THE-SCENES STORY OF A SUPREME COURT NOMINATION (1992) and AFRICAN AMERICAN WOMEN SPEAK OUT ON ANITA HILL-CLARENCE THOMAS (Geneva Smitherman ed. 1995).

United States. Several females were elected to Congress as a direct result of the widespread societal disdain for such instances of sexual harassment.[36]

When it comes to crimes against children, particularly sex crimes, successful campaigns by advocates have led to decisive legislative action. After Amber Hagerman was abducted and murdered in Texas in 1995, citizens in that state lobbied extensively for a change in the laws to protect children from sexual predators, leading to a system of "Amber Alerts."[37] In South Africa, the government has also taken steps to address the widespread incidence of sexual violence and punish those responsible. For example, steps have been taken to improve the prosecution of sexual offenses, such as the establishment of specialized police units and specialized sexual offense courts.[38] But these formal legislative steps often appear to contradict the public sentiment as expressed by the government. For example, although advocates, including rape victims, have lobbied extensively in the media and launched public awareness and educational campaigns,[39] the government's primary response has been to question the rape statistics, deeming them exaggerated.[40] One example is the hostility of President Thabo Mbeki to Charlene Smith, a white woman who was raped in her home in Johannesburg, and who has since become one of South Africa's most prominent anti-rape activists. President Mbeki's response to her activities illustrates how an issue of gender becomes embroiled in a debate about race. By suggesting that Smith's motive in campaigning for rape prevention is merely to reinforce societal stereotypes of black men as predatory, the President reduced the issue of violence against women to one of racism, an always toxic issue in South Africa.[41]

No analysis of the contemporary reality of crime in South Africa, and particularly crimes against women, can proceed without investigating the social, political, and economic legacies of apartheid. Although feminist scholars have attempted to examine the effects of apartheid on women's status and role within South African society, it is only in the last few years that a concerted effort has been made by feminist and other legal scholars to explore the linkages of today's overwhelming statistics on sexual violence to the legacy of apartheid.[42]

---

[36] *See generally* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita F. Hill and Emma C. Jordan eds. 1995).

[37] *See* http://www.amberalert.gov.

[38] *See* Human Rights Watch, *South Africa: The State Response to Violence and Rape* (1995), http://www.hrw.org/reports/1995/Safricawm-02.htm (last visited Feb. 22, 2008).

[39] In 1999, an advertising campaign involving the South African born actress Charlize Theron that attempted to highlight the alarming statistics on rape, was halted when a men's group sued, claiming that the advertisement violated their constitutional rights to equality. *See Rape Advert Row in South Africa,* BBC NEWS, Oct. 5, 1999, http://news.bbc.co.uk/1/hi/world/africa/465639.stm.

[40] *See Mbeki Questions SA Rape Figures*, BBC NEWS, Oct. 28, 1999, http://news.bbc.co.uk/1/hi/world/africa/492669.stm.

[41] Sharon Lafraniere, *After Apartheid: Heated Words about Rape and Race,* N.Y. TIMES, Nov. 24, 2004, *available at* http://www.nytimes.com/2004/11/24/international/africa/24letter.html?n=Top/Reference/Times%20Topics/People/M/Mbeki,%20Thabo&_r=1&adxnnl=1&oref=slogin&adxnnlx=1192680514-s4djga6srUnAdKwOyN4emA.

[42] *See* Sheila Meintjies, *Gender, Citizenship and Democracy in Post-Apartheid South Africa,* GENDER RESEARCH PROJECT BULLETIN (1997); *see also* Catherine Campbell, *Learning to Kill: Masculinity, The Family and Violence in Natal,* 18 J. OF S. AFR. STUD. 614 (1992); Moffett, *supra* note 1.

In this exploration, the work of feminist and other legal scholars, particularly from the United States and other Western societies, has been helpful.[43] But the application of their work has been limited because they "fail to provide sufficiently nuanced explanatory or analytical frameworks"[44] for the "pervasive sexual violence"[45] that is the reality in South Africa.

In light of South African experiences with the Truth and Reconciliation Commission, specifically its failure to adequately address gross gender-based violations of human rights, there is growing literature suggesting that the Commission's conduct has contributed to the continuing violence against women, a violation of their human rights.[46] There is also a growing body of scholarship that suggests that during periods of "political restructuring," the incidence of sexual crimes against women and children rises exponentially, often linked to the brutal, violent, immediate past.[47] This appears to be the case in South Africa.

The Constitution and Gender Equality

South Africa's commitment to equality and dignity is clearly articulated in its Constitution. The preamble to the Constitution explicitly recognizes the injustices of apartheid South Africa, and serves to honor "those who suffered for justice and freedom," and who "worked to build and develop" the country.[48] In particular, the Constitution is seen as the vehicle to "heal the divisions" of apartheid South Africa and to "establish a society based on democratic values, social justice, and fundamental human rights."[49] Chapter One of the South African Constitution amplifies the founding values of human dignity, equality, nonracism, and non-sexism.[50]

The protection afforded to women is not confined to the traditional categories of protection against discrimination based on sex and gender, but is grouped with the same protections afforded to pregnancy and sexual orientation cases. Combined with other grounds for prescribing unlawful discrimination, including race, national origin, and language, the protection against invidious discrimination is expansive and unequivocal.[51] In addition, a particular novel feature of the South

---

[43] *See e.g.*, Catherine Mackinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1988); Elizabeth Schneider, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

[44] Moffett, *supra* note 1, at 16.

[45] *Id.*

[46] Beth Goldblatt, *Gender and Reparations in South Africa, available at* http://www.ictj.org/static/Africa/SAfrica/SouthAfricaExecSum.pdf.

[47] *See* Human Rights Watch, *"The Guns Are In The Bushes": Continuing Abuses in Liberia* (Jan. 2003), *available at* http://hrw.org/backgrounder/africa/liberia0104.htm; *see also* Jeanne Ward and Mendy Marsh, United Nations Population Fund, *Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources, available at* www.unfpa.org/emergencies/symposium06/docs/finalbrusselsbriefingpaper.doc.

[48] S.AFR. CONST., *supra* note 11.

[49] *Id.*

[50] *Id.*

[51] *Id.* at ch. 2 § 9(3) (providing that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or

African Constitution is its recognition of the interconnectivity of different forms of discrimination, providing that the state may not discriminate "on one or more grounds."[52] The Constitution, therefore, protects individuals on one or several grounds, thereby embracing the arguments that focus on the intersections of different forms of discrimination made by critical race scholars.[53]

By creating the conditions, at least formally, for the development of a jurisprudence of substantive equality, the Constitution embodies the right to dignity and preferential treatment in order to redress the legacy of discrimination and dispossession. Section Nine of the Constitution provides that "to promote the achievement of equality," the government may take "legislative and other measures designed to protect or advance persons" who have been "disadvantaged by unfair discrimination."[54] The Constitution also envisions access to justice as a fundamental right[55] and, in addition to a range of procedural safeguards, provides a generous provision for standing.[56] This provision therefore guarantees that a range of interested parties, not directly affected by the immediate dispute may, in the public interest, bring a host of constitutional claims.

The Bill of Rights purports to protect the "right to bodily and psychological integrity" which includes the reproductive rights of women, providing that everyone has the right "to make decisions concerning reproduction."[57] In addition, the Bill of Rights also protects the right of everyone to personal security[58] and freedom from violence, thus proscribing violence in both the public and private sphere.[59] This provision has been interpreted by the Constitutional Court to mandate the government to take proactive steps to shield women from domestic violence,[60] as well as violence at the hands of strangers.[61]

The Bill of Rights has been hailed as one of the Twentieth Century's most impressive documents, and has been examined and analyzed by a variety of local

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.").

[52] *Id.*

[53] *See* Taunya Banks, *Toward a Global Critical Feminist Vision: Domestic Work and The Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1 (1999); *see also* Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995).

[54] S. AFR. CONST. 1996, *supra* note 11, ch. 2, § 9(1), (2).

[55] *Id.* at ch. 2, § 34.

[56] The Constitution provides that an aggrieved individual has the right to approach a court seeking relief. This section lists those individuals as:

a. anyone acting in their own interest;
b. anyone acting on behalf of another person who cannot act in their own name;
c. anyone acting as a member of, or in the interest of, a group or class of persons;
d. anyone acting in the public interest; and
e. an association acting in the interests of its members. *Id.* at ch. 2, § 38.

[57] *Id.* at ch. 2, § 12(2).

[58] *Id.* at ch. 2, § 12(1).

[59] *Id.* at ch. 2, § 12(1)(c).

[60] *S. v Baloyi*, 1999 (2) SA 425 (CC) ¶ 11 (S. Afr.).

[61] *S. v Carmichele*, 2001 (4) SA 938 (CC) ¶ 62 (S. Afr.).

and global texts, in a range of disciplines, particularly law and politics.[62] The African National Congress ("A.N.C."), the ruling party since 1994, negotiated with other political parties in drafting such an impressive constitutional document committed to equality. Such negotiations created the conditions for significant female representation in Parliament by setting aside one-third of the A.N.C.'s first Parliamentary list for female candidates.[63] As a consequence, women are now represented in Parliament in impressive numbers, and women also hold several ministries, including key ministries such as Minerals and Energy, Justice, and Health and Foreign Affairs.[64]

The Constitutional Court and Gender Equality

The Constitutional Court's evolving jurisprudence on equality has for the most part demonstrated a commitment to substantive equality, as opposed to mere formal equality.[65] The Court has been mindful of the context within which discrimination and disadvantage are embedded within South African society, and its judgments have attempted to focus not just on equal treatment, but also on equitable outcomes. As Justice O'Regan noted in an earlier equality case, "it is necessary to recognize that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality."[66]

Since its inception in 1995, the Constitutional Court has heard several cases that directly address the equality principle as outlined in the Constitution.[67] In this endeavor the Constitutional Court has incorporated international human rights law, and in particular the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[68] in its interpretation of equality. By doing so, the Court has spawned an equality jurisprudence that is widely cited by legal scholars.[69] Indeed, this literature constantly references the transforma-

---

[62] *See, e.g.*, RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (David Van Wyk et. al. eds., 1995). *See also* THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellmann eds., 2001); *and* NEGOTIATING JUSTICE: A NEW CONSTITUTION FOR SOUTH AFRICA (Mervyn Bennun & Malyn D. D. Newitt ed.,1995).

[63] *See* Danisa Baloyi, *Apartheid and Identity: Black Women in South Africa, in* CONNECTING ACROSS CULTURES AND CONTINENTS: BLACK WOMEN SPEAK OUT ON IDENTITY, RACE, AND DEVELOPMENT 39, 43 (Achola O. Pala ed., 1995).

[64] *Id.*; *see also* Brigitte Mabandla, *Women in South Africa and the Constitution-Making Process, in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 70 (Julie Peters & Andrea Wolper eds., 1995).

[65] *See* Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, 21 S. AFR. J. ON HUM. RTS. 163 (2005); *see also* Pierre De Vos, *Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. ON HUM. RTS. 258 (2001).

[66] *President of the Rep. of S. Afr. & Another v Hugo*, 1997 (4) SA 1 (CC) ¶ 112 (S. Afr.).

[67] *See* Penelope E. Andrews, *Evaluating the Progress of Women's Rights on the Fifth Anniversary of the South African Constitution*, 26 VT. L. REV. 829 (2002).

[68] Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 Dec. 1979, entry into force 3 Sept. 1981.

[69] *See* S. AFR. CONST. 1996, *supra* note 11.

tive possibilities generated by the equality jurisprudence of the South African Constitutional Court.[70]

The Court has adjudicated a vast array of equality issues.[71] Exploring a range of factual situations, the Court has formulated a substantive vision of equality. In a case involving the rights of HIV-positive persons not to be discriminated against in their employment, the Court made it clear that it would not condone the stigma and stereotyping of those who are HIV positive.[72] Justice Ngcobo, writing for the majority, stated:

> In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation [sic] and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.[73]

The Court in its judgment examined the commercial reasons provided for the disparate treatment of those who are HIV positive, and concluded that those reasons cannot be conscripted to disguise prejudice.[74]

The Court has also reviewed prohibitions made on the rights of homosexuals to engage in consensual sexual conduct, finding such prohibitions a violation of their constitutional rights to equality, privacy, and dignity.[75] Similarly, the Court has struck down legislation that failed to provide the same benefit to permanent same-sex life partners as it did to heterosexual spouses.[76]

In an equality judgment that examined the law of primogeniture, the Court weighed the rights of African girls and women not to be discriminated against under indigenous customary law.[77] In its judgment, the Court examined the place of indigenous law in South Africa's constitutional framework, recognizing the important role of indigenous law in South Africa's culturally diverse society. Referring to the neglect of the positive aspects of customary law, including its

---

[70] Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. ON HUM. RTS. 248, 255 (1998).

[71] *See e.g.*, *Harksen v Lane NO, O & Others* 1998 (1) SA 300 (CC) (S. Afr.); *Brink v Kitshoff NO*, 1996 (4) SA 197 (S. Afr.); *Pretoria City Council v Walker* 1998(2) SA 363 (CC) (S. Afr.); *Prinsloo v Van Der Linde &* Another 1997 (3) SA 1012 (CC) (S. Afr.).

[72] *Hoffmann v S. Afr. Airways*, 2001 (1) SA 1 (CC) ¶ 28 (S. Afr.).

[73] *Id.* at ¶ 28.

[74] For a discussion of the protection of HIV positive individuals in the workplace, *see generally* Charles Ngwena, *HIV in the Workplace: Protecting Rights to Equality and Privacy*, 15 S. AFR. J. ON HUM. RTS. 513 (1999).

[75] *Nat'l Coal. for Gay and Lesbian Equal. & Another v Minister of Justice & Others*, 1999 (1) SA 6 (CC) ¶ 2 (S. Afr.).

[76] *Nat'l Coal. for Gay and Lesbian Equal. & Others v Minister of Home Affairs & Others*, 2000 (2) SA 1 (CC) ¶ 2 (S. Afr.).

[77] *Bhe & Others v Magistrate, Khayelitsha & Others*, 2005 (1) SA 580 (CC) ¶ 222 (S. Afr.).

"nurturing of health communitarian traditions,"[78] the Court nevertheless found it subject to the Bill of Rights, particularly the equality provisions.

The Court has also addressed the issue of violence against women, interpreting such violence as an impediment to equality. Utilizing both the imperatives in the Bill of Rights, and those found in international instruments such as the CEDAW, the Court has adopted a purposive approach, outlining very clearly in its pronouncements the need to eradicate the ubiquitous problem of violence against women in South Africa. Justice Sachs has noted that, "[t]he non-sexist society promised in the. . .Constitution, and the right to equality and non-discrimination guaranteed. . .[is] undermined when spouse-batterers enjoy impunity."[79]

The court has applied this approach to violence against women in the public criminal law arena. An example of the former is the Court clearly articulating that the right to be free from violence in both the public and private sphere may result in state actors being held accountable when they negligently or intentionally fail to protect female victims from violence perpetrated by third parties.[80]

The Court has struck an impressive balance between the competing rights of privacy and state regulation[81] and religious rights and equality.[82] It has done so by appreciating the context of the lived realities and deeply held beliefs of individuals and groups as well as the need to create a society predicated on equality and dignity. In the same vein, the Court has tried to strike a healthy accord between the rights of criminals in a very violent society, such as South Africa, and the rights of individuals to personal security.[83]

The Court has therefore appreciated its central role in ensuring that the equality and dignity provisions in the Constitution are interpreted in a manner that will benefit women, especially black women, who are the most disadvantaged group in South African society. But the effectiveness of the Court in this venture is dependent upon the willingness of government officials and members of civil society to give effect to, and enforce, its judgments.[84]

Impediments to the Eradication of Violence against Women

In previous articles I have outlined the contours of the cultures of masculinity in South Africa.[85] These articles have left a devastating legacy for women, who

---

[78] *Id.* ¶ 45.

[79] *S. v Baloyis*, *supra* note 60, ¶ 12.

[80] *S. v Charmichele*, *supra* note 61.

[81] *Case & Another v Minister of Safety & Sec. & Others*, 1996 (3) SA 617 (CC) ¶89 (S. Afr.) (statutory prohibition of possession of pornographic material unconstitutional).

[82] *Prince v President of the Law Soc'y of the Cape of Good Hope*, 2002 (2) SA 794 (CC) ¶ 90 (S. Afr.) (religious use of cannabis not sufficient ground for exemption from drug laws).

[83] *See S. v Zuma & Others*, 1995 (2) SA 642 (CC) (S. Afr.).

[84] In addition, certain scholars have argued that the contextual interpretative stance of the Court may not be as transformative as it appears, since it draws too much on an experiential base that judges may not possess. *See* Albertyn & Goldblatt, *supra* note 70, at 260.

[85] *See* Andrews, *supra* note 26. *See also* Penelope Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 MICH. ST. J. INT'L L. 41 (2007) [hereinafter *Learning to Love*].

continue to be subject to widespread fear of violence. Indeed, as Mmatshilo Motsei, a South African women's rights activist, poignantly notes:

> For me, the Zuma rape trial did not help relieve the fear that I will not be able to protect myself and my daughter or her daughter from rape. Since I started working in the area of gender-based violence, I have carried a fear of being raped. When I lie awake at night after watching a news bulletin riddled with bullets and blood, rage and rape, I long for a place where women and children are cherished and loved by equally loved and self-loving men.[86]

In the last few years, lesbians have become the target of a pattern of intimidation and violence. In fact, it is suspected that three female murder victims in the last year were targeted specifically because of their sexual orientation.[87]

In my scholarship I have examined the tripartite components of masculinity in South Africa. I have argued that the peculiar flavour of South African patriarchy emanates from three interlinked political and cultural origins, and that these origins overlap and combine to create particularly vexing political, social, and cultural conditions in which to pursue gender equality.[88] The three sources I identify are first, a masculinist culture emanating from an authoritarian and militaristic apartheid state; second, the masculinist cultural remnants of a violent anti-apartheid struggle; and third, aspects of indigenous customary law that continue to subordinate women.[89] Regarding the first, the Final Report of the Truth and Reconciliation Commission has delineated in graphic detail the depths to which the South African military and security establishment have gone to retain white supremacy in the face of overwhelming opposition to apartheid.[90] Such violence became an integral part of white South Africa's maintenance of rigid racial hierarchies, and it also reinforced a militaristic masculinity predicated on the subordination of white women and the suppression of black women.[91]

The liberation movements were scrutinized as well by the Truth and Reconciliation Commission, and their methods also raised questions about male violence and female subordination.[92] Despite popular rhetoric, the very nature of this clandestine military struggle and the inevitable absence of transparency and accountability reinforce patterns of masculinity that disadvantaged women disproportionately.[93] The mythologized and lionized "comrade" became the

---

[86] MOTSEI, *supra* note 2, at 195.

[87] *See* Jessica Stern, *Letter: Homophobic Violence Mars Women's Day*, HUMAN RIGHTS WATCH, Aug. 8, 2007, http://hrw.org/english/docs/2007/08/08/safric16618.htm; and *South Africa: Murder Highlights Violence Against Lesbians*, HUMAN RIGHTS WATCH, Mar. 3, 2006, http://www.hrw.org/english/docs/2006/03/02/safric12753.htm).

[88] *See* Andrews, *supra* note 26.

[89] Andrews, *Learning to Love*, *supra* note 85, at 46-48.

[90] *See* FINAL REPORT OF THE S. AFR. TRUTH & RECONCILIATION COMM'N, *supra* note 21.

[91] Andrews, *Learning to Love*, *supra* note 85, at 46-48.

[92] *Id.*

[93] *See* Tumi Makgetla, *Zuma Trial Lifts the Lid on Gender Based Violence During Exile*, MAIL & GUARDIAN ONLINE, Mar. 17, 2006, http://www.mg.co.za/articlePage.aspx?articleid=267002&area=/in-

penultimate symbol of black political opposition, epitomizing male strength and male defiance.[94]

The third component of this masculinist culture in South Africa was a patriarchy rooted in some indigenous and religious institutions, and in indigenous and religious practices that subordinate and disadvantage women in a host of areas, including the custody of children, access to property, and rights to inheritance.[95] These systems have also come under scrutiny as more women exert their autonomy in the face of new opportunities generated by the equality framework in the Constitution.[96]

These interlocking and overlapping patriarchal norms have provided tremendous challenges for South Africa in its quest towards gender equality. In a society in transition, beset by economic and social problems, attacking the root causes of violence against women will require considerable resources. Moreover, as I indicated earlier, the government has committed itself, at least formally, to take steps to stem violence against women.[97] Arguably, however, much of behavioural change is not predicated on money, but merely a change in values. Prominent South Africans have called for a reappraisal of the "value system",[98] and have bemoaned the "failure of idealism" of those who govern South Africa, as well as its citizens.[99]

Since 1994 and the establishment of the democracy in South Africa, significant opportunities have arisen in which an evaluation of the widespread incidence of violence against women may have provided the moment for an unequivocal rejection of such violence, one that went beyond mere platitudes. One occasion presented itself during the process of the Truth and Reconciliation Commission in which the issue of violence against women could have been explored in greater detail.[100] Indeed, feminists who have lamented the failure of the Truth and Reconciliation Commission to do so have argued persuasively that this omission was a missed opportunity for the society to recognize in a vivid and

---

sight/insight_national; *see also* Jacklyn Cock, *Keeping the Fires Burning: Militarisation and the Politics of Gender in South Africa,* 16 REVIEW OF AFRICAN POLITICAL ECONOMY 50 (Summer 1989).

94 Andrews, *Learning to Love, supra* note 85, at 46-48.

95 *See* Christina Murray and Felicity Kaganis, *The Contest Between Culture and Gender Equality Under South Africa's Interim Constituion,* 5 OXFORD INT'L L. REV. 17 (1994); *and* Ronald Thandabantu Nhlapo, *International Protection of Human Rights and the Family: African Variations on a Common Theme,* 3 INT'L J.L. & FAM. 1 (1989).

96 *See Bhe & Others v Magistrate, Khayelitsha & Others,* 2005 (1) SA 580 (CC) ¶ 222 (S. Afr.).

97 *See* Andre Grobler, *Mbeki Focuses on Fighting Crimes Against Women,* MAIL & GUARDIAN ONLINE, Aug. 9, 2007, http://www.mg.co.za/articlePage.aspx?area=/breaking_news/breaking_news__national/&articleid=316220.

98 MOTSEI, *supra* note 2, at 173 (quoting Sello wa Loate, *Violence-Related Deaths in the Lives of Young Black Men in Alexandra Townships*).

99 *See* Anton Ferreira, *Tutu Sees 'Original Sin' in SA Leaders,* MAIL & GUARDIAN ONLINE, Sep. 26, 2006, http://www.mg.co.za/articlePage.aspx?articleid=284961&area=/breaking_news/breaking_news__national/; *and* Bishop Desmond Tutu, *The Joy and Shame of SA Today,* THE TIMES, Sep. 1, 2007, http://www.thetimes.co.za/News/Article.aspx?id=553563.

100 Andrews, *Learning to Love, supra* note 85, at 51-52.

compelling way the systemic nature of violence against women.[101] This recognition may have also contributed somewhat to a greater societal commitment to address this violence.

The Zuma trial and its aftermath provided a crucial moment for South Africans to engage with the issues of violence against women in a fruitful manner. Instead, the trial divided the nation, and created a level of rancour and hostility that allowed the issue to become submerged in the acrimony.[102] As a consequence, the moment was lost.

Annually an opportunity arises when South Africans celebrate International Women's Day on the eigth of August. This day is an opportunity widely recognized as a national moment to reflect on the situation of women. Although the government annually embarks on widely publicized public events, it has been argued that the day should be more about concrete action and less about platitudes.[103] A female commentator noted caustically on the celebrations this past August:

> Why are we willing to subject ourselves to the words of powerful men and women who unashamedly act in hateful ways towards women. . .What does this incessant talk of women's empowerment matter if most women continue to live below the poverty line. . .Which women's rights are we speaking about when we turn around and tell young lesbians it is their fault they were raped, or make homophobic jokes?[104]

Her observations, understandably exasperated, reflect widespread scepticism on the part of women advocates, as a result of insufficient action on the part of the government, the police, and other relevant parties to deal aggressively and comprehensively to reduce the statistics of violence against women.

Conclusion

I have argued that the unravelling of the cultures of masculinity, so deeply ingrained in the political, social, and emotional DNA of South Africa, will require more than a constitutional and legal framework committed to equality to radically eviscerate such deeply ingrained attitudes.[105] This is not to discount the enormous symbolic and substantive possibilities generated by a legal edifice committed to gender equality, but such a legal infrastructure requires constant, vigilant, and effective implementation and enforcement processes.

---

[101] Lyn Graybill, *The Contribution of the Truth and Reconciliation Commission Toward the Promotion of Women's Rights in South Africa,* 24 WOMEN'S SUTD. INT'L F.1 (2001); *and* Beth Goldblatt and Shiela Meintjes, *Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission* (May 1996), *available at* http://www.doj.gov.za/trc/submit/gender.htm.

[102] *See generally* MOTSEI, *supra* note 2.

[103] Pumla Dineo Gqola, *Whip Out the Gender-Speak,* MAIL & GUARDIAN ONLINE, Aug. 8, 2007, http://www.mg.co.za/articlePage.aspx?articleid=316006&area=/insight/insight__comment_and_analysis/.

[104] *Id.*

[105] *Id.*

EXPORTING SOUTH AFRICA'S SOCIAL RIGHTS JURISPRUDENCE

Eric C. Christiansen[†]

I. Introduction

The South African Constitution and its early jurisprudence have been discussed extensively among comparative constitutional law scholars and other academics. Frequently, the Constitution has been described as a model document for the domestic protection of human rights, and the South African Constitutional Court, the highest court in post-apartheid South Africa, has often been lauded by political progressives and human rights activists for advancing the cause of equality and justice.

One of the most distinctive elements of South Africa's jurisprudence has been its willingness to adjudicate socio-economic rights in addition to traditional civil and political rights. While the advancement of social welfare as a whole has clearly proceeded at a far slower pace than political equality, the Constitutional protection of social rights and its enforcement by the Court continues to inspire social justice advocates in their work within South Africa and abroad. Indeed, despite the as-yet inadequate advancement of substantive socio-economic equality, much can be praised about the South African Constitutional project—and much can be learned from it.

Particularly, much benefit will result from closer examination of the process through which the South African Constitutional Court decided how to adjudicate social rights cases—a jurisprudential investigation of the manner of enforcement rather than of the substantive rights. These are not the normal comparative law questions of similarity, difference, and connection, but rather the more pragmatic inquiries into functional adaptability and transnational applicability. Can the lessons of the South African Court's first generation aid a nation adopting, amending, or newly interpreting its national constitution's commitment to social justice? Specifically, can the Court's unique approach to formulating socio-economic rights jurisprudence be exported to other countries? In this essay, I assert that the unique but adaptable manner in which the Court's social rights jurisprudence accommodates classic non-justiciability arguments, what I call "differentiated incorporation," advances social justice within South Africa and creates an exportable model of social rights enforcement.

[†] Associate Professor of Law, Golden Gate University School of Law, San Francisco, California. J.D., New York University School of Law, 2001; M.A., University of Chicago, 1994. This essay is a somewhat expanded version of my presentation at the 2007 Loyola University Chicago School of Law International Law Review Symposium, *The Rule of Law and Delivering Justice in Africa*. I am grateful to the organizers, participants, and attendees for an engaging and informative event. I also wish to thank Michele Benedetto and Chester Chuang for their thoughtful critiques of an earlier version of this essay.

II. An Affirmative Social Right Jurisprudence

Alone among constitutional democracies, the Republic of South Africa has developed a comprehensive socio-economic rights jurisprudence that enforces an array of enumerated social welfare protections including rights to housing, healthcare, and education.[1] This jurisprudence arose in direct refutation of the commonly held view among constitutional scholars that socio-economic rights are incapable of legitimate judicial determination.[2] Nevertheless, the South African Constitutional Court chose to adjudicate such rights as a means of advancing the transformative purpose of the South African Constitution.

Because of the well-established arguments against judicial enforceability of social rights, the South African jurisprudence has been described as revolutionary and heroic by advocates of constitutional social welfare rights and as irresponsible and doomed by their opponents. As I have argued in a previous work, the Court has in fact been both less revolutionary and less irresponsible than commentators claim.[3] This is because the South African Court has crafted an affirmative social rights jurisprudence that is tempered by internalized justiciability concerns. It has incorporated the concerns of jurists opposed to enforceable socio-economic rights into its manner of adjudicating and remedying such rights. Part III of this essay will focus on how this restrained formulation of a social rights jurisprudence results in exportability, but prior to such a discussion, it is helpful to understand the nature of South Africa's social rights provisions and its core case law.

A. Enumerated Socio-economic Rights

Socio-economic rights had long been advocated by the African National Congress ("ANC") and other groups fighting to end apartheid in South Africa. At the core of such "social rights" are rights to adequate housing, healthcare, food, water, social security, and education.[4] Each of these rights is expressly included

---

[1] *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527-28 (1992). South Africa is exceptional for its comprehensive list of enumerated, enforceable social rights. *See also* Eric C. Christiansen, *Survey of Socio-Economic Rights in National Constitutions: Healthcare, Education, Social Security, Housing, Food and Water* (December 2005) (unpublished manuscript, on file with author).

[2] *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS, 237-320 (2d ed. 2000); Philip Alston, *Economic and Social Rights*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137 (Louis Henkin & John Lawrence Hargrove eds., 1994); Dennis Davis, *The Case Against Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475 (1992).

[3] Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007) [hereinafter *Non-Justiciable Rights*]. The present essay relies heavily on the historical background and additional discussion made at greater length in the earlier *Non-Justiciable Rights* article.

[4] There is no set list of which rights are properly defined as "socio-economic" rights. For purposes of this essay, I include those rights in the South African Constitution that are traditionally and consistently identified as socio-economic rights by commentators, have been so identified by the South African Constitutional Court, or have as their evident purpose the improvement of society through an impact on individuals' social welfare. Similarly, I use the terms "social" and "socio-economic" to describe the

in the 1996 South African Constitution.[5] The right to housing presents the typical textual formulation of such rights in that the declaration of the right is accompanied by textual limitations related to "available resources" and "progressive realization". It states:

§ 26. Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.[6]

The impetus (if not necessity) to include such rights in South Africa's first democratic constitution was a result of the role socio-economic oppression played within the larger context of apartheid's system of political and social subjugation. As the Court acknowledged in its first social rights case:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions in great poverty. . . These conditions already existed when the Constitution was adopted and a commitment to address them, and transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.[7]

Nevertheless, inclusion of these rights in the post-apartheid constitution was contentious and thus, in accordance with the negotiated political compromise between the constitutional drafting parties, the new Constitutional Court had to "certify" that the socio-economic rights provisions were compatible with the pre-

---

same collection of rights; I have avoided "red" rights, "second-generation" rights, and "positive" rights as less helpful descriptors for the same rights.

[5] S. AFR. CONST. 1996, ch. 2. The other core social rights included in the South African Bill of Rights include:

§ 27. Health care, food, water and social security
(1) Everyone has the right to have access to
a. health care services, including reproductive health care;
b. sufficient food and water; and
c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.

§ 28. Children
(1) Every child has the right. . .
c. to basic nutrition, shelter, basic health care services and social services;

§ 29. Education
(1) Everyone has the right
a. to a basic education, including adult basic education; and
b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

Additional socio-economic rights can be found in the South African Constitution in ch. 2: §23 (labor relations), §25 (property rights and land reform), §28 (children's rights to, *inter alia*, "basic nutrition, shelter, basic health care services and social services"), and §35 (detainee's rights to, *inter alia*, "adequate accommodation, nutrition, reading material and medical treatment").

[6] S. AFR. CONST. 1996, ch. 2, § 26.

[7] *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para. 8 (S. Afr.). This and all South African Constitutional Court cases are available online at the Court's official website, http://www.constitutionalcourt.org.za.

Constitutional agreement between the ANC and the white-minority government.[8] A denial of certification would have resulted in removal of such rights from the text of the proposed constitution.[9]

B. Social Rights at the Constitutional Court

1. Threshold Adjudication Question

The Court's *In re Certification* judgment addressed multiple challenges to the inclusion of social rights in the Constitution. The challenges were based on arguments that socio-economic rights were not "universally recognized fundamental rights" and that they violated the constitutional principle of separation of powers.[10] The Court rejected both challenges.[11] It asserted that the "universally recognized fundamental rights" requirement merely established a minimum threshold that placed no limit on the inclusion of additional rights.[12] The Court also stated that the adjudication of socio-economic rights did not inevitably violate the separation of powers requirement.[13] The threshold importance of the *Certification* judgment is that it permitted inclusion of socio-economic rights in the final text of the South African Constitution. However, while the justiciability question (*whether* such rights could be adjudicated) was answered, the enforceability question (*how* such rights would be adjudicated) remained. Two years later, the Court addressed the enforcement question in its first substantive social rights case.

---

[8] For a general discussion of the required constitutional certification process, *see Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras. 1–19, 76–78 (S. Afr.); for a discussion focused on the controversy regarding inclusion of social rights, *see Non-Justiciable Rights*, *supra* note 3, at 324-42.

[9] The Constitution discussed in this essay is actually the second post-apartheid constitution. S. AFR. CONST. 1996. The first, or Interim Constitution, was a temporary measure to support the transition to democracy. Schedule 4 of the Interim Constitution formalized the pre-constitutional negotiated agreements—required elements of the final Constitution—in its "Thirty-four Principles." S. AFR. (INTERIM) CONST. 1993.

[10] S. AFR. (INTERIM) CONST. 1993, sched. 4, Principles II ("Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution. . .") and Principle VI ("There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances. . .").

[11] The initial review of the proposed final constitution by the Constitutional Court held "we ultimately come to the conclusion that the [proposed text] cannot be certified as it stands because there are several respects in which there has been non-compliance with the [Thirty-four Principles]," but also noted that, "in general and in respect of the overwhelming majority of its provisions, [it] has attained [its] goal." *Ex parte Chairperson of the Constitutional Assembly, supra* note 8, at para. 31. Certification of the subsequently amended text was granted by the full court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC) para. 205 (S. Afr.). There were no changes to the social rights provisions between the two drafts.

[12] *Ex parte Chairperson of the Constitutional Assembly, supra* note 8, at para. 76.

[13] *Id.* at para. 77. ("[I]t cannot be said that by including socio-economic rights . . . a task is conferred upon the courts so different from that ordinarily conferred upon them . . . that it results in a breach of the separation of powers.").

2. *Enforcement of Substantive Social Rights*

Since its 1996 *Certification* opinion, the Court has addressed the Constitution's social rights provisions in numerous cases, but the core of its substantive jurisprudence is evident in three fundamental cases: *Soobramoney, Grootboom,* and *Treatment Action Campaign (TAC).*

In *Soobramoney,* the Court affirmed the enforceability of social rights but held that neither the right of access to healthcare nor the right to emergency medical treatment required the Court to overturn the otherwise reasonable medical decisions of doctors and administrators faced with limited financial resources.[14] The *Grootboom* case addressed the right to housing for squatters in an informal settlement and concluded that governmental housing programs violated the Constitution where they failed to develop and implement a "comprehensive and coordinated program" to advance the right, particularly if the programs failed to address the housing needs of the poorest South Africans.[15] In the *TAC* case, the Court declared unconstitutional a government program which significantly restricted distribution of medication that dramatically decreased the likelihood of mother-to-child transmission of HIV.[16]

In general, these and other social rights cases[17] affirm that, although the "obligations imposed on the state . . . are dependent upon the resources available for such purposes,"[18] the Court will require creation of a broad policy-based program with particular attention paid to those who are most vulnerable.[19] Also, it requires implementation by including "all reasonable steps necessary to initiate and sustain" a successful program to advance the asserted right.[20]

However, while the Court's case law may be studied by foreign courts, it is neither the specific textual provisions nor the interpretation of the rights themselves that are most readily exportable. Instead, it is the manner in which the South African Constitutional Court has chosen to formulate its approach to enforcement that may assist other nations to advance social welfare through their constitutions.

---

[14] *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal,* 1998 (1) SA 765 (CC) (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/[1234].PDF.

[15] *Gov't of Republic of S. Afr. v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/2798.PDF.

[16] *Minister of Health v Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC) (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/2378.PDF [hereinafter TAC].

[17] *See, e.g.,* Jaftha v Schoeman 2004 (2) SA 140 (CC) (S. Afr.) (concluding a lack of judicial oversight for a debt-related forced home sale was an unconstitutional violation of Section 26); *Khosa v Minister of Soc. Dev.* 2004 (6) SA 505 (CC) (S. Afr.) (denial of social welfare benefits to non-citizen permanent residents was unreasonable and violated the rights to both equality and social security). For a discussion of the most judgments (including lower court judgments) related to socio-economic rights, *see* the Socio-Economic Rights Project of the Community Law Centre's Case Reviews, *available at* http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/case-reviews-1/south-african-cases.

[18] *Soobramoney, supra* note 14, para. 11 (Ngcobo dissent).

[19] *Grootboom, supra* note 15, para. 67.

[20] *Id.*

C. Crafting a Social Rights Jurisprudence

In order to reach its judgments in the cases discussed above, the South African Constitutional Court needed to determine how a judicial body can best interpret and enforce such rights—an assessment that required the Court to confront long-standing arguments against the justiciability of socio-economic rights. The Court did this by implicitly and explicitly evaluating the varied arguments against social rights adjudication, discarding the analyses that were inapt under its unique Constitution and then crafting a jurisprudence that accounts for and incorporates the surviving criticisms in its enforcement. This differentiated incorporation model, which allows each country to evaluate general adjudication critiques against its specific judicial culture and constitutional text, is what makes the South African approach an exportable commodity.

1. Adjudication of Non-Justiciable Rights

There are a significant number of traditional arguments against the justiciability of socio-economic rights but they fall into two general categories of concerns: those focused on democratic legitimacy issues and those related to the competency of courts to address socio-economic controversies.[21] Since such arguments were crafted in the abstract—in the absence of a court that was actually adjudicating such rights and without a single country enforcing expansive, enumerated constitutional social welfare provisions—several of the traditional critiques were inapplicable as applied in the particular South Africa Constitutional setting. Arguably, it would be true of any country that only some of the theoretical concerns will remain valid when examined in the specific context of its history, culture, and government.

Legitimacy critiques are mostly focused on the anti-democratic nature of judicial decision-making; it is the anti-majoritarian critique of judicial review exacerbated by the intrinsically policy-related nature of decisions regarding social welfare and budgeting. Nevertheless, such critiques were generally out of place in the South African context because the Constitutional text expressly grants unusually expansive powers of judicial review to the South African judiciary—powers meant to enable the Court to advance the fundamentally transformative purpose of the post-apartheid constitution.

The second category of traditional concerns about judicial enforcement of social rights is more problematic, even in South Africa. Competency concerns focus on the inadequacy of the judiciary and of the adjudicative process to appropriately resolve social rights complaints. These failings include (1) procedural limitations, especially concerns about the general suitability of any particular plaintiff; (2) informational problems, including the absence of specialized, unbiased fact-finding; and (3) remedy-related difficulties, particularly where judicial remedies would be inadequate or politically inappropriate. While some of these alleged failings are addressed by the procedures and capabilities of the

[21] *See Non-Justiciable Rights, supra* note 3, at 347-52.

Constitutional Court,[22] these plaintiff, information, and remedial problems (unlike most of the legitimacy-based concerns) remained genuine concerns as the Court began crafting its social rights jurisprudence. Hence, for the South African Court—as would be true of any nation's court wishing to enforce social rights but cognizant of the traditional concerns—only a small subset (rather than the full panoply) of non-justiciability arguments needed to be addressed in its formulation of a jurisprudence.

2. *A Prudent Jurisprudence*

The South African Court has created a jurisprudence that accounts for the justiciability concerns that survived its differentiation process, i.e., the plaintiff, information, and remedial problems discussed above. Whether consciously or not, the current South African social rights jurisprudence recognizes this smaller set of critiques as legitimate and adjusts its standard approach to rights adjudication in ways that account for those existing justiciability concerns. The peculiarities of the Court's jurisprudence in this area and some of its otherwise inexplicable adjudicatory decisions make sense if we understand that the Court is crafting the most expansive possible affirmative social rights jurisprudence while tailoring it to account for the traditional theoretical challenges.

As a consequence, the South African jurisprudence exhibits greater legislative deference in the area of social rights than in its comparable civil and political rights cases.[23] Additionally, the Court has repeatedly focused its assessment on the compliance of the governmental program at issue with Constitutional requirements, rather than on the rights of the particular plaintiffs before it.[24] Both of these strategies have lessened the impact of the plaintiff problem. Furthermore, in deference to the potential information problem, the Court has regularly requested additional information prior to and following oral argument, has been hesitant to resolve issues where it lacks sufficient essential data, and has defined, as necessary, its substantive decision-making areas fairly narrowly. For example, the Court navigates among sub-issues and makes determinations only in precise areas where it concludes it has sufficient information to adjudicate.[25]

Moreover, the Court has avoided the most egregious elements of the remedial problem by refusing to fully enforce (or recognize) absolute rights, rights not limited by the "progressive realization" and "within available means" language

---

[22] S. AFR. CONST. 1996 ch. 8, § 173 (the Constitutional Court has "inherent power to protect and regulate their own process . . . taking into account the interests of justice.") and § 172 ("When deciding a constitutional matter within its power, a court. . . may make any order that is just and equitable. . . .").

[23] *Grootboom*, *supra* note 15, para. 41 ("A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent."); *TAC*, *supra* note 16, para. 22 (tailoring its orders in order to be consistent with "the deference that courts should show to [policy] decisions taken by the executive").

[24] All of the Constitutional Court's orders to date relate to the state's programs rather than to an individual's request for relief. No individual relief has yet been granted in a socio-economic rights case.

[25] *Khosa*, *supra* note 17 ("[i]t would not, however, have been in the public interest in this case for this Court to have proceeded . . . without the information necessary for a proper determination of the case. . . ."); *TAC*, *supra* note 16, para. 128 (refusing to address formula feeding issue because there was not "sufficient evidence to justify an order").

of most social rights.[26] Unqualified or absolute rights are a significant problem for any social rights jurisprudence because they illustrate the worst fears of the critics of social rights enforcement. On their face, such rights are not subject to implementation over time nor to concerns about inadequate state resources. If enforceable as written, they would grant extensive authority for the Court to insist upon their full implementation as a first-tier priority unhindered by other factors; even valid concerns of the legislature or executive.

In its adjudication, the South African Constitution Court's jurisprudence has ignored the unlimited language of the right to basic education and to the basic welfare for all children. Section 29 states "[e]veryone has the right. . . (a) to a basic education, including adult basic education"[27], while section 28 states "[e]very child has the right. . .(c) to basic nutrition, shelter, basic health care services and social services."[28] Instead it has interpreted these textually unlimited rights as if they were no different from the other, limited social rights in the Constitution.[29]

Additionally, the Court has expressly rejected the application of a minimum core rights analysis in its interpretation of social rights under the Constitution. Minimum core analysis is the legal procedure used by the United Nations Committee on Economic, Social and Cultural Rights in its analysis of mandatory country reports under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[30] The Committee analyzes information supplied by the reporting country and non-governmental organizations to identify a minimum core, which is a mandatory minimum standard to be provided by each reporting country to its citizens in relation to each right protected by the ICESCR.[31] It is particularly surprising that the South African Constitutional Court would reject such analysis (as it does for both standard and unlimited social rights) because the Constitution requires the Court to consider international law in its adjudication of rights.[32] Moreover, the text of the social rights in the South African Constitution is based on the wording in the ICESCR.[33] These counter–textual

---

[26] Absolute rights are those rights without in-text limitations on the rights. They lack the standard internal limitation: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." S. AFR. CONST. 1996, ch. 2, § 26. Similar language is included in the text of other rights; *see supra* note 5.

[27] S. AFR. CONST. 1996, ch. 2, § 29.

[28] S. AFR. CONST. 1996, ch. 2, § 28.

[29] *See Non-Justiciable Rights*, *supra* note 3, at 382-84; *Grootboom*, *supra* note 15. The Court has not yet had a case relying on the right to basic education.

[30] International Covenant on Economic, Social and Cultural Rights (ICESCR), *opened for signature*, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[31] U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, General Comment 3: The Nature of States Parties Obligations, § 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) ("[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.").

[32] S. AFR. CONST. 1996, ch. 2, § 39 ("When interpreting the Bill of Rights, a court. . . must consider international law; and. . . may consider foreign law.").

[33] ICESCR, *supra* note 30, art. 2(1). ("Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full

elements of its jurisprudence provide strong evidence that the Court is crafting a jurisprudence that deftly navigates around the surviving concerns of those opposed to social rights adjudication.

This process of differentiated incorporation is what makes the South African model exportable. Other countries' judiciaries can do the same as the South African Court has done: after distinguishing between the valid and invalid components of the traditional non-justiciability critiques in their domestic setting, they can adjudicate in a manner that incorporates the extant concerns.

D. Two Exportability Challenges

Effectively examining the potential exportability of the South African model described above requires appraisal of at least two preliminary challenges: the unique character and purpose of the South African Constitution and the question of its success in actually advancing social justice. These challenges raise questions an "importing" country might consider: whether the South African model will be viable elsewhere and whether it has been successful enough in South Africa to merit adoption by another country.

1. Addressing Distinctiveness

The first challenge is the distinctiveness of the South African Constitution. It is certainly true that the modern South African Constitution is unlike any other. It is a reaction to the particular outrages of the system of government that preceded it. In its rights provisions and in its structural provisions the Constitution signals and effectuates a radical repudiation of apartheid. The Preamble states in part:

> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to
> 1.) Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> 2.) Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> 3.) Improve the quality of life of all citizens and free the potential of each person; and
> 4.) Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.[34]

Some may argue that its exceptional character limits the Constitution's usefulness to other countries and disallows any transnational applicability.

However, the South African Constitution is unique in precisely the same way that all other constitutions are unique. Like all constitutions, the South African

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

[34] S. AFR. CONST. 1996, pmbl.

Constitution is fundamentally reactive. With its expansive protections of civil and political rights, the Constitution responds to the panoply of restrictions placed on all non-white South Africans—most forcefully upon black South Africans—under apartheid. The primacy of the fundamental rights in the Constitution and the particular pre-eminence of the rights to dignity and equality reflect the desired reversal of the previous political morality.

Of course, apartheid was much more than just a political system of forced segregation and disfavor against black South Africans. Apartheid also established and sustained a scheme of crippling socio-economic inequality; apartheid-era South Africa was "among the world's most unequal economies."[35] The South African Constitution includes provisions addressing socio-economic rights in reaction to the effect of apartheid. For many South Africans, the end of apartheid required an end to the radical economic disparity of the past. Political equality was both an end itself, as well as a means to equality of access, advantage and opportunity.[36] To the extent it is true that the radical socio-economic inequality of apartheid resulted in inclusion of enumerated and enforceable social rights in the final South African Constitution, it could be argued that such rights cannot effectively be exported to countries with a different history.

Indeed, historical need and popular expectations applied substantial pressure on the drafters of the Constitution. However, that is the nature of the constitutional drafting process generally, not just in South Africa. There is no reason to assume similar pressures for improved socio-economic conditions will not be (or have not been) frequent motivations for political change through constitutional processes in many countries. Indeed there is every reason to believe that constitutional drafting procedures that result in enumerated and ostensibly enforceable social rights are in fact motivated by very similar popular, political, or moral concerns. Similar constitutional goals may grow out of distinctive histories.

Furthermore, we are not discussing the adoption of South Africa's textual rights provisions or its case law by other countries. Rather what South Africa offers is a method of formulating a country-specific approach to domestic enforcement of social rights. It is the particular strength of the Constitutional Court's social rights jurisprudence that it is procedurally adaptable to different circumstances in different countries under different constitutions. Distinctiveness encourages adoption of a method of adjudication that tailors to the particular milieu of the adopting country, as the South African method does. The textual

---

[35] Julian May, Talking to the Finance Minister about Poverty: Pro-Poor Policy and the Political Economy of Information 10, University of Manchester (April 7-9, 2003), *available at* http://www.chronicpoverty.org/pdfs/2003conferencepapers/May.pdf (citing the World Bank's description of South Africa's economic inequality). Statistics for all individual aspects of the South African economy evidence dramatic racial inequality during the transitional period. While just one percent of whites fell below the national poverty line, over 60% of blacks did. *Id.* 65% of whites had completed secondary education compared to 24% of blacks and 24% of blacks had no formal schooling (compared to one percent of whites) at the time of the transition. A.J. Christopher, ATLAS OF CHANGING SOUTH AFRICA, 233 (2000).

[36] 3 Debates of the Constitutional Assembly, Rep. of S. Afr., 122-23 (1996) (ANC member Kader Asmal said, "The struggle for liberation in South Africa was not only a struggle for the right to vote, to move, to marry, or to love. It has always been a struggle for freedom from hunger, poverty, landlessness, and homelessness."); *Soobramoney*, *supra* note 7, para. 8.

provisions of the South African Constitution are similar to those that many countries may include in their constitutions, but it is the manner of enforcement through differentiated incorporation that exhibits adaptability to historical settings and political realities in other countries.

2. *Assessing Success*

The second challenge that could be raised against the exportability of the South African social rights jurisprudence is its capacity for success. Does the South African model succeed in increasing social justice through advancement of socio-economic rights? Specifically, is life better for those South Africans who experienced wide-ranging oppression of their social rights during the apartheid regime? Presumably, if the social welfare has not improved of the people for whom the constitutional inclusions of such rights were meant to protect, there is little impetus to adopt such a system.[37]

Assessing the success of the Court's jurisprudence on such a level is challenging. What determines success and how can it be reliably measured? One gauge is overall improvement in the substantive areas enumerated in South African social rights provisions, e.g., housing, healthcare, basic education, social services for children, etc.

Unfortunately, it is challenging to answer even such a relatively straight-forward inquiry. In attempting to find reliable socio-economic data, the normal difficulties—especially when researching conditions among the poorest South Africans—are dramatically compounded by the unreliability (and occasionally the outright falsity) of apartheid-era statistics. According to current reports, conditions have improved for the poorest South Africans. The available and most reliable data shows an increase in the amount of available housing, the number of medical clinics, and school enrollment but, the stark socio-economic legacy of apartheid will haunt South Africa for many more decades.[38]

The slow pace of change has justifiably disappointed many concerned individuals within and outside South Africa. The real question is not whether there has been some evident improvement, but whether socio-economic indicators have improved as much as they realistically could have. And, what is the contribution of the constitutional provisions? For our purposes, the concern is about the con-

---

[37] It should also be noted that there is a certain irrationality to the "ineffectual" challenge from opponents of social rights since it contradicts the well-established legitimacy arguments social rights adjudication. The traditional legitimacy complaint asserts that the monies spent on social programs—as required by an empowered court interpreting enumerated rights—are a violation of the necessary separation of powers because the legislative branch is responsible for all budgeting. This critique presumes—as do other traditional critiques—that allocation of money to social programs will occur. That alone may be presumptive evidence of a potential for success.

[38] *See* Gov't Comm'n and Info. Sys., Rep. of S. Afr., Toward Ten Years of Freedom: Progress in the First Decade, Challenges in the Second Decade (2004), *available at* http://www.gcis.gov.za/docs/publications/10yrstab.pdf. The housing situation illustrates the continuing challenge. Even though 1.46 million subsidized houses were built in the decade prior to 2004, 36% of households still do not reside in formal housing. *Id.* Similar statistics are available for other socio-economic indicators. *Id. See* SouthAfrica.Info, The Poor Must Also Benefit: Mbeki, (Feb. 6, 2006), http://www.southafrica.info/ess_info/sa_glance/government/stateofnation2006-social.htm (last visited Jan. 10, 2008).

tribution of the Constitution and the Court to the advancement of social equality—an even more elusive component of the assessment of success. Has the presence of enumerated social rights provisions in the Constitution improved the lived reality of South Africans? In the absence of any improvement, it could be reasonably asserted that the Court had failed in its appointed task. But where, as here, there is evidence of improvement, responsible assessment of judicial success may remain difficult.[39]

Ultimately, in what must be an incomplete assessment, I believe that there has been clear success in one area, moderate successes in other areas, and additional indeterminate positive effects. At the very least, the Court's jurisprudence has been clearly successful on an inspirational level. By hearing claims and evaluating government actions against constitutional social welfare protections, the Court reminds South Africans of the vision of substantive equality contained in their Constitution. "The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."[40]

Moderate success has been evident in the Court's judgments in the specific substantive areas brought before it. Official responses to *Soobramoney* and *TAC* asserted a willingness to comply with the Court's orders but implementation has been inconsistent and incomplete.[41] The unknowable element of the "success" determination is the impact the threat of judicial review has had in promoting social welfare legislation at a national and provincial level. Hopefully, the combination of enumerated social rights with potential enforceability by the Court has successfully reinforced the government's early commitment to social transformation.

At the present stage, thirteen years after the Court began hearing cases under the post-apartheid Constitution, there is reasonable evidence of modest success on the part of the Court at openly reaffirming the nation's commitment to transformation, actively identifying specific areas of governmental failings, and passively pressuring the government to advance the social goals of the constitutional text. The result may be, problematically, more pleasing and meaningful to comparative constitutional law scholars than to needy South Africans, but it is nevertheless a genuine advance in contrast to constitutional silence on such matters.

---

[39] This is not to assert that the social benefit of individual judgments is not possible. Although beyond the scope of this essay, an assessment of the pragmatic consequences of *Grootboom* or *TAC* would at least reveal whether the South African judiciary needs to re-assess its individual rulings, e.g., to question whether the courts should take on a more participatory post-judgment role. The most obvious (and clearly constitutionally permissible) option would be the use of supervisory orders in connection with its judgments.

[40] *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC), at 36 (S. Afr.).

[41] Siri Gloppen, *Social Rights Litigation as Transformation: A South African Perspective* (CMI Working Papers 2005) 16-17; *available at* http://www.cmi.no/publications/2005/wp/wp2005-3.pdf.

III. An Exportable Social Rights Jurisprudence Model

What does the South African social rights jurisprudence model offer to the constitutional courts of other nations? It is exportable to other nations seeking to enforce enumerated socio-economic rights because South Africa has created its affirmative social rights jurisprudence that internalizes country-specific justiciability concerns. Its process consists of (1) differentiating between legitimate and illegitimate critiques of social rights adjudication; and (2) incorporating the genuine justiciability issues into the procedures and standards followed by the court. The result is a country-specific jurisprudence that accommodates valid justiciability concerns through indigenous processes, and provides the missing element for social rights adjudication. When coupled with evidence of successful enforcement by South African courts, it permits enforcement without ignoring the potentially valid concerns that arise in the context of socio-economic rights.

A. Differentiated Incorporation

It is critical to remember we are evaluating export of the South African model for determination of an appropriate jurisprudence, rather than export of the South African rights and case law. This should not be surprising. On the one hand, this distinction merely restates the earlier point that each constitution and thus each nation's jurisprudence is, out of necessity, reflective of local conditions. But there is more to this declaration. The model is exportable because the court of other nations can explicitly follow the process followed by the South African Constitutional Court. A court interpreting a new constitution or a newly amended constitution that includes socio-economic rights as enforceable provisions, can evaluate the historical arguments against adjudication of socio-economic rights, discard those arguments that are invalid or inapt in their particular constitutional culture, and then craft a social rights jurisprudence that expressly addresses the remaining, legitimate concerns.

Each step of this process must be tailored to the particular country by its courts. While a similar collection of theoretical opposition arguments will generally be considered at the start of the differentiation stage, there will inevitably be concerns or emphases unique to the adopting country, derivative of its particular history or legal culture. The judiciary must examine each non-justiciability argument in relation to its own constitutional text and culture. Issues that will impact this analysis include the text of the constitution (especially the claimed social rights provisions), the approach to rights adjudication generally, separation of power issues, federalism issues (where applicable), legal culture, the capability and credibility of the judiciary, procedural issues that impact the courts' capacity to solicit information, and the breadth and flexibility of the courts' remedial powers.

In the latter stage the courts will develop—through the normal adjudicative process—a jurisprudence that incorporates the subset of non-justiciability concerns that it determined to be valid in the differentiation stage. Certain elements are likely to be consistent in comparative perspective, e.g. significant legislative deference, but most will reflect the distinctive features of the country in question.

Hence, the particular South African conclusions about differentiation or incorporation may not be appropriate or helpful in other countries.

Moreover, this procedure benefits from being self-improving. Now that the South African model is developing, further and more precise critiques of social rights adjudication can be expected. That insight, in tandem with the developing jurisprudence in the Constitutional Court and the lower courts of South Africa, will highlight additional concerns and evidence the absurdity of others. Through the process of repeatedly adjudicating the same textual rights, courts will re-evaluate their own initial self-imposed limitations. I expect that on-going adjudication of such rights will slowly but continually diminish many of the limits placed uniquely on social rights jurisprudence.

Similarly, the South Africa model is a proactive guide for constitutive bodies drafting enforceable socio-economic clauses for new or amended national constitutions. Until recently, the socio-economic rights debate has primarily focused on the options of exclusion (rejecting such rights on the basis of the non-justiciability arguments), inclusion as unenforceable (typically in countries with little or no genuine judicial review), or inclusion as mere "directive principles" for policy making (unenforceable policy statements).[42] Now, an additional viable option is available: judicial enforceability subject to differentiated incorporation.

B. The South African Social Rights Innovation

The burgeoning socio-economic rights jurisprudence of the South African Constitutional Court has been transformative in the field of comparative constitutionalism. The debate about inclusion and enforcement of social rights will continue, but it has been radically changed by the development of an affirmative jurisprudence of the South African Constitutional Court.

The most persuasive historical argument against comprehensive social rights adjudication was its radical novelty. A plethora of justifications for opposition were routinely proposed, without a significant counterexample to examine. Without a viable example of adjudication, critics were able to argue that adoption of inherently unenforceable rights would fatally warp the constitutional separation of powers, destroy the rule of law, or bankrupt the nation to pay for its textual social welfare commitments—among other assertions of disaster.[43] Of course, such arguments ignored the harm worked on nations and the rule of law by unaddressed socio-economic inequality. The South Africa case law is a direct refutation of these dire claims. It exhibits modest but real enforcement of social rights and supports limited but genuine socio-economic change.

---

[42] *See* Christiansen, *Survey of Socio-economic Rights in National Constitutions*, *supra* note 1; *see*, e.g., INDIA CONST. art. 37 ("The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.").

[43] *See*, e.g., Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION, 225, 225–32 (András Sajó ed., 1996) (arguing against the inclusion of socio-economic rights in the new post-communist constitutions of Eastern Europe).

Moreover, the restraint demonstrated by the South African Court—most of it self-imposed—belies these fears.[44] Even without clear constitutional guidance, the Court chose a middle position for its jurisprudence, encompassing legislative deference, a reasonableness standard, and rejection of the unrestricted enforcement of unlimited textual rights. To the extent one trusts judicial review generally, similar results seem likely in most countries following the South African model.

IV. Conclusion

In its process of formulating a domestic jurisprudence of social rights enforcement, the South African Court had little guidance. The majority of academic commentators opposed the enforcement of social rights by the judiciary. Hence, the Court's task at least implicitly involved a review and evaluation of the reasonableness and applicability of those traditional critiques. The result in South Africa was an affirmative jurisprudence that internalized jurisprudential limits that correspond to those justiciability critiques not otherwise addressed by the Constitutional text or other particular elements of the South African milieu. This process for development of an adapted, affirmative jurisprudence of socio-economic rights enforceability is a novel and potentially fruitful contribution to comparative constitutionalism. The resulting case law may be of some value to other nations as a guidepost and model, but it is the process of differentiated incorporation, by which the Court formulated its internalized limits, that is clearly exportable to and adaptable by other countries desiring judicial enforcement of socio-economic rights.

[44] The South African example puts this dramatic fear of a "Godzilla jurisprudence" to rest. (A "Godzilla jurisprudence" because it envisions the judiciary running roughshod over the system of separated powers and raining destruction down on the carefully crafted budget decision of the democratically elected legislature—causing damage and destruction like Godzilla on one of his famed visits to Tokyo.)

TRANSFORMATION AND THE DEMOCRATIC CASE FOR JUDICIAL REVIEW: THE SOUTH AFRICAN EXPERIENCE

Dennis M. Davis†

In 1994, South Africans voted in the country's first democratic election. In doing so, South Africans chose to be governed by a written constitution that included an ambitious bill of rights.[1] That document has been termed transformative by the Constitutional Court[2] and many commentators.[3] In a recent public lecture, Chief Justice Langa spoke of the text as a design to heal the wounds of the past and guide the country towards a better future.[4] Viewed in this way, the Chief Justice argued that the Constitution is in part a bridge between the unstable past and the uncertain future.[5] The Chief Justice continued in describing that a transformative constitution represents something greater, and may in fact be:

> [a] way of looking at the world that creates a space which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected, and in which change is unpredictable, but the idea of change is constant.[6]

A careful reading of the Constitution supports the argument that the Constitution seeks the transformation of the society through the construction of a multicultural social democracy in South Africa.[7] This description of the Constitution as a societal transformative document is supported by the following seven provisions found within the text of the Constitution.

First, section 9 of the Constitution supports the conception of substantive equality in which the material conditions of citizens must be interrogated in promotion of the equality guarantee. In addition, section 9(3) contains a powerful

† Judge of the High Court of South Africa. Honourable Professor of Law at the University of Cape Town.

1 *See* Constitution of the Republic of South Africa Act 200 of 1993, S. AFR. (Interim) CONST. 1993 [hereinafter "Interim Constitution"] (initially the supreme law of South Africa was the Interim Constitution, passed by the 'white Parliament' following negotiations at the multi party negotiating forum). This Constitution was of application until the democratically elected Constitutional Assembly passed into law the Constitution of the Republic of South Africa Act 108 of 1996; *see* HASSAN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA (Cape Town: Oxford 1998) (discussing its formulation).

2 *See S v Makawanyane & Others* 1995 (3) SA 391 (CC) at para. 262 (S. Afr.) (proclaiming the transformative quality of the text in the Constitutional Court's first case addressing the issue, with then President of the Court Arthur Chaskalson).

3 *See* Pius Langa, Chief Justice of South African Constitutional Court, Lecture at the University of Stellenbosch, South Africa: Transformative Constitutionalism (Oct. 9, 2006) *available at* http://law.sun.ac.za/LangaSpeech.pdf (discussing the most recent criticism).

4 *Id.* at 3.

5 *Id.* at 5.

6 *Id.*

7 *See generally* Constitution of the Republic of South Africa Act 108 of 1996, S. AFR. CONST. 1996.

anti-discrimination clause, which protects citizens not only against discrimination on the grounds of race and gender, but also on the grounds of sexual orientation, age, belief, opinion, and arguably, class.

Secondly, section 8 of the Constitution provides for the horizontal application of the Bill of Rights. In short, all power, whether originating in the state or in private organizations, is subject to scrutiny in terms of the provisions of the Bill of Rights, whenever this power is exercised in the public domain.

Next, section 23 protects a range of labour rights, including the right to strike, the right to organize collectively, and the right to form trade unions.

The fourth provision contains a range of socio-economic rights; these rights include the right to housing[8] and the right to health.[9] However interpreted, these clauses impose an obligation upon the State to ensure that no socio-economic programme can be introduced without taking account of the priorities of the poorest of the poor within South African society.

Section 31 of the Constitution contains a guarantee of cultural rights, and seeks to ensure that cultural identity is protected.

The sixth provision, which supports the Constitution as a societal transformative document, describes the foundational values of the constitutional text as an amalgam of equality, dignity, and freedom. Taken together, these values are different from the meaning of the parts. For example, it is not possible to contend for a negative conception of freedom as made famous by Isaiah Berlin.[10] The values of equality, dignity, and freedom provide the foundation upon which the constitutional text is based, a foundation upon which an egalitarian vision of South African society emerges. In terms of such vision, freedom without recognition of equality and dignity, and conversely equality, which crowds out freedom and individual dignity, cannot be sustained.

Finally, section 36 of the Constitution contains a limitation clause to ensure that the rights in the Constitution do not trump the policy of the democratically elected government. However, the government has to show adequate justification for the limitation if any policy restricts a constitutionally entrenched right. By ensuring a culture of justification rather than a juristocracy prevailed in the Constitution, the drafters sought to achieve a balance between constitutionalism and majoritarian democracy. The Constitution demands judges examine the justification for policy, rather then seek to impose their own policies, which would tilt the balance of power in favour of government by judiciary. A constitution which did not have this balance between constitutionalism and majoritarian democracy, and allowed judges to impose their own policies, would arguably erode democratic rule and invariably, erode the legitimacy of the constitutional enterprise.

---

[8] *Id.* at § 26.

[9] *Id.* at § 27.

[10] ISAIAH BERLIN, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 121-22 (Oxford University Press 1969).

The Constitutional Court and Democracy

From 1994 to 2004, the South African public appeared to embrace the possibility of change as envisaged by the democratic model adopted in 1994. A decade later, if you listen to any talk radio program you will hear complaints about the Constitution; complaints that range from the unconstitutionality of the death penalty, to the recognition of gay marriage, and to the provision of procedural safeguards for the criminally accused. The common themes in the complaints are: 1.) a majority of citizens are opposed to these constitutional provisions as interpreted by the Constitutional Court; 2.) that hence it is undemocratic to prevent majority opinion from being implemented; and 3.) that the gap between majority opinion and the decision to declare the death penalty to be unconstitutional, for example, will cause the legal system to be viewed as illegitimate.

This vocal form of protest against the practice in a constitutional democracy where judges interpret a text called a written constitution, brings up two interrelated issues. First, why should the majority public opinion on important matters of public policy be constrained in perpetuity by a legal text, which, secondly, is interpreted by unelected judges who follow their own values in giving content to this text? The answers to these questions are not obvious, and unsurprisingly, South African judges hold differing opinions.

A recent decision of the Constitutional Court dealing with a challenge to an amendment to the laws governing termination of pregnancies is illustrative.[11] This decision reveals differences between the judges as to the role of courts in a constitutional democracy.[12] In this case, a group named Doctors for Life complained that the National Council of Provinces ("NCOP")[13] passed certain health bills, including the Choice of Termination of Pregnancy Amendment Act, [14] without holding proper public hearings and ensuring adequate public participation. The failure of provincial legislatures to hold public hearings also became relevant, because the provinces are critical to the very purpose of the NCOP.[15]

Writing for the majority of the court, Justice Sandile Ngcobo correctly noted that this case contained an important question on the role of the public in the lawmaking process, and thus was "at the heart of our constitutional democracy."[16] One important issue in the *Doctors for Life* case concerned the nature and scope of the constitutional obligations of a 'legislative organ' of the state to facilitate public involvement in its legislative process, along with the obligations

[11] *Doctors for Life Int'l v Speaker of the Nat'l Assembly*, 2006 Case No. CCT 12/05 (CC) (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/7605.PDF [hereinafter *Doctors For Life Int'l*].

[12] *Id.* at para. 227.

[13] *See* S. AFR. CONST. 1996, *supra* note 7, at § 42-82 (The National Council of Provinces is the upper house of Parliament. It consists of 90 delegates, of whom each of the 9 Provinces are entitled to 10 delegates. It is modeled on the German Bundesrat).

[14] *Doctors for Life Int'l*, *supra* note 11, at para. 2-3.

[15] *Id.* at para. 5.

[16] *Id.* at para. 1.

of legislative committees.[17] Another important issue concerned the extent to which the Constitutional Court may interfere in the processes of a legislative body in order to enforce the obligation to facilitate such public involvement.[18]

Justice Ngcobo exhaustively examined the constitutional importance of public involvement in the law making process.[19] He noted that:

> In the overall scheme of the Constitution, the representative and participatory elements of our democracy should not be seen in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy.[20]

Later in his judgment, Justice Ngcobo observed that within African communities, the "imbizo" or "legotla" are the traditional methods of public participation, which should infuse the constitutional idea of participation in the legislative process.[21] Hence the principles to be protected by the court included the duty to provide meaningful opportunities for public participation in the law-making process, and the duty to take measures that ensured that "people have the ability to take advantage of the opportunities provided."[22]

The majority of the court went on to hold that the NCOP has an important role to play in the national law-making process.[23] The NCOP represents the provinces to ensure that provincial interests are taken into consideration in the national law-making process.[24] In doing so, the provinces give voting mandates to their NCOP delegations.[25] Further, Parliament and the provincial legislatures have broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, as long as it is reasonable to do so.[26] The Court would not prescribe to Parliament what the manner or mechanisms of public participation should be, as the Court determined that the choice should be left to Parliament since the Court's only task is to ensure that reasonable steps were taken.[27]

However, the Court went on to say that the duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity

---

[17] *Id.* at para. 206.

[18] *Id.* at para. 211.

[19] *See id.* at para. 135.

[20] *Id.* at para. 115.

[21] *Id.* at para. 101 (discussing the Imbizo or legotla as indigenous descriptions for public consultation of the applicable community).

[22] *Id.* at para. 129.

[23] *Id.* at para. 84.

[24] *Id.* at para. 86.

[25] *Id.*

[26] *Id.* at para. 145.

[27] *Id.* at para. 129; *see also id.* at para. 146.

to be heard in the making of laws that will govern them.[28] In determining whether Parliament has acted reasonably, the Court will need to consider a number of factors, including the nature of the legislation and what Parliament itself has assessed as being the appropriate method of facilitating public involvement in a particular case.[29]

On the facts, Justice Ngcobo found that the Traditional Health Practitioners Act[30] and the Choice on Termination of Pregnancy Amendment Act[31] had generated great public interest at the NCOP, as evidenced by requests for public hearings.[32] In recognition thereof, the NCOP decided that public hearings would be held in the provinces and advised the interested groups of this fact.[33] However, a majority of the provinces did not hold hearings on these Bills because there was insufficient time to do so. Although this was known to the NCOP, they still did not hold public hearings.[34] For these reasons, Justice Ngcobo held that the failure by the NCOP to hold public hearings, in relation to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act, was unreasonable.[35] He concluded that the NCOP did not comply with its obligation to facilitate public involvement, as contemplated by Section 72 of the Constitution.[36]

The majority of the Court thus decided that Parliament, in particular the NCOP, had not discharged its constitutional obligation of conducting sufficient public hearings before passing legislation of considerable public interest.[37] Therefore, the court insisted upon a dialogical process between the democratically elected legislature and the public before the amendment became law.[38]

In contrast, Justice Zac Yacoob, in a minority judgment, held that the Court should not impose obligations of consultation upon a democratically elected legislature.[39] By doing so the Court would undermine the scope of the legislature and the right to vote, which was designed to elect public representatives who would then have autonomy to make decisions on behalf of the public.[40] The core of Justice Yacoob's reasoning is found in the following passage:

---

[28] *Id.* at para. 145.

[29] *Id.* at para. 128.

[30] Traditional Health Practitioners Act 35 of 2004.

[31] Choice of Termination of Pregnancy Amendment Act 38 of 2004.

[32] *Doctors for Life Int'l, supra* note 11, at para. 156.

[33] *Id.* at 158.

[34] *Id.* at 188.

[35] *Id.* at 189.

[36] *Id.* at 195; *see also* S. AFR. CONST. 1996, *supra* note 7, at § 72(1)(a) ("Public access to and involvement in National Council," provides that the NCOP must "facilitate public involvement in the legislative and other processes of the Council and its committees").

[37] *Doctors for Life Int'l, supra* note 11, at para. 213.

[38] *Id.*

[39] *Id.* at para. 283 (Yacoob, J., dissenting); *see also id.* at 337 (Yacoob, J., dissenting).

[40] *Id.* at para. 292 (Yacoob, J., dissenting).

> Citizens of this country cast their votes in favour of political parties represented in the National Assembly and the provincial legislatures. . . It is these elected representatives that govern the people and their representative activities are the activities of the people. In passing legislation . . . members . . . do not act on their own whims but represent the people of this country. To undermine these representatives is to undermine the political will of the people . . . Constitutionally speaking it is the people of this country who, through their elected representatives pass laws.[41]

Whereas the minority judgment places great importance on the principle of representative democracy, the majority insists, with considerable persuasion, that the South African Constitution enshrines a principle of public deliberation which not even the peoples' representatives can take away. The division in the Court illustrates the point of debate, namely: how far should the rule of the Constitutional Court extend over the country's public representatives, including the will of the voters?

A Juristocracy?

It should be accepted as trite that constitutional jurisprudence is never so text based that it can be wrenched away from the controversies of political theory. But if judges are free to give content to open ended constitutional rights in terms of their own political and jurisprudential commitments, how does the nation ever achieve constitutional rule based upon a shared set of norms? And if that cannot be achieved, then, are we not driven back to a majoritarian conception of democracy, which at the very least has the capacity to respond to the political will of the "people"? Viewed within the context of the case discussed above, this debate appears to admit a number of different answers. First, the Court extends judicial review beyond the concerns of traditional rights. It insists that the democratic model contained in the South African Constitution is one of deliberative, participative democracy, rather then representative democracy, where citizens vote but once every four or five years. Second, judicial review is confined to narrower questions of specified rights, and third, that rights should exist without the enforcement mechanism of judicial review.

Ronald Dworkin claims in a recent book that while citizens have a basic right to democratic procedures, including the right to vote and to participate actively in politics, there is no basic right to one form of democratic design.[42] In the South African case, the design chosen and on which citizens voted, was that of constitutional democracy. It cannot be said that by so choosing this model, the citizenry were duped into an undemocratic form of government. It was chosen by "we the

[41] *Id.*

[42] RONALD DWORKIN, JUSTICE IN ROBES, 147-50 (The Belknap Press of Harvard University Press 2006).

people" to ensure that certain foundational rights were enjoyed by all, regardless of access to political power at a transient moment in the history of the nation.[43]

Referring to the argument that this form of political model concentrates too much power in the hands of the individual judge, who is free to impose his or her views on the nation, Dworkin argues that judges do make value judgments when they decide these cases.[44] However, he adds that these are value judgments that need to make sense of the scope and ambition of the constitution read as a whole.[45] In addition, the doctrine of stare decisis ensures judges are constrained by the reading of previous judicial colleagues confronted with the same clauses.[46] In other words, judges are not free to impose their own view on the constitution, regardless of the text.[47] Some reading of the constitutional text as a whole and reference to precedent is required.[48]

Dworkin readily accepts that even the application of precedent requires a value judgment.[49] Judgments of relevant similarity are not made by mechanistic use of analogy. Rather, the judge has to determine whether the present dispute is of sufficient legal equivalence to the previously decided case so as to be followed.[50] Thus the judge does not, on this argument, decide cases by relying on her own values.[51] Instead, she strives to quarry out some more objective approach by asking what would be just in this situation. The concept of justice is sourced in the principles which underlie the legal system they are enjoined to protect.[52] Dworkin thus argues that judges must take account of the consequences of their decisions, not by their political or personal preferences, but directed by principles embedded in the legal system read as whole.[53] These are principles that guide the process of adjudication as to which consequences are relevant, and how these should be weighed.[54]

No matter the plausibility of this theory, the meaning of the constitutional text is invariably controversial and will remain contested. Legal values, such as predictability and clarity, simply do not stack up. These values give way invariably to argumentation and contestation of legal principle. As Jeremy Waldron observes in his review of Dworkin's book:

---

[43] For a thoughtful discussion on the negotiations that guided the transition to democracy, *see* ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTY: THE INSIDE STORY OF SOUTH AFRICA'S ROAD TO CHANGE (University of Chicago Press 1992).

[44] DWORKIN, *supra* note 42, at 144.

[45] *Id.* at 117-39.

[46] *Id.* at 123.

[47] *Id.*

[48] *Id.* at 117-39.

[49] *Id.* at 144.

[50] *Id.* at 127.

[51] *Id.* at 117-39.

[52] *Id.*

[53] *Id.*

[54] *Id.*

> Citizens cannot plausibly insist that judges turn themselves into machines, that they reason in exactly the same way, or that they avoid any intellectual exertions that might show up the differences in values between them. But they can insist that any judge addressing their case should try as hard as he can, by his own lights, to judge them by standards that they have applied to others.[55]

A Dworkinian account of adjudication should not be adhered to since Dworkin's theory has been rigorously exposed from a non-foundationalist perspective. Non-foundationalists contend that a judge engages with the legal materials in question, and shapes these to fit the resolution of the dispute before her, in a manner that advances justice. Given that justice is an interpretive concept, and that judges may well seek to justify the chosen interpretation initially in the community's own understanding of what justice consists, this notion of a community meaning is invariably a contested concept. There is no single foundationalist key to unlock the problem. A "right" answer, in short, depends upon the reading of an individual judge or judges, located within a particular legal community with its own transient, but specific reading.

When judges seek to advance justice through law, "[they] do not pronounce ex cathedra, but creatively reshape old material into new designs".[56] As the Canadian constitutional scholar, Alan Hutchinson, comments, the "legal past" does not pull judges back, but rather "impels them forward" in their quest for justice.[57] As he states:

> As such, great judges do not ignore the past nor obsess about it, but they work the past so as to realise its present possibilities for future innovation: they commit themselves to persuading us that the legal materials in the justice they might give rise to can be and ought to be seen in a very different light and shape. . . Judges are to be judged by the political merit of their practical performances, and not the conceptual coherence of their theoretical reflections.[58]

If the non-foundationalist account of adjudication is accepted, then there is simply no easy walk to judicial objectivity. No set of principles which Hercules, Dworkin's model judge, would be able to glean from the body of legal materials would allow him to produce but one correct answer in the image of *Law's Em-*

---

[55] Jeremy Waldron, *How Judges Should Judge*, 53 NEW YORK REVIEW OF BOOKS (2006), *available at* http://www.nybooks.com/articles/article-preview?article_id=19216.

[56] ALAN HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 322 (Duke University Press 2000). Apart from Hutchinson's work, which usefully exposes Dworkin, reference must be made to A Critique of Adjudication by Duncan Kennedy, the most rigorous progressive examination of adjudication and its profound limitations and ambiguities. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (Harvard University Press 1997). Within the South African context, see the seminal article: Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. OF HUM. RTS. 146 (1998).

[57] HUTCHINSON, *supra* note 56, at 323

[58] *Id.*

pire.[59] Where then does this lead us in an attempt to develop an understanding of adjudication? Hutchinson suggests that by way of a case-by-case development of the law, judges will not feel obliged to revere present legal or political arrangements or revise them for the sake of it, but rather, "[t]hey will work to adapt legal doctrine so that it can accommodate to the understanding and practice of social life as a fluid game of dynamic possibilities."[60]

This approach espoused by Hutchinson appears similar to that advocated by Chief Justice Langa. This is particularly true where the Chief Justice argues that transformation is inherently fluid as the country moves haltingly toward a just future, where justice is never settled nor ultimately determined.[61] In the same way, adjudication is never settled, for contestation and dialogue about judicial decisions can never be circumvented. For this reason, the Dworkinian demands for coherence and integrity notwithstanding, the interpretations of the judiciary will continue to be controversial, as will the extent to which the judiciary constitutionally interferes in the formulation and execution of public policy.

It is for this reason that theorists like Jeremy Waldron and Mark Tushnet have argued that because disagreements about rights are not unreasonable and that legitimate differences are inevitable, it is important that such disagreements are resolved by means of responsible deliberative mechanisms.[62] They contend that ordinary legislative procedures do this best, and that recourse to the elitism of a judiciary adds little to the process, save to produce a disenfranchisement and legalistic obfuscation of the fundamental moral disagreements in society about rights.[63]

Waldron contends that we overestimate the purchase of judicial review as a means to protect rights.[64] Deliberative processes by way of the legislature are the more democratic route.[65] Yet Waldron concedes that his model only works where four assumptions operate.[66] These include, first, that democratic institutions are in reasonably good working order; second, a set of judicial institutions in reasonably good working order to settle disputes and uphold the rule of law; third, that there is a general commitment on the part of most members of a society to the idea of individual and minority rights; and fourth, that there is a persistent and good faith disagreement about rights.[67]

Significantly, Waldron accepts that the development of a rights culture can and often is accompanied by a Bill of Rights, but that the intervention of an elitist

---

[59] *See generally*, RONALD DWORKIN, LAW'S EMPIRE (The Belknap Press of Harvard University Press 1986).

[60] HUTCHINSON, *supra* note 56, at 327.

[61] Langa, *supra* note 3, at 4.

[62] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366-69, 1371-73, 1386-95 (2006); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, 137-52 (Princeton University Press 1999).

[63] Waldron, *supra* note 62; Tushnet, *supra* note 62.

[64] Waldron, *supra* note 62, at 1353.

[65] *Id.* at 1349-50, 1353.

[66] *Id.* at 1360.

[67] *Id.*

conception of review by unelected judges converts a rights enterprise into something undemocratic.[68] Waldron objects to strong judicial review where courts have the power to set aside legislation passed by a democratically elected legislature.[69] He appears to adopt the view that as rights are invariably the subject of normative disagreement, it would be best if the disputes are settled in the most democratically constituted of institutions, namely, the legislature.[70]

Outside of Waldron's birth country of New Zealand, it is difficult to conceive of countries where recourse alone to legislative deliberation is going to promote and protect a rights culture. In many instances, it is the legislative product of the legislature that undermines the rights of citizens. The admission of inherent disagreement about the nature of rights means that a legislature can hardly be immune from this problem. To argue that an electorate may vote out such a body at the next election is hardly of comfort to those who may suffer for years before an amendment is effected. This view also ignores the importance of having rules for the political game that allow for fair participation and which trump the kind of prejudice that relegates the potential role of a segment of society to second class citizenship.

The example of the case of gay marriage may suffice. In *Minister of Home Affairs v. Fourie,* Justice Sachs, on behalf of the majority of the Constitutional Court, held that. "[a] democratic, universalistic, caring and aspirationally, egalitarian society embraces everyone and accepts people for who they are."[71] He then referenced to the vision of an open and democratic society contemplated by the Constitution.[72] Justice Sachs noted that:

> There must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. . . . [T]he test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.[73]

In deciding that the law was unconstitutional in not granting the same status to gay marriage as it did to heterosexual marriages, the Court asserted that the present law "manifestly affects" the dignity of gays and lesbians as full members of South African society.[74] In this decision, the Court protected the autonomy of all who make up South African society, thereby promoting the conditions in which all may participate fairly in the political process. The decision, on its own, does not undermine democracy. On the contrary, it promotes a form of democracy that recognises the role of democratically elected institutions, both in the defer-

---

[68] *Id.* at 1358.

[69] *Id.* at 1349-50, 1353.

[70] *Id.*

[71] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), para. 60 (S.Afr.).

[72] *Id.* at para. 89.

[73] *Id.* at para. 94.

[74] *Id.* at para 114.

ence courts show to the role of these bodies, and by the application of a limitation clause in the Bill of Rights, in terms of which legislation may be held to trump a constitutionally entrenched right. In addition, the protection and promotion of self-autonomy allows for individuals to coalesce into civic movements that in turn can enjoy a dialogic relationship with both the courts and the legislature.

A Response to Waldron, Tushnet, and the South African Majoritarians[75]

The case in favour of the constitutionally entrenched model which includes a judicial role can be summarised as follows. First, the design of the South African Constitution was intended to ensure that neither judges, the executive, nor legislature ran the country exclusively. But how they do it together, and more particularly the role that the judiciary plays in this democratic model, should always be the subject of rigorous public debate. Second, the very purpose of a constitution of the model embraced by South Africa is to secure for each permanent resident[76] the conditions under which each person can enjoy the value of autonomy, and can participate in the formulation and development of public reason.

To the extent that the South African Constitution extends way beyond the protection of civil and political rights, it may be argued that the model guarantees, in part, a juristocracy whereby judges can trump the distributive decisions best left to the legislature and executive.[77] The provisions in the South African Constitution of socio-economic rights, often viewed with suspicion by majoritarians and libertarian constitutionalists, can be justified within this theoretical framework. In a recent contribution to this debate, Canadian theorist, Alan Brudner, captures the point:

> A claim of right to social and economical equality is consistent with the worth of the contingent person if it is justified by a principle of equal concern for each person's success in leading a self-authored life with the contingent endowments in which his personhood is uniquely . . . expressed. . . . [P]eople may claim protection against the external circumstances of their own lives that are unfavourable to self-authorship. . .[78]

This second response to the type of majoritarianism illustrated by Waldron must come with a caution: where the courts do not respect the legislature's reasonable judgment as to whether the legislative programme promotes and protects

---

[75] As an indication of the way in which (hopefully) transient considerations influence the discourse, the current crime wave in South Africa has powered a furious attack on the Constitutional Courts finding that the death penalty is unconstitutional. An article that appeared in the Cape Times, authored by a recent appointment to the Bench Judge John Murphy, makes a call for a referendum with great enthusiasm. In this case, the judge was not seized with a difficult, emotionally draining case. Rather, a sitting judge wrote an article for the popular press in which he called for a public reconsideration of the constitution as interpreted by the constitutional court, contending that current public opinion must be given its day. John Murphy, *Face Death Penalty Head-on*, CAPE TIMES, Oct. 5, 2006.

[76] I employ this term, rather then the term "citizen," as rights in the constitution are enjoyed by a larger group then citizens.

[77] *See generally* S. AFR. CONST. 1996, *supra* note 7.

[78] ALAN BRUDNER, CONSTITUTIONAL GOODS 264 (Oxford University Press 2004) (emphasis omitted).

rights to the maximum extent possible with available public means, or the executive's similarly based implementation, then the courts encroach into the political territory of representative politics. Again this is better stated in theory then it is implemented in practice. The question that must be addressed concerns the problem of the elected bodies developing policies that run counter to the vision of the constitution. Then the best that courts can do is to adjudicate in terms of an articulated theory of the constitution, which in turn is the subject of public deliberation. Both the pressure from civic movements and the deliberative role of the legislature constitute pressure points upon the judiciary in its development of the constitutional text.

Conclusion

Perhaps it is necessary to conclude with the following reminder that constitutions are not all the same and not one size fits all. Yash Ghai warns of this in his conclusion to an analysis of comparative constitutions, in which he suggests that similar language and seemingly common concepts are deceptive. He states, "comparative constitutional law has become mired in formalism and pseudo-universalism and the wonderful multiplicity of the constitution has become lost."[79]

We should develop our analysis not in the pseudo–democratic claim about majority opinion at a point in history, but with the possibility of embracing three coordinating strands for the South African democracy. These include: a deliberative legislature, a judiciary which promotes the procedural and substantive conditions for political participation, and civil society where those conditions are utilized by autonomous citizens uniting in a common political purpose.

This roots the Constitution in South African history, but with a clear transformative possibility. The representative model of democracy has a much contested pedigree in South Africa because it was employed to shore up white rule from 1910 to 1994. However, it is now the subject of transformation, namely, from a mechanism of white oppression of the majority, to that of means where public representatives elected by the people can produce a legislative programme for the reconstruction of the country. The Bill of Rights finds its political roots in the African Claims of 1943 and the Freedom Charter of 1955, where the African National Congress took the lead and campaigned for a Bill of Rights for the country, in which "all should enjoy human rights" became a foundational part of the political opposition to apartheid.[80] Hence fundamental human rights were part of the political discourse that led to the adoption of the Constitution.

However, the history of South Africa is also one of a rich deliberative democracy in which civil society led the political way, by ensuring that the activity of civic groupings shaped the very political programmes that became the stuff of

[79] Yash Ghai, *A Journey Around Constitutions: Reflections on Contemporary Constitutions*, 122 S. AFR. L.J. 804, 831 (2005).

[80] For the texts of these two documents, *see* Ebrahim, *supra* note 1, at 396, 415.

struggle.[81] Hence the idea, as set out by Justice Ngcobo in the case of *Doctors for Life International*, in which civil society is able to convert Parliament into a transmission belt for the implementation of the wishes of "the people," is one that is grounded in a rich and effective political tradition.[82]

The debate conducted around the democratic claim of constitutional review is all too often couched in binary terms. On the one hand, there is the exhortation that the disputes about rights should be left to the democratically elected body and, on the other hand, proponents argue that only a dispassionate institution such as a judiciary should adjudicate on these disagreements. South African legislation and policy are developed and executed by bodies chosen, whether directly or indirectly, by the people. Although for the phrase "we the people" to participate meaningfully, and to guarantee the autonomy of each individual to experience a self-authored life, a Bill of Rights which is developed by a judiciary, subject in turn to critical public evaluation, contributes to the enhancement of democracy. In turn, that process of critical evaluation of all three arms of state, is generated by means of a civil society made up of self-authored beings whose autonomy cannot be taken away by the irate holders of public power, save in terms of clear public justification.

This three pronged model of democracy moves beyond the sterile debates about the democratic pedigree of judicial review. By contrast, it promotes a form of deliberative democracy which holds the promise of transformation of democracy beyond public participation every five years at the ballot box. It also eschews the elitism of a judiciary subsuming politics into a complex, arcane legalese of which only the modern day philosopher kings can decipher. It is a model of democracy that is deeply rooted in the political history of South Africa.

[81] For an example of the nature of civic political struggle and its tradition within South Africa, *see* JEREMY SEEKINGS, THE UDF: A HISTORY OF THE UNITED DEMOCRACTIC FRONT IN SOUTH AFRICA 1983-1991, (Ohio University Press) (2000).

[82] *See generally Doctors for Life Int'l*, *supra* note 11.

AFTER ATROCITY EXAMPLES FROM AFRICA: THE RIGHT TO EDUCATION AND THE ROLE OF LAW IN RESTORATION, RECOVERY, AND ACCOUNTABILITY

Erika R. George[†]

I. Introduction

In recent years, there has been a proliferation of international legal institutions to respond to the challenges confronted by many countries emerging from armed conflict, mass violence, or systematic human rights violations. Unfortunately, there are ample recent examples of atrocities throughout the world—the killing fields of Cambodia, ethnic cleansing in the former Yugoslavia, and the genocide in Rwanda are but a few. To date, efforts of the international community to restore respect for human rights and ensure that those responsible for atrocities and human rights abuses in post-conflict societies have predominately centered on criminal justice models.[1] For example, the last decade has seen the creation of the International Criminal Court, ad hoc tribunals for Rwanda and the former Yugoslavia, and a special court in Sierra Leone. Recent negotiations resulted in the formation of a hybrid tribunal for Cambodia. Most of these contemporary responses have associated criminal accountability in the international legal system with advancing the rule of law.[2] Yet the "rule of law," now promoted by the international community as a means for establishing peace and stability in societies where massive human rights tragedies have occurred, has often been uprooted or may never have taken root in those countries.

An increasing number of weak or failing states and humanitarian crises over the past several years sparked greater demand on the part of the international community for rule of law promotion efforts designed to build or rebuild legal institutions, provide accountability for abuses and war crimes, restore functioning civilian democratic governments, and foster economic recovery.[3] In parts of the African continent recently plagued with armed conflict such as Sudan, Liberia, Sierra Leone, and Rwanda, the rule of law ceased to meaningfully exist. In those areas not devastated by war, systemic rights violations such as those associated with the maintenance of South Africa's apartheid regime served to discredit the

[†] Associate Professor of Law, University of Utah, S.J. Quinney College of Law; B.A., University of Chicago; M.A., University of Chicago; J.D., Harvard Law School. The author would also like to thank Nathaniel Sanders and Jared Peterson for their research assistance. Special thanks to Wayne McCormack for his thoughtful comments and to the participants in the symposium on *The Rule of Law and Delivering Justice in Africa*, Loyola University Chicago International Law Review 2007.

[1] Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, 30 COLUM. HUM. RTS. L. REV. 285, 286 (1999) (considering how criminal processes effect the liberal transformation of transitional states emerging from authoritarian rule).

[2] *Id.*

[3] JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 62 (2006).

rule of law. There, implementation of unjust and racially discriminatory laws undermined respect for the law generally. Yet, in those countries where atrocities, armed hostility, and systematic abuses have ended, Africa has attempted to recover and restore the rule of law. What lessons can we draw from these varied experiences of African nations emerging from situations of violent conflict and/or systematic human rights abuses? Of the multiple models employed to hold perpetrators accountable after atrocities are committed, what potential do these models hold for advancing human rights and furthering freedoms in civil society? Are present structures sufficient to respond to the challenges of fostering restoration, recovery, and accountability after an atrocity? Are any of the current strategies used to realize the rule of law after an atrocity likely to deliver justice in Africa?

This article begins to consider these important questions through a discussion of the multiple models used to address, and redress massive human rights violations in South Africa, Rwanda, and Sierra Leone. I argue that lawyers and policy makers working to advance the rule of law must consider the *role* of law in transitional societies not only as a means of ensuring that perpetrators of grave human rights abuses are held accountable, but also as a foundation for the future. I submit that for the rule of law to take root, the conditions of a society must be fertile; and respect for the right to education must be honored in order to cultivate such conditions. Creating durable solutions to humanitarian and security problems requires a long-term commitment to rebuilding and reforming repressive or conflict-ridden societies. In particular, long-term solutions require building or rebuilding the rule of law by creating a widely shared public commitment to human rights, and a preference for relying on law and the political process rather than resorting to violence to resolve conflict.[4] Education is a vital precondition for strengthening the rule of law and enabling reconstruction that has not received sufficient attention in the literature on transitional justice.

Part II of this article briefly reviews a predominant model of transitional justice: the criminal trial; as well as some of the criticisms of this approach. Part III describes the human rights violations that occurred in South Africa, Rwanda, and Sierra Leone and offers an assessment of the different institutions created to respond to the violations in each situation. Part IV argues that the experience of delivering justice in Africa after atrocities teaches that lawyers and others who care about promoting the rule of law must move beyond a narrow criminal prosecution model for transitional justice, and towards a broader scope that creates space for a range of approaches to address the variety of problems faced by post-conflict societies. This section also posits that the lesson to be learned is that there is no one model in the abstract which by design will deliver justice in Africa. Rather, designs for delivering justice will depend on the context of each situation such that multiple methods of response may be necessary. Part V concludes with a discussion of the contribution that respect for, and realization of, the right to education may offer to averting future atrocities and systematic human rights violations.

---

[4] *Id.*

II. The Predominant Paradigm and its Problems

> *A trial in the aftermath of mass atrocity, then, should mark an effort between vengeance and forgiveness. It transfers the individuals' desire for revenge to the state or official bodies. The transfer cools vengeance into retribution, slows judgment with procedure, and interrupts, with documents, cross-examination, and the presumption of innocence, the vicious cycle of blame and feud.*[5]

Today's international and national prosecutorial initiatives for war crimes and crimes against humanity are legacies of the Nuremberg and Tokyo trials conducted after World War II. The Nuremberg Trials are credited with planting the seeds of social consciousness which grew into an international movement for human rights, a body of human rights law, and the subsequent creation of institutions to implement and enforce human rights law. The Nuremberg Tribunal established, among other things, the concept of individual criminal responsibility for crimes against humanity, including: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilians as well as persecutions on political, racial, or religious grounds. Irrespective of whether or not these acts would violate the domestic law of the country where they were perpetrated, the concept of crimes against humanity is grounded in an understanding of the universal nature of certain rights.[6]

The heritage of modern human rights law owes much to the potent symbol of "crimes against humanity," signaling the law's universality. Human rights' universality maintains that there are basic human rights that are the same for everyone everywhere. In the prevailing post-conflict paradigm, "mass violence is constructed as something extraordinarily transgressive of universal norms," and the "[a]cts of atrocity are characterized as crimes against the world community or, more emotively, as offenses against us all."[7] Accordingly, because human rights tragedies are constructed as being of central concern to humanity as a whole, "international institutions putatively representative of the global community become appropriate conduits to dispense justice and inflict punishment."[8]

A. Purposes of Post-Atrocity Processes

The post-WWII paradigm of a universalized criminal justice system to redress human rights violations persists to the present day as evidenced by the proliferation of international and hybrid tribunals. According to Ruti Teitel, that human rights protections are still thought to be attainable through international punishment processes is evidence of the continuing dominance of the postwar paradigm

---

[5] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 26 (1998).

[6] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[7] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 540 (2005)[hereinafter *Collective Violence*].

[8] *Id.*

and its central symbols.[9] Successful criminal convictions of the perpetrators of the worst atrocities have been few and far between despite numerous genocidal campaigns and the commission of other atrocities since WWII. Some argue that this relative lack of enforcement through the criminal justice process has contributed to a pervasive sentiment that the international human rights regime is deeply flawed.[10] Nevertheless, the judicial procedural feature of the universal conception of rights retains an ongoing significance in today's efforts to address atrocities. The dual purposes said to be served by the introduction of judicial processes after massive human rights tragedies are: (1) to ensure that perpetrators of the violations are held accountable for their crimes; and (2) to reestablish or establish the rule of law in post-conflict societies.[11]

1. Ensure Accountability, End Impunity

Advocates of the establishment of criminal justice processes following atrocities argue that the risk of prosecution can serve as a deterrent.[12] Would-be violators of human rights will be less inclined to employ measures of extreme violence or transgress internationally recognized norms of crimes against humanity where there is a risk of conviction and punishment. Ensuring that perpetrators face some reckoning may also be critical to future societal stability as criminal trials signal to all members of society that abuses will not be permitted to recur. The process of ensuring accountability in turn reinforces broader efforts at reform of the justice system.[13]

2. Promote the Rule of Law

Although few legal scholars believe criminal trials should be the only, or entire response to mass atrocities, many have ascribed considerable transformative potential to trials because trials contribute to the establishment of the rule of law.[14] As commonly used, the phrase "the rule of law" has come to be associated with a nebulous collection of concepts, including fairness, order, and equality under the law.[15] Richard Fallon has observed that "virtually all understandings of the rule of law share three purposes, or values; the rule of law serves to protect

---

9 Teitel, *supra* note 1, at 289.

10 *See generally*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Eric A. Posner, *All Justice, Too, Is Local*, N.Y. TIMES, December 3, 2004, *available at* http://www.nytimes.com/2004/12/30/opinion/30posner.html?_r=1&oref=slogin.

11 Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transnational Justice*, 15 HARV. HUM. RTS. J. 39, 65-7 (2002).

12 *See e.g.* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2276-77 (2003).

13 STROMSETH ET AL., *supra* note 3, at 250–51.

14 Drumbl, *Collective Violence*, *supra* note 7, at 546 (citing Jackson Nyamuya Maogoto, WAR CRIMES AND REALPOLITICK (2004); *see also* Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712 (2003) (calling for a more critical discourse on the efficacy of managing massive atrocities in distant lands within the rarified confines of international legal process).

15 STROMSETH ET AL., *supra* note 3, at 68–70.

people against anarchy; to allow people to plan their affairs with confidence because they know the legal consequences of their actions; and to protect people from the arbitrary exercise of power by public officials."[16] While a generally agreed upon definition has been elusive, rule of law projects underway in post-conflict societies primarily seek to foster the establishment of legal institutions and structures including well-functioning, respected courts, judicial review, fair and adequate legal codes, and well-trained lawyers.[17] Most scholars define the rule of law in a formal or minimalist manner emphasizing the rule of law's formal and structural components rather than the substantive content of the laws.[18]

Even in the absence of a precise definition, most policymakers and practitioners from a variety of different constituencies take it for granted that the rule of law is needed in post-conflict societies.[19] Members of the economic development and corporate communities assume that the rule of law will produce effective dispute resolution mechanisms as well as a predictable and fair legal framework, which will protect property interests and enforce contracts. For many human rights advocates, however, "where the rule of law is absent, human rights violations flourish."[20] Accordingly, human rights advocates are also enthusiastic about promoting the rule of law, expecting that it will guarantee due process and equal protection to individuals and limit the power of governments over individual liberties. Increasingly, international and national security experts view expansion of the rule of law in certain societies as a key aspect of preventing terrorism.[21] While the causes of terrorism are complex, misery and repression are believed to create fertile ground for radicalization and incitement to violence. The rule of law may play an important role in eliminating the conditions that give rise to sympathy for the use of violence and terror, as well as to bring attention to and redress perceived grievances.[22]

B. Problems with Post-Atrocity Processes

Commentators have advanced both pragmatic and principled critiques of the expansion of criminal justice models to address atrocities. Critics attribute the faith in international tribunals and international criminal justice on the part of so many activists, scholars, states, and policy makers to "a perplexing fusion of

---

[16] Richard H. Fallon, *"The Rule of Law" as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7 (1997).

[17] STROMSETH ET AL., *supra* note 3, at 56.

[18] *Id.* at 70 (citing Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L. 467 (1997)); *see also* Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 135 (1993) (offering a discussion of substantive rule of law theories).

[19] STROMSETH ET AL., *supra* note 3, at 74 (citing Tom Carothers, AIDING DEMOCRACY ABROAD (1999)).

[20] *Id.* at 58–59.

[21] Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 253 (2007) [hereinafter *Pursuing Accountability*].

[22] STROMSETH ET AL., *supra* note 3, at 59-60 (citing Tom Carothers, *Promoting Democracy and Fighting Terror*, 82 FOREIGN AFFAIRS Jan.-Feb. 2003).

exuberance and under theorizing."[23] For example, Mark Drumbl observes: "[a]lthough there is much to celebrate in holding systematic human rights abusers accountable for their actions; an iconoclastic preference for the criminal law may not always be the best way to promote accountability in all afflicted places and spaces."[24] He and others are concerned that the "structural simplicity" pursued by the dominant model of prosecution and punishment may discount the complexity of justice and reconciliation.[25]

A rights-based approach argues that major perpetrators of atrocities must be held legally accountable if a country is to make an effective transition to a society guided by the rule of law. Realists raise pragmatic concerns disputing the beneficial impact of trials, arguing that criminal prosecutions can be destabilizing since those at risk of prosecution will be unwilling to relinquish power.[26] Instead, conditional amnesties can, they argue, remove elements that would disrupt transition efforts and create a better prospect for peace and the rule of law in the long term.[27]

Other commentators raise objections based on principle, concerned that current criminal justice models may be too limited and limiting.[28] Many of these commentators are also concerned about imperialist overtones of international criminal justice, and argue that the judicialization of mass violence actually involves the transplantation of the domestic criminal models of Western legal systems.[29] Western models are in turn presented as value neutral and universal.[30] Although globalized, these models are not universal but rather deeply culturally

---

[23] Drumbl, *Collective Violence, supra* note 7, at 547–48.

[24] *Id.* at 547.

[25] *Id.*; *see generally*, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariez Currena eds., 2006)[hereinafter TRANSITIONAL JUSTICE].

[26] Stromseth, *supra* note 21, *Pursuing Accountability*, at 253-54.

[27] *See, e.g.*, Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKLEY J. INT'L L. 283, 285 (2007); Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L. J. 205 (2000); Minow, *supra* note 5, at 44-48.

[28] *See, e.g.*, Trumbull, *supra* note 27, at 285 (acknowledging the difficulty governments in transitional societies face in determining how and whether to bring violators of human rights to justice); *see also* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301 (2003).

[29] *See, e.g.*, Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 994-95 (2006) (explaining why international criminal justice is "tainted by a lack of evenhandedness that has a certain imperialist tinge").

[30] Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263 (2003); Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1327 n. 24 (2005) (observing: Although international criminal justice institutions may have harmonized adversarial and inquisitorial methodologies, this harmonization is a political settlement among powerful international actors. It is not a genuinely inclusive process that accommodates the disempowered victims of mass violence—largely from non-Western audiences and often estranged from any state or government—who consistently lack any clout in international relations).

contingent.[31] Under this view, implementation of international criminal law risks a democratic deficit insofar as it excludes the perspectives of precisely those communities traumatized by the criminality on trial in the international forum. Thus, replication of the predominant international criminal law model without respect for context and differences may mean externalizing justice away from the very communities closest to the conflict.[32]

III. Examples: Multiple Models of Delivering Justice after Atrocity

Most of the early literature on international justice debates the relative merits of criminal prosecutions versus truth commissions. Now, a consensus is emerging that either a truth *or* a justice approach was inappropriate and unnecessary.[33] Indeed, a number of recent transitional justice efforts have stressed both a truth *and* a justice approach. There is a growing recognition that no single method may adequately serve societies rebuilding after conflict. I will now analyze how efforts to deliver justice after atrocity in South Africa, Rwanda, and Sierra Leone have sometimes combined multiple institutions and experimented with community level initiatives that draw upon traditional law and culture.

A. South Africa

1. Historical Overview

After years of wars of conquest and competition between European colonials and Africans over resources in the region, the Union of South Africa was officially founded by Dutch and English colonists in 1910. Only whites participated in the National Conventions that led to the formation of the Union.[34] Shortly after the formation of the Union, the white government introduced legislation to prevent blacks from purchasing and possessing property outside of designated reserved land areas. Africans living in the new Union formed the Native National Congress, which would later become the African National Congress ("ANC") in 1912. The National Party, which would later become the architect of the modern systemic Apartheid rule, was formed in 1914.

Apartheid, the policy of separateness, was solidified when the National Party came to power in 1948.[35] Under apartheid policies, the country's population was legally classified by race and the principle of "separate development" was promoted by the political leadership as the best way of dealing with the "native problem."[36] Policies adopted by successive South African governments since

---

[31] For a discussion of the underappreciated significance of culture in transitional justice projects *see generally*, Ariel Meyerstein, *Between Law and Culture: Rwanda's Gacaca and Postcolonial Legality*, 32 LAW & SOC. INQUIRY 467 (2007).

[32] *See generally* Drumbl, *Collective Violence*, *supra* note 7; *see also* Brooks, *supra* note 12.

[33] TRANSITIONAL JUSTICE, *supra* note 25.

[34] FRANK WELSH, A HISTORY OF SOUTH AFRICA 365 (2000).

[35] South Africa declared itself a Republic in 1961, leaving the Commonwealth.

[36] Business Hearings: Hearing Before the South African Truth and Reconciliation Commission (November 11, 1997), *available at* http://www.doj.gov.za/trc/special/business/busin1.htm.

1948 were increasingly repressive. By the 1970s, over three million people were forcibly removed and resettled in black homelands by the government.[37]

The government's apartheid policies were met with opposition and resistance. The ANC challenged apartheid with campaigns of civil disobedience. The government in turn responded with violence. The massacre of peaceful protesters at Sharpeville by police forces in 1960 triggered an international outcry.[38] The massacre was not the only, or the worst, outrage atrocity committed by police. However, because it came in the middle of a treason trial and was coupled with the callous attitude of the government, the massacre established South Africa as politically "untouchable" for most other countries.[39] In the months following the massacre, international capital and investment was withdrawn at a rate that halved the country's reserves and shook the currency.[40]

In 1960, the government banned the ANC. The ANC continued to operate underground and eventually formed a military wing to launch a sabotage campaign against the government. Nelson Mandela, who co-founded and led the military wing was captured, tried and sentenced to life imprisonment in 1962. Conflict and violent clashes continued, while protests by blacks were brutally put down by government security forces. Uprisings continued undeterred despite military efforts. Anti-apartheid activists refused to be governed by racism and resolved to make the streets of South Africa "ungovernable" by the white government.

In 1989, FW de Klerk replaced PW Botha as South Africa's president and met with Mandela. During de Klerk's tenure, some public facilities were desegregated and a number of ANC activists were released from prison.[41] In the early 1990s, opposition political parties were unbanned, and Mandela was released from prison after being confined for 27 years. While 1991 marked the start of multiparty talks, during the four-year period between the release of Mandela and South Africa's first democratic elections, it appeared that rampant political violence would destroy the country.

In April 1994, the ANC won a majority in the first national elections in which every citizen was given the right to vote.[42] Mandela became president and formed a Government of National Unity. South Africa's Commonwealth membership was restored and the remaining international sanctions were lifted. South Africa took a seat in the United Nations General Assembly after a 20-year absence. De Klerk and Mandela were awarded the Nobel Peace Prize for negotiating a relatively nonviolent transition to a democratic society.

---

[37] Jeanne M. Woods, *The Fallacy of Neutrality: Diary of an Election Observer*, 18 MICH. J. INT'L L. 475, 494 n.139 (1997).

[38] Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Human Beings: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1482-83 (1996).

[39] Welsh, *supra* note 34, at 454.

[40] *Id.* at 456.

[41] Kimberlee Ann Scalia, *A Delicate Balance: The Effectiveness of Apartheid Reforms in the Struggle for the Future of South Africa*, 6 FLA. J. INT'L L. 177, 179 n.13 (1990).

[42] Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 75 n.58 (1997).

2. *The Process of Restoration, Recovery, and Accountability*

The Apartheid system faced accountability not in a court or tribunal, but before a Truth and Reconciliation Commission ("South African TRC").[43] The objectives of the Commission were to promote national unity and reconciliation in a spirit of understanding transcending the conflicts and divisions of the past.[44] The South African TRC was tasked with establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from March 1960 through 1993. The South African TRC also researched the antecedents, circumstances, factors, and context of such violations.

The South African TRC was to facilitate the granting of amnesty to persons who made full disclosure of their acts, to establish and make known the fate or whereabouts of victims, to grant survivors an opportunity to relate their own accounts of the violations they suffered, and to recommend reparation measures.[45] Finally, the South African TRC was to compile a report providing as comprehensive an account as possible of its activities and findings.[46]

Three committees comprised the South African TRC: (a) the Committee on Human Rights Violations, which was directed to address matters pertaining to investigations of gross violations of human rights; (b) the Committee on Amnesty, designed to deal with claims relating to amnesty; and (c) the Committee on Reparation and Rehabilitation tasked with dealing with matters relating to reparations.[47]

3. *Future Prospects*

More than a decade after the South African TRC's final report, evaluations of its efficacy continue.[48] Some observers of the South African TRC's process, while appreciating the stark choices facing the parties involved in the transition, have raised concerns about the nature of the nation's agreement, which transferred power largely without a settling of historic wrongs, displacements, and economic disadvantages.[49] Essentially, some see the South African TRC's process as a compromise to the apartheid government, guaranteeing that white politicians, police, and army officers would never be tried for the crimes they

---

[43] *See* RICHARD A WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 9–10 (2001).

[44] Promotion of National Unity and Reconciliation Act No. 34 of 1995, July 26, 1995, ch. 2, para. 3–4.

[45] Marianne Geula, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transnational Government Conflict in a Divided Society*, 18 B.U. INT'L L. J. 57, 64-66 (2000).

[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, Penny Andrews, Book Review *David Dyzenhaus, Judging the Judges, Judging Ourselves: Truth Reconciliation and the Apartheid Legal Order* 24 MELB. U. L. REV. 236 (2000).

[49] Gillian Slovo, *Making History: South Africa's Truth and Reconciliation Commission*, Dec. 5, 2002, *available at* http://www.opendemocracy.net/democracy-africa_democracy/article_818.jsp.

committed in the name of the system in exchange for insurance against a right wing revolt backed by the power of the armed forces.[50] In South Africa, because neither side could impose a victor's justice as neither side won a decisive victory,[51] many saw a negotiated transition as the best alternative at the time.[52]

South Africa exchanged retributive justice or criminal prosecution for a variant of restorative justice, which attempted to direct attention to the needs and participation of victims who would hopefully find that "revealing is healing."[53] The South African TRC hearings allowed people to speak of what had been done to them. Some have argued that, given existing inequalities due to past discrimination, there was a tension in the purpose of the South African TRC itself, in that "it was a commission set up to draw a line under the past, to seal it up so that it could not contaminate the future, to expose the truth about past illegalities without throwing the weight of law against them, and to offer compensation without revenge."[54]

Despite its shortcomings, perhaps the most significant contribution of the South African TRC was the history it made and the possibility of its promise, not just for those participating in the hearings but also because the report it produced rewrote the history of South Africa for future generations. Because atrocities were confessed, they cannot be denied, so it can be said the battle for history was won by those who suffered systematic human rights violations.[55]

B. Rwanda

1. Historical Overview

While the 1994 genocide in Rwanda was Africa's worst in modern times, ethnic violence in the country was not unprecedented. Rwanda had long been beset by ethnic tensions associated with the traditionally unequal relationship between the dominant Tutsi minority and the disadvantaged Hutu majority.[56] A Tutsi King, Kigeri Rwabugiri, established a unified state in Rwanda in the late 1800s.[57]

---

[50] *Id.*

[51] *See* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 25 (1999).

[52] *See generally* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); Albert L. Sachs, *Honoring the Truth in Post-Apartheid South Africa*, 26 N.C. J. INT'L L & COM. REG. 799 (2001); Peter Bouckaert, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375 (1997).

[53] Slovo, *supra* note 49.

[54] *Id.*

[55] See Justice Pius Langa, *South Africa's Truth and Reconciliation Commission*, 34 INT'L LAW. 347, 348 (2000) (observing "[t]he story of the [South African TRC] is consistent with remembering and then closing the book on the past. The book will always be there, it is a record of the cruelties human beings are capable of—people who are otherwise flesh and blood humans" and asking "is there a lesson for us there, as a developing generation?").

[56] For a general discussion of the political history of Rwanda and how that history influenced the ethnic hatred motivating the genocide *see generally,* Human Rights Watch, Leave None to Tell the Story: Genocide in Rwanda 31-64 (1999).

[57] *See* ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995); GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 23 (1995).

Rwanda later became part of German East Africa until 1916 when Belgian forces occupied the country.[58] In 1923, the League of Nations granted Belgium a mandate to govern the Ruanda-Urundi region, which it ruled indirectly through Tutsi kings.[59] In 1946, Ruanda-Urundi became a UN trust territory governed by Belgium.[60]

In 1957, Hutus issued a manifesto calling for a change in Rwanda's political power structure to give them a voice commensurate with their numbers.[61] Tens of thousands of Tutsis were forced into exile in Uganda following inter-ethnic violence.[62] Rwanda was proclaimed an independent republic in 1961. With a Hutu president in power after independence, many more Tutsis left the country. In 1963, Tutsi rebels based in bordering Burundi killed some 20,000 Hutus following an incursion into Rwanda. Ethnic conflicts reached a head in 1973 after a military coup led by a Hutu, Juvenal Habyarimana.

Although controversy surrounds attempts to explain what triggered the 1994 genocide, most scholars concede that from April 7 to July 17, 1994, between 500,000 and 1,000,000 Rwandans were killed by hundreds of thousands of their fellow citizens.[63] Ten percent of the population died within days. Among the most distinguishing characteristics of the tragedy in Rwanda were the systematic manner of the slaughter and the wide-spread participation in its implementation.[64]

2. *The Process of Restoration, Recovery, and Accountability*

a. *The International Criminal Tribunal for Rwanda*

In 1994, the U.N. Security Council established an International Criminal Tribunal for Rwanda ("ICTR") to prosecute persons "responsible for genocide and other serious violations of international humanitarian law."[65] The Resolution maintained that criminal prosecution of those responsible for serious violations "would contribute to the process of national reconciliation and to the restoration and maintenance of peace."[66] The resolution granted the ICTR, sitting in Arusha, Tanzania, power to prosecute persons responsible for violations in Rwanda and in the territory of bordering states between January 1, 1994 and

---

58 *See* WILLIAM ROGER LOUIS, RUANDA-URUNDI, 1884-1919 (1979).

59 *See* QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 611-16 (1930).

60 Trusteeship Agreement for the Territory of Ruanda-Urundi, Approved by the General Assembly of the United Nations on 13 December 1946.

61 Office of the President of the Republic of Rwanda, The Unity of Rwandans Before the Colonial Period and Under the Colonial Rule Under the First Republic 42 (1999)

62 PRUNIER, *supra* note 57, at 61-67.

63 Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ILSA J. INT'L & COMP. L. 41, 69-70 (2005).

64 *See generally*, Human Rights Watch, Leave None to Tell the Story, *supra* note 56.

65 S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (8 November 1994).

66 *Id.*

December 31, 1994.[67] By October 2006, the ICTR had rendered thirty-one judgments related to the genocide.[68] The ICTR established an outreach project in 1998 and opened an information center in Rwanda in 2000. Although the ICTR maintains a website, but few Rwandans have internet access or other regular access to information about the ICTR's accomplishments.

b. Gacaca

Because the ICTR brought so few cases to judgment and the weak domestic judicial system was plagued with severe backlogs and thousands of untried detained suspects, alternative procedures were sought to adjudicate the violations. The Gacaca courts are an alternative dispute resolution mechanism, distinct from the ICTR and traditional systems of criminal justice. Gacaca was introduced after it became increasing clear that prosecutions were insufficient to try the more than 100,000 detainees suspected of having participated in the genocide.[69]

The term "Gacaca", meaning "lawn", recalls the way that members of a traditional Rwandan pre-colonial community court would sit on the grass while hearing disputes brought before the community.[70] Historically, the Gacaca process emphasized restitution and reconciliation as the principal objectives.[71] While some sanctions might be imposed by a Gacaca gathering, the sanctions were meant to educate the perpetrator regarding the gravity of the offense as well as to reintegrate the accused into the community.[72] In part, the focus on restorative justice through the Gacaca in Rwanda was a reaction against the limited results from the retributive justice campaign initiated by the Rwandan government after the genocide.[73]

3. Future Prospects

The ICTR has produced groundbreaking legal precedents contributing to the development of international criminal law generally. The ICTR also served to focus the attention of the world on fundamental rules of international law by bringing some major perpetrators to justice. The process has established an official record of the crimes committed and the criminal responsibility of those involved.

---

[67] See Security Council Resolution 955 (1994) S/RES/955 (1994).

[68] 11th Annual Report of the ICTR Presented to the General Assembly by Judge Erik Mose in ICTR Newsletter 2 (October 2006) ("To date, judgments have been rendered, or trials are ongoing in respect of a total of fifty-six alleged leaders of events in 1994").

[69] Lin, *supra* note 63, at 75.

[70] L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385, 386, 401 (2003); *See also* Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31 (2002).

[71] Tully, *supra* note 70, at 396.

[72] *Id.* at 386-401.

[73] Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 76–78 (2002); *see also* Lin, *supra* note 63, at 81.

Despite these accomplishments, the ICTR may be remembered for its shortcomings as much as its achievements. Critics fault the fact that the ICTR was geographically and psychologically distant from those most affected by the atrocities under investigation.[74] This distance, coupled with only belated and limited outreach attempts, is believed to have undercut the ICTR's legitimacy in eyes of critical domestic audiences. Limited accurate information about the tribunals' proceedings undermined their potential impact to demonstrate fair justice and accountability for atrocities in a way that resonates with the people most directly affected.

Finally, the ICTR contributed very little to the process of building domestic judicial capacity in Rwanda. Indeed, until the recent focus on the ICTR's completion strategy, the ICTR had done very little to help strengthen the ability of local courts to deal with the substantial number of potential suspects remaining to be tried.[75]

In sum, the ICTR's impact within Rwanda has been a mixed one. The tribunal's relationship with the Rwandan government was uneasy from the start. After seeking international assistance in bringing perpetrators of Rwanda's devastating genocide to justice, Rwanda was the only state on the UN Security Council to vote against establishing the ICTR. Rwanda's objections— which still fester— included the failure to locate the tribunal within Rwanda, the lack of a provision for capital punishment, and the limits on the time constraints imposed on the court's jurisdiction.[76] Management problems and the more than one billion dollars spent on the ICTR while Rwanda's domestic system struggled to try thousands of suspects have also been a source of resentment and tension. The limited number of individuals that the ICTR is able to try, the slow pace of proceedings at the tribunal, and the limited role for and attention to the needs of victims have all been criticism raised by Rwandan political leaders. In light of these issues, the ICTR has had a difficult time establishing broad credibility among the Rwandan public. "For many Rwandans, moreover, the individuals who directly committed atrocities in front of their own eyes matter as much as the more distant architects of the genocide."[77]

Similar to South Africa's TRC, the Gacaca has become a celebrated alternative for restorative justice.[78] But, despite enthusiasm over the Gacaca courts, the system has yet to progress in implementation beyond a few pilot projects. Participation in the Gacaca courts has been lower than initially predicted, and gather-

---

[74] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 25 (2001).

[75] STROMSETH ET AL., *supra* note 3, at 265; *see also* Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR's Outreach Programme*, 3 J. INT'L CRIM. JUST. 950 (2005).

[76] STROMSETH ET AL., *supra* note 3, at 271; *see also* Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal For Rwanda Making a Difference Towards Reconciliation in Rwanda,* in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 83, 84–85 (Steven R. Ratner & James L. Bischoff, eds., 2003).

[77] STROMSETH ET AL., *supra* note 3, at 271.

[78] *See, e.g.*, Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 372–86 (2005).

ings have been canceled for failure to meet quorum requirements.[79] Fear of retribution is also a factor dividing Rwandan communities over the Gacaca process. The fears of retribution in Rwanda are real. Human rights monitors have raised concerns about the security of survivors and witnesses in judicial proceedings, and Human Rights Watch has documented incidents of Gacaca participants being slain in reprisal for participating.[80]

C. Sierra Leone

1. Historical Overview

In 1787, British abolitionists and philanthropists established a settlement in Freetown for repatriated and rescued slaves.[81] In 1808, Sierra Leone became a crown colony. The country gained independence from British rule on April 27, 1961. Sierra Leone's long civil war began on March 23, 1991, when forces of an organized armed group, known as the Revolutionary United Front ("RUF") led by Foday Kankoh and assisted by Charles Taylor's Liberian military forces, entered Sierra Leone from bordering Liberia to overthrow the government.

International and local pressure led to democratic elections in 1996. On the day of the election, however, the RUF attacked. In response, various civil militia forces united into a centralized force which became know as the Civil Defense Forces ("CDF"). The CDF fought the RUF rebels alongside the standing Sierra Leone Army ("SLA"). After the democratic election, army elements calling themselves the Armed Forces Revolutionary Council ("AFRC") led by Jonny Paul Koroma, overthrew the newly elected government. Koroma invited the RUF to join the government after the coup. Combined RUF/AFRC forces began to attack the CDF as well as civilians deemed to be collaborating with or sympathetic to the CDF.

Eventually, international efforts again produced a cease fire and peace agreement on July 7, 1999. The formal beginning of the end of the conflict was the Lomé Peace Agreement of July 27, 1999 between the government and the RUF. The agreement provided a controversial amnesty for perpetrators of atrocities on all sides of the conflict.[82] In October 1999, the UN established a peacekeeping mission to Sierra Leone ("UNAMSIL").[83] The RUF leader, Sankoh, was arrested on May 17, 2000. British troops were immediately deployed to deter vio-

---

[79] Lin, *supra* note 63, at 80-1.

[80] *Killings in Eastern Rwanda*, HUMAN RIGHTS WATCH, January 2007 (in one set of incidents a genocide survivor, the nephew of a Gacaca judge was killed and eight people, among them children, were slain in reprisal); *see also Another Gacaca Judge Murdered*, N.Y. TIMES, Jan. 2, 2007., *available at* http://www.newtimes.co.rw/index.php?option=com_content&task=view&id=56&Itemid=39.

[81] For an early history of Sierra Leone *see generally*, A.P. KUP, A HISTORY OF SIERRA LEONE: 1400-1787 (1962).

[82] William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission, in* TRANSITIONAL JUSTICE, *supra* note 25.

[83] *See* Security Council Resolution 1270, S/RES/1270 (1999); *see also* Lisa Danish, *Internationalizing Post-Conflict Justice: The "Hybrid" Special Court For Sierra Leone*, 11 BUFF. HUM. RTS. L. REV. 89, 99 (2005).

lence and train local army and police. Another cease fire agreement was signed in May 2001. The civil war was officially declared over in 2002. Ultimately, Sierra Leone emerged from decades of civil war with the help of Britain, and a large United Nations peacekeeping mission. Foreign troops disarmed tens of thousands of rebels and militia fighters.

The country now faces the challenge of reconstruction. If the aims of the RUF were initially shared by many of those who were also frustrated by dictatorship, poverty, and underdevelopment, the conflict lost any of its legitimate aspirations when the RUF used barbaric tactics against great numbers of the civilian population.[84] A lasting legacy of the war, which left some 50,000 to 75,000 dead, will be the after-effects of the atrocities committed by the RUF rebels—whose signature abuse was to chop off the limbs of their victims to terrorize others. Sierra Leone's civil war was also characterized by the forced recruitment of child soldiers, widespread rapes and murders, and the gruesome mutilation of civilians. Trade in illicit gems, known as "blood diamonds," played a role in funding conflict, and thus perpetuated the civil war. The war rendered almost half the country's population of five million either internally displaced persons or refugees. The prevalence of rape and other sexual assaults during the war resulted in an increased spread of HIV/AIDS. The current Sierra Leone government, in combination with several outside groups, put forth serious effort to reintegrate refugees, internally displaced persons, ex-combatants, and victims into their communities—a monumental task.[85]

2. *The Process of Restoration, Recovery, and Accountability*

In July 2002, the United Nations and the Sierra Leone government concluded an agreement establishing a Special Court for Sierra Leone. A U.N.–backed war crimes court was created and seated in Sierra Leone to try those, from both sides of the conflict, who bore the greatest responsibility for the brutalities.[86] A Truth and Reconciliation Commission for Sierra Leone ("Sierra Leone TRC") was also established in July 2002. Perhaps the most distinctive feature of post-conflict justice in Sierra Leone has been the parallel existence of both an international criminal justice mechanism, in the form of the Special Court, and a parallel Truth and Reconciliation Commission of its own.[87] In the past, these Commissions have been viewed as an alternative to criminal justice that only informally obviates or, at the very least, suspends prosecutions. In Sierra Leone, these two institutions operated contemporaneously.[88]

---

[84] Danish, *supra* note 83, at 99.

[85] Sigall Horovitz, *Transitional Criminal Justice in Sierra Leone,* in TRANSITIONAL JUSTICE, *supra* note 25, at 44–45 .

[86] In 2006, Charles Taylor, the former Liberian president, who faced war crimes charges in Sierra Leone's special court over his alleged role in the country's civil war, has been transferred to the Netherlands-based International Criminal Court. At this writing his trial is underway.

[87] *See* Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L. J. 472 (2006).

[88] Schabas, *supra* note 82.

a. The Special Court

On August 14, 2000, the Security Council adopted Resolution 1315, requesting that the Secretary-General of the United Nations negotiate an agreement with the government of Sierra Leone to create an "independent special court" with jurisdiction over "crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone."[89] The Resolution also recommended that the special court "should have personal jurisdiction over persons who bear the greatest responsibility of the crimes" and that the judicial process of court should be "fair, impartial and comprehensive in its temporal and territorial reach."[90]

The stated purpose remains very consistent with the predominant paradigm of prosecution, conviction, and punishment. The Resolution provided that: "in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."[91]

b. Sierra Leone's Truth and Reconciliation Commission

Pursuant to section 6(1) of the Truth and Reconciliation Commission Act of 2000 ("Act"), Sierra Leone's TRC was established "to create an impartial historical record of violations and abuse of human rights and international humanitarian law related to the armed conflict in Sierra Leone spanning from the beginning of the conflict in 1991 until the signing of the Lomé Peace Agreement."[92] The Sierra Leone TRC is to address impunity, to respond to the needs of the victims, to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered.[93] Arguably, the Sierra Leone TRC has been tasked with a more ambitious and expansive mandate than that of the Special Court.[94]

Significantly, the Act also requires the Sierra Leone TRC to investigate and report on the "antecedents" of the conflict.[95] Commentators have observed that the concept of human rights violations and abuses in the Act seems to suggest that these could be committed by individuals as well as governments.[96] Under

---

[89] S.C. Res. 1315, ¶ 1-3, U.N. Doc. S/RES/1315 (August 14, 2000).

[90] *Id.* at ¶ 2.

[91] *Id.*

[92] The Truth and Reconciliation Commission Act 2000, art. 6(1) (Sierra Leone), *available at* http://www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html (last visited Feb. 29, 2008).

[93] Schabas, *supra* note 82, at 23.51.

[94] Hans Kochler, GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS (2003).

[95] The Truth and Reconciliation Commission Act 2000, art. 6(2) (Sierra Leone), *supra* note 92.

[96] *See* Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and The Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 146 (2003).

this view, responsibility could extend to transnational corporations trading in conflict diamonds or private security organization funneling weapons.[97]

In contrast to the mandate of the South African TRC, which spoke only of "gross violations," in Sierra Leone, the core concept is instead "human rights violations and abuse."[98] The Commission process has incidentally also served to highlight the indivisibility and interrelationship among different human rights in the lives of survivors. For example, many victims reported to the Sierra Leone TRC that they were not seeking compensation or restitution tied to the specific harms suffered in the recent past, but rather schooling for their children, medical care, and decent housing for their futures. For the victims of terrible brutality who participated in the process, the future lay in the vindication of their economic and social rights rather than some classic legal concept or restitution.[99]

3. Future Prospects

Sierra Leone's Special Court ("Special Court") is the first modern international criminal tribunal located within the country where the prosecuted crimes were committed. It is also the first such tribunal that was created by a bilateral treaty, which coexists with a Truth and Reconciliation Commission and that has planned an extensive outreach program to the affected communities that relies mostly on national staff.[100]

Hybrids may have the potential to overcome some of the limitations of purely international or solely domestic proceedings, and as such, may enjoy greater legitimacy among affected local populations than either distant international or discredited domestic alternatives.[101] Thus, hybrids may have the further advantage of "contributing to domestic capacity building and institutionalization of accountability norms."[102] Placing the tribunal directly in countries that have endured atrocities and including national participation in the work of the institution provides an opportunity to build capacity and leave behind a tangible contribution to the national justice system through the necessary provision of resources, facilities, and training.[103] Finally, by providing for direct interaction between national and international jurists, the Special Court provides enhanced opportunities for outreach to the local population. As Jane Stromseth notes, "[h]ybrids may prove more effective than either international or national processes alone in fostering awareness of and encouraging lasting respect for the fundamental principles of international law, and human rights at the domestic level, among citizens and

---

97 Schabas, *supra* note 82, at 24.51.

98 *Id.*

99 *Id.* at 25.

100 Horovitz, *Transitional Criminal Justice in Sierra Leone in* TRANSITIONAL JUSTICE, *supra* note 85, at 4353.

101 Chandra Lekha Sriram, *Globalising Justice: From Universal Jurisdiction to Mixed Tribunals*, 22 NETH. Q. OF HUM. RTS. 7, 15–16 (2004).

102 STROMSETH ET AL., *supra* note 3, at 275.

103 Vincent O. Nmehielee & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF., 107, (Summer 2006).

officials of the country involved. They may be more effective at norm diffusion."[104]

The Sierra Leone experiment stands out as a unique interaction between the UN and the judiciary of the state in the framework of an international entity *sui generis*. Commentators have observed that the borderline between political and judicial processes has been obfuscated by the simultaneous operation of the Sierra Leone TRC, the mandate of which runs parallel to the jurisdiction of the Special Court. It remains to be seen whether the parallel and simultaneous functioning of both the Special Court and the Sierra Leone TRC can be said to have been reconciled with the over-all goal of prosecuting the persons who bear the greatest responsibility for commission of international crimes in the territory. Both institutions have the power of gathering evidence concerning the same events but their aims are essentially different; the former strives for criminal prosecution, while the latter seeks national reconciliation. Some have argued that these differing goals create competing jurisdictions, producing two divergent systems for those whose transgressions will be handled by way of criminal prosecution and those who will simply be summoned to relate their experiences in the interest of national reconciliation.[105]

Despite its financial constraints and other challenges, at a minimum, the Sierra Leone experience may help us understand that post-conflict justice requires a complex mix of complementary strategies.

IV. Lessons Learned from Multiple Models of Delivering Justice: Essential Elements for Accountability Processes

No single mechanism or approach can satisfy the many and sometimes conflicting goals of justice, truth, prevention, deterrence, reconciliation, and domestic capacity building in the aftermath of severe atrocities. Recognition of this fact has contributed to a significant recent trend toward mixed approaches to accountability that combine multiple mechanisms designed to advance a number of different goals. In order to be successful, rule of law rebuilding programs must respect and respond to the unique cultural character and needs of any post-conflict society.[106] Now, after many well-intentioned but less than optimal interventions around the world and the African continent, it has become increasingly clear that there is no "one-size-fits-all" form for rebuilding the rule of law in post-conflict settings. Nevertheless, the relative successes and failures of the varied experiments from South Africa, Rwanda, and Sierra Leone teach that at least two features, legitimacy and flexibility, are necessary to any transitional justice effort.

---

[104] STROMSETH ET AL., *supra* note 3, at 275.

[105] *See e.g.*, Marissa Miraldi, *Overcoming Obstacles of Justice: The Special Courts of Sierra Leone*, 19 N.Y.L. SCH. J. HUM. RTS. 859 (2003).

[106] STROMSETH ET AL., *supra* note 3, at 9–10.

A. Legitimacy

Often, in post-conflict societies, institutions meant to buttress the rule of law were either badly discredited by the abuses of a corrupt regime or entirely dismantled during armed conflict. In repressive states, such as Apartheid South Africa, the legal institutions lost credibility because they were used in order to further the political agenda of those in power. In weak states like Sierra Leone and Rwanda, legal institutions may simply have been too corrupt and inefficient to win much loyalty. Starting from warped or weak foundations, lawyers and policy makers involved in transitional justice initiatives should see themselves as tasked with the challenge of creating the conditions necessary for the growth of a rule of law culture.

Jane Stromseth has observed that when trial proceedings are widely viewed as fair and legitimate by the community most directly affected, they are more likely to demonstrate credibility in that previous patterns of impunity have been rejected, that law can be fair, and that political position or economic clout does not immunize a person from accountability.[107] If the procedure is viewed as biased, ignoring influential individuals while leaving lesser offenders to answer charges, the process may signal that justice systems are not fair, that nothing has changed, or that deep-seated grievances will not be addressed. On the other hand, proceedings perceived as legitimate by the domestic and international community can strengthen the fabric of a post-conflict society by helping to build and spread domestic support for a norm of accountability and the rule of law.[108] Political scientists have theorized that at some point in the development of a new norm of the rule of law, a "tipping point" is reached where the norm, enjoying broad acceptance, cascades through a society.[109]

A primary factor in building legitimacy is the move away from remotely located international tribunals and toward domestic hybrid courts with national participation that are situated in the affected countries. Hybrid tribunals located in-country may be viewed more readily as legitimate by domestic audiences, have greater potential for domestic capacity building by including domestic jurists, and are able to demonstrate the importance of the rule of law to locals.[110] In Sierra Leone, defendants have been prosecuted before mixed panels of national and international justices, while the prosecutorial staff is also composed of international and national lawyers. In contrast, international courts, like the ICTR, are physically and psychologically distant from the people most affected by the atrocities prosecuted.

---

[107] Stromseth, *Pursuing Accountability*, *supra* note 21, at 263-65.

[108] STROMSETH ET AL., *supra* note 3.

[109] *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895 (1998).

[110] *See, e.g.*, Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

B. Flexibility

Transitional justice strategies should be adaptive and dynamic, and should aim to build upon existing cultural and institutional resources, moving them in a constructive direction. At a minimum, some space should be retained in post-atrocity accountability processes for alternative and complementary mechanisms beyond just criminal prosecution that draws from local customs, national practices or indigenous legal process. This is not to advocate for a purely national strategy over and above other options. Indeed, other alternatives are highly appropriate where the history and heritage of a discredited legal institution endures in the community memory. International criminal law interventions that engage in practices that actually reflect the customs, procedures, and values of those individuals affected by violence, both as perpetrators and victims, may also help reform domestic institutions and national courts.

Even if establishing respect for the rule of law is a goal for international criminal law and transitional justice, legal institutions are only one means of achieving that end. Sometimes international criminal trials are not necessarily the most effective means.[111] In the immediate wake of violent conflicts, some commentators have argued that there may be times when non-legal approaches, such as informal or traditional dispute resolution, are more effective to quickly establish the rule of law than any number of courts or judicial training programs.[112]

The formal institutional elements of the rule of law, though valuable, are unlikely to reap lasting benefits unless they are integrated into the broader project of ensuring peace, stability, and security. Jane Stromseth has argued that "promoting social change requires creativity, openness to alternative and nontraditional approaches, and a willingness to move beyond political elites to focus as well on grassroots efforts."[113] In sum, it requires a willingness to consider the role of civil society. Formal and informal education systems play a significant role in shaping civil society. Therefore, our understanding of the *role* of the rule of law must be flexible and expansive enough to incorporate education into the planning of transitional justice programs.

V. Averting Future Atrocities through Education

> *In every failed state there is a failed education system.*[114]
>
> *Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.*[115]

---

111 *See generally* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

112 STROMSETH ET AL., *supra* note 3, at 329.

113 *Id.* at 315.

114 Emily Vargas Baron, *The Challenge of Education in Emergencies: Policy and Practice*, remarks delivered at the Third Preparatory Committee for the 2001 U.N. Special Session on Children, June 12, 2001.

115 STROMSETH ET AL., *supra* note 3.

In their book, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Jane Stromseth and her colleagues highlight the question of culture and the significant role it may play in post-atrocity accountability efforts. She observes that, to date, few efforts to create rule of law programs have paid explicit attention to the challenge of creating cultures that respect the rule of law—perhaps because culture is the domain of anthropologists, not political realists or lawyers.[116] Rule of law programs are generally assigned to lawyers who are trained to think in terms of codes and institutions rather than in terms of cultural change. Stromeseth suggests that lawyers "need to think less like lawyers and more like agents of social change."[117] Generally, the more deeply-rooted the causes of atrocities, the greater the need for an accountability process to act not only as the arbiter of guilt or innocence in specific cases, but to become an agent for achieving more systemic social change.[118]

The rule of law is a complex and culturally situated idea, consisting of both institutions and of a particular set of normative cultural commitments.[119] The rule of law involves not merely the existence of formal rules, but also the existence of people who voluntarily choose to respect those rules and rights. This definition emphasizes that the rule of law is a matter of cultural commitment, as well as the creation of institutions and legal codes.[120] There also remains the matter of fostering a cultural commitment to the values underlying the rule of law.[121] Essentially, creating the rule of law is an issue of norm creation.[122]

The lessons learned from the experiences in Africa should lead to the consideration of the role of law in creating cultures that are less susceptible to massive human rights violations. I submit that education can aid in the cultivation of a culture of respect for the rule of law, a thirst for justice, and a taste for using alternatives to violence to resolve existing injustices. Deep-seated grievances, lasting inequalities, and the systemic problems that may have originally contributed to violence and instability must be fully appreciated and addressed by government and civil society if a stable rule of law is to take root. Education can aid in this task.

A. What can education do to further the rule of law and transitional justice initiatives?

1. Expanding Transitional Justice to Include Education

The contemporary understanding of transitional justice for post-conflict societies is broadening to encompass more than just prosecutions, reparations,

116 *Id.* at 314.

117 *Id.* (citing Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, Paper No. 41, October 2003).

118 *Id.*

119 STROMSETH ET AL., *supra* note 3, at 11.

120 *Id.* at 78.

121 *Id.* at 80.

122 Brooks, *supra* note 12, at 2285–86.

preventing impunity, and building the rule of law. Transitional justice goals are expanding to include truth sharing, reconciliation, preserving the memory of victims, building peace, and creating respect for human rights and democracy. Education, however, while often invoked conceptually, has been largely absent from the transitional justice discourse. Education should be among the primary goals of future transitional justice initiatives.

Elizabeth A. Cole observes, that "[t]he connection between transitional justice and education, or more precisely its reform, is one that, although acknowledged, has hardly been investigated either theoretically or empirically."[123] While it is generally recognized that representation of the past and intergroup reconciliation matter in a post-conflict society,[124] in transitional justice work in Africa (and elsewhere), education about that very past has been given little attention. With the exception of Sierra Leone, neither Truth and Reconciliation Commissions nor tribunals have included in their mandates the production of materials specifically aimed at either school-based or non-school based informal education for youth.

a. The Right to Education

Education was historically defined as a responsibility held by parents and the church rather than a right.[125] While the rights of the child emerged at the international level over a decade ago with the 1990 entry into force of the Convention on the Rights of the Child, the promises of the treaty are only slowly being translated from words on paper to acts in practice. While there is an internationally recognized right to education, evidence of abuses in education is not systematically collected and remains largely unknown.[126]

The officially decreed objectives and purposes of education in many nations tend to affirm the promotion of human rights, often repeating the wording of international human rights instruments that advocate strengthening respect for human rights, understanding and tolerance among nations, racial and religious groups, equality of sexes, peace and environmental protection.[127]

The right to education enshrined in Article 26 of the Universal Declaration of Human Rights, provides that: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary edu-

---

[123] Elizabeth A. Cole, *Transitional Justice and the Reform of History Education*, 1 INT'L J. TRANSITIONAL JUST., 115, 115–37 (2007).

[124] *Id.* at 115-16 (explaining that aside from Sierra Leone's program, only the Peruvian Truth and Reconcilliation Commission had a specific mandate to make recommendations for the reform of secondary education, particularly the civics curriculum, and for the creation of curricula both for students and for teachers in training).

[125] Klaus Dieter Beiter, THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW 21–22 (2006).

[126] Katarina Tomasevski, *Human Rights in Education as Prerequisite for Human Rights Education*, *in* RIGHT TO EDUCATION PRIMERS No. 4, 10 (2001), *available at* http://www.right-to-education.org/content/primers/rte_04.pdf.

[127] *Id.* at 11.

cation shall be compulsory."[128] The International Covenant on Economic, Social and Cultural Rights ("ICESCR")[129] and the Convention on the Rights of the Child ("CRC") also recognize a right to education.[130] The purpose of education, as stated in the CRC, is to foster development of a child's personality, talent, and mental and physical abilities to their fullest potential to prepare him or her for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples.[131]

Education is regarded as an enabling right or, a right of empowerment, which enables children to become familiar with all their other rights and to stand up for and exert these rights. Being aware of human rights is a prerequisite to exercising such rights and respecting the rights of others.[132]

Public schools especially have an authority that derives from the fact that they directly or indirectly carry the "imprimatur of the state."[133] There is now a rich collection of writings on transitional justice and there is a growing body of work on history education and its relation to political change, democratic citizenship, international relations, and globalization.[134] More work is needed on the relationship between the frequency of conflicts, the rate of recovery after atrocity, and the efficacy of human rights and history education.

b. The Relationship of Education to Conflict Prevention and Creation

According to Lund and Mehler, the causes of violent conflicts may be traced back to four key causes: (1) political, cultural, and economic disparities; (2) legitimating deficits on the part of the government; (3) mistrust between identity groups and the lack of possibilities for peaceful equilibrium, and (4) the absence of an active civil society.[135] We can expect that education would have a positive impact on each of these underlying causes of societal conflict. Education could contribute to overcoming the structural causes of conflict in that education reinforces social cohesion and contributes to social balance by opening up employment opportunities for those from disadvantaged groups in a given society regardless of social origin. Education may also promote civic engagement, en-

---

[128] Universal Declaration of Human Rights, G.A. Res. 217A(III), at 76, U.N. Doc. A/810 (1948) [hereinafter UDHR].

[129] International Covenant on Economic Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, 8, 6 I.L.M. 360, 364 (1976) [hereinafter ICESCR].

[130] United Nations Convention on the Rights of the Child, Art. 29, November 20, 1989, 28 I.L.M. 1448 [hereinafter CRC].

[131] *Id.*

[132] Klaus Seitz, EDUCATION AND CONFLICT: THE ROLE OF EDUCATION IN THE CREATION, PREVENTION AND RESOLUTION OF SOCIETY CRISES-CONSEQUENCES FOR DEVELOPMENT COOPERATION 33 (2004).

[133] Cole, *supra* note 123, at 121 (citing Laura Hein and Mark Selden, *The Lessons of War, Global Power and Social Change, in* CENSORING HISTORY: CITIZENSHIP AND MEMORY IN JAPAN, GERMANY AND THE UNITED STATES, (Laura Hein & Mark Selden eds., 2000)).

[134] *See, e.g.*, MINOW, *supra* note 5; MARGOT STERN STROM, FACING HISTORY AND OURSELVES: HOLOCAUST AND HUMAN BEHAVIOR: RESOURCE BOOK (1994); MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover and Harvey Weinstein eds., 2004) (considering transitional justice and social reconstruction issues, prominently including education).

[135] Seitz, *supra* note 132, at 17.

courage an attitude of tolerance and build capability for dialogue with different people and people who may hold different perspectives.[136]

Seen in this light, the lack of appropriate education itself could be regarded as one of the key secondary causes of escalating societal conflicts.[137] Accordingly, "one of the key questions for the relationship between education and conflict is the manner in which education systems organize their dealings with diversity."[138] The issue of the constructive engagement of heterogeneity has to be reflected institutionally as well as conceptually with regard to access and curricula.[139]

While education can be used to promote empowerment, it can also be abused to justify repression.[140] Indeed, "[s]chools, no less than the police or judiciary, can sustain systemic injustices. They model equity and its lack through the inclusion and exclusion of different groups of students and through teaching narratives of inferiority and superiority, hatred and discrimination."[141] The formal education system can contribute to exacerbating and escalating societal conflicts when it reproduces socio-economic disparities and brings about social marginalization or compartmentalization or promotes the teaching of identity and citizenship concepts which deny the cultural plurality of society. These elements of an education system can then lead to intolerance toward the "other".

Often, getting all children to school is inappropriately equated with their right to education. Questions about what and how children are taught are rarely asked, usually only when abuses of education are detected. Only recently has significance been attached to the negative influences of education structures and processes on societal conflict situations.[142] Whether intended or not, poor education can contribute to the escalation of societal conflicts. Further, schools themselves are sometimes sites of violence.[143] Children can be exposed to advocacy in favor of racism or incitement in favor of genocide, in schools.[144]

Education is a key medium with which ethnicity can be mobilized for the escalation of conflicts or maintenance of divisions, making youth agents of intolerance who serve to further foster exclusion or intolerance of "others."[145] For example, under the colonial education system in Rwanda and Burundi, Hutu and

---

136 *Id.*

137 *Id.*

138 *Id.* at 10.

139 *Id.*

140 Tomasevski, *supra* note 126, at 9.

141 Cole, *supra* note 123, at 120 (citing ANNA OBURA, NEVER AGAIN: EDUCATIONAL RECONSTRUCTION IN RWANDA 29 (2003) ("[I]t is significant that the education system has become a prime target in many civil wars since schools are seen as representing political systems and regimes, and as symbols of peace").

142 *See, e.g.*, KENNETH D. BUSH AND DIANA SALTARELLI, THE TWO FACES OF EDUCATION IN ETHNIC CONFLICT (2000).

143 For a discussion on the harmful effects of violence in schools *see generally*, HUMAN RIGHTS WATCH, SCARED AT SCHOOL (2001); Erika George, *Instructions in Inequality*, 26 MICH. J. INT'L L. 1139 (2005).

144 Tomasevski, *supra* note 126, at 9.

145 Seitz, *supra* note 132, at 10.

Tutsi were given restricted and greater access respectively to education, leading to educational disparities which exacerbated the violent ethnic conflicts and massacres during the 1990s.[146] Hutu teachers actively participated in the genocide by murdering or denouncing Tutsi students to Hutu militias.[147] South Africa's education system during the apartheid era exemplified an education system which conveyed to the black majority an image of being inferior and a feeling of superiority to the white elite.[148] In Sierra Leone, the pool of marginalized and/or socially excluded young men with a low level of education was a significant driving force behind the conflict. State education systems are still responsible on a very fundamental level, for creating and recreating a society's image of itself.[149]

The interplay between education and conflict is relevant in the context of rule of law initiatives. School enrollment has been said to serve as a "barometer" of a community's perceived hope for the future.[150] For example, since the end of the Rwandan crisis, 67% of children have been enrolled in more than 2,000 primary schools across the country—a tremendous sign of confidence in the nation's future.[151] In war-torn countries in particular, education is not only a way of teaching children life skills but can also aid in healing and rehabilitation. Children benefit from the contact with other children and teachers, which helps them preserve their physical and psychological health.[152]

2. *The Potential of Education to Avert Future Atrocities*

Eliminating the lasting legacy of human rights abuses and addressing the long-held grievances that may lead to violent conflict requires going beyond making changes to formal law structures and institutions. Although changes to formal law plays an important role in promoting cultural change, the eradication of discrimination and other injustices that may give rise to societal unrest is a matter of attitudes and beliefs as much as it is a matter of law and structure. Inevitably, putting into place new and improved institutions and legal codes will not create a substantive cultural commitment to equality and rights.[153] However, putting in place new norms and ideals will over time improve the likelihood of successfully creating a culture of respect for the rule of law and human dignity by equipping individuals and communities with the tools to mediate the pluralities within their societies. Thus, a focus on the role of law in supporting the development of these capabilities through education and educational reform in post-conflict societies is especially urgent and timely.

---

146 *Id.*

147 Lin, *supra* note 63, at 72-73.

148 Tomasevski, *supra* note 126.

149 Seitz, *supra* note 132, at 53.

150 Isabelle Roger, *Open Forum: Education for Children during Armed Conflicts and Post-Conflict Reconstruction*, 3 DISARMAMENT F. 45, 46 (2002).

151 *Id.*

152 *Id.* at 45-46.

153 STROMSETH ET AL., *supra* note 3, at 75.

To this end, transitional justice initiatives should interface with educational institutions. Educational systems have to be as inclusive and integrated as possible. Educationalists maintain that: "[e]ducation components [should] be expressly anchored with the objective of reinforcing individual and collective conflict transformative competencies."[154] There should be equal access to education, and curricula should reflect the social and cultural diversity of a given society. Schooling should allow for the development of multiple and inclusive identity concepts which appreciate differences and heterogeneity, and which are able to encounter foreignness with tolerance and empathy.

A strong argument can be made from the experiences of South Africa, Rwanda, and Sierra Leone for the promotion of closer collaboration between transitional justice actors and educators.[155] While education about the history of a particular conflict or injustice in general does not contribute to retributive justice as does criminal prosecutions, it is related to other major aspects of confronting the past such as truth sharing, official acknowledgement of harms, recognition of survivors, and the preservation of their memories, fostering a restorative justice.[156] Schools represent an important vehicle to carry forward and continue the work of transitional justice institutions beyond their original period of their activity and scope of influence.[157] A problem common to most truth commissions and tribunals has been their relatively limited impact. The ad hoc international tribunals for both Yugoslavia and Rwanda have, for example, been criticized for their lack of outreach to the affected communities and the lack of didactic materials for teaching.[158] Once a Truth and Reconciliation Commission has officially ended, there is still a need to carry on its work to develop new frameworks for public discourse, discussion, and analysis in order to continue to engage new audiences and younger members of society.[159]

The decision of Sierra Leone's TRC to produce versions of its report for children and secondary school students was an important innovation in the work of creating respect for the rule of law and deserves closer study; the children's version of the report included information on international human rights. The Commission reports are intended to be used in schools—possibly in oral history projects where students become historians themselves.

VI. Conclusion

Education shapes the next generation. As the examples discussed illustrate, building a durable rule of law culture is a long-term project, especially in societies where a skepticism of law may need to be unlearned before a more construc-

154 Seitz, *supra* note 132, at 11.

155 Cole, *supra* note 123, at 123 (explaining that even for those groups designated as other or enemies, their understanding of history will be crucial to a society's ability to reconcile with a difficult past for the sake of a more just future).

156 *Id.*

157 *Id.* at 121.

158 *Id.*

159 *Id.* at 122.

tive role for law in society can flourish. Educators and historians should be involved from the beginning in planning transitional justice interventions; educators, as well as legal scholars and political and religious leaders, should be given a stake in the work of transitional justice. Transitional justice institutions should encourage the production of didactic materials for both teachers and students based on tribunal mandates and transcripts and truth commission testimonies, and reports.

Support for realizing the right to education at every level is crucial to fostering the rule of law. Support for legal education is already seen as a critical investment in a sound justice system by rule of law advocates.[160] Donors typically focus on short term training for lawyers and judges.[161] This focus must expand. Jane Stromseth notes that, "[f]rom primary school onward, lessons about law, legal institutions, governance, and the nation's human rights history should be integrated into texts and curricula."[162] Particularly in those societies where secondary schooling is a luxury, special emphasis should be placed on integrating the idea of the rule of law into primary curricula. Programs designed to educate non-elites about law, human rights, and governance will enhance the efficacy of transitional justice sector programs.[163] Over the long term, the cultivation of a culture of respect for the rule of law will depend in large part on educating not only the next generation of legal professionals, but also non-lawyers.

---

[160] Nevertheless, in many post-conflict settings, law schools are underfunded and understaffed; curricula may not have been updated for decades. Although investing in law schools may not be the most immediate priority after an intervention, it should not spend too much time on the back burner, for the relative neglect of legal education can have long-term costs. STROMSETH ET AL., *supra* note 3, at 333 (citing Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patters*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003).

[161] STROMSETH ET AL., *supra* note 3, at 333.

[162] Id. at 342.

[163] Id. at 341.

AFRICAN LEGAL EDUCATION: A MISSED OPPORTUNITY AND SUGGESTIONS FOR CHANGE: A CALL FOR RENEWED ATTENTION TO A NEGLECTED MEANS OF SECURING HUMAN RIGHTS AND LEGAL PREDICTABILITY

Thomas F. Geraghty[†]
Emmanuel K. Quansah[††]

I. Introduction

The creation and maintenance of a strong legal profession is thought in the United States to be a key element in promoting the efficient and fair administration of justice. Law schools and bar associations in the United States stress the importance of training ethical and socially responsible lawyers.

The mission statement of the Northwestern University School of Law reads as follows:

> The mission of Northwestern University School of Law is to lead in advancing the understanding of law and legal institutions, in furthering justice under the rule of law, and in preparing students for productive leadership, professional success, and personal fulfillment in a complex and changing world.[1]

The motto of the American Bar Association ("ABA") is "Defending Liberty, Pursuing Justice."[2] Prominent members of the legal profession in the United States urge that American law schools should do more to train future leaders of our society.[3]

The recent book *Educating Lawyers*, popularly known as the "Carnegie Report on Legal Education," notes that in the United States, professional education is:

[†] Professor of Law, Associate Dean for Clinical Education; Director, Bluhm Legal Clinic, Northwestern University School of Law.

[††] Associate Professor of Law, former Head of the Department of Law, Coordinator, Clinic Legal Education Programme, University of Botswana. The idea to write this article was conceived when Prof. Quansah paid a two week visit at the invitation of Prof. Geraghty to the Bluhm Legal Clinic at Northwestern University School of Law from April 10-21, 2006. The authors would like to thank Charles Majinge, LLM 2007, Northwestern University School of Law, and former Director of the Legal Clinic at the University of Dar es Salaam School of Law, and Alex Aixala, J.D., 2008, Northwestern Law School for their research support. The authors also thank Taddese Lencho, Professor of Law and former acting Dean of the Faculty of Law, Addis Ababa University, and Adam Stapleton, Visiting Clinical Professor at the Bluhm Legal Clinic, Northwestern Law School and Consultant to Penal Reform International, for their comments on drafts of this article.

[1] *See* THE STRATEGIC PLAN FOR NORTHWESTERN UNIVERSITY SCHOOL OF LAW, 2 (2001), *available at* http://www.law.northwestern.edu/difference/Strategic_Plan.pdf (last visited Feb. 25, 2008).

[2] *See* American Bar Association, http://www.abanet.org (last visited Feb. 25, 2008).

[3] *See* Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 Yale L.J. Pocket Part 266 (2007), *available at* http://yalelawjournal.org/images/pdfs/102.pdf (". . .law schools should more candidly recognize the importance of leadership and should more directly prepare and inspire lawyers to seek roles of ultimate responsibility and accountability than they do today.") (last visited Feb. 25, 2008).

> [I]nherently ethical education in the deep and broad sense. The distillation of the abilities and values that define a way of life is the original meaning of the term *ethics*. It comes from the Greek *ethos*, meaning 'custom,' which is the same meaning of the Latin *mos, mores*, which is the root of 'morals.' Both words refer to the daily habits and behaviors through which the spirit of a particular community is expressed and lived out. In this broad sense, professional education is 'ethical' through and through.[4]

As a consequence of the recognition that the quality of legal education is important to the quality of justice, substantial resources, both private and public, are devoted to legal education in the United States.

The question of what the role of African law schools should be in their countries is a more complex issue, one that cannot be resolved in a sentence, a paragraph, in an article, or by outsiders. Moreover, the state of legal education varies from country to country. This article focuses on the state of legal education in sub-Saharan Africa, excluding South Africa, where legal education is relatively well-supported.

In the 1960's and 1970's, it was thought by many legal educators in the United States that law schools in Africa could play a key role in developing a cadre of able, ethical, and effective leaders.[5] As a consequence beginning in the 1960's, a great deal of time, effort, and money were spent on attempting to create African law schools in the image of Western, university-based legal education.[6] This effort waned in the mid-1970's as the result of a number of factors, including political unrest in many African countries, as well as the prevalence of one-party states that were not supportive of higher education generally and legal education in particular.[7] In addition, a debate emerged (still on-going) concerning whether

---

[4] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 30-31 (Jossey-Bass 2007).

[5] *See generally*, JOHN S. BAINBRIDGE, THE STUDY AND TEACHING OF LAW IN AFRICA, (Fred B. Rothman & Co., 1972); Quintin Johnstone, *American Assistance to African Legal Education*, 46 TULANE L.R. 657 (1972).

[6] *Id*; *see also* J. Donald Kingsley, *The Ford Foundation and Education in Africa*, African Studies Bulletin, Vol. 9, No. 3 (Dec., 1966); L. Michael Hager, *Legal Development and Foreign Aid: A Liberian Experience*, 29 J. LEGAL EDUC. 482 (1978).

[7] *See* TWENTY YEARS AFTER, A CONFERENCE OF LAW TEACHERS WHO WORKED IN AFRICA (Compiled by John S. Bainbridge, 1986) [hereinafter TWENTY YEARS AFTER]. At this conference, Cliff F. Thompson, a leader in the movement to strengthen African law schools in the 1960's and 1970's remarked, "[w]e went to Africa in 1961, and we left our final job there in 1973. In 1983, I returned on a Fulbright grant to Sudan and Ethiopia. Political events in Sudan have washed away much of what was done, but the remnants of much able work by visitors and Sudanese remains, should the rule of law, whether Islamic or Sudanese common law, again be allowed to flower. Able faculty remain in the University of Khartoum and in government ministries, but the destruction of the legal and judicial system, which was carried on by General Numeri even before his Islamization of the substantive law, was a serious blow to the work of two decades. Given the Marxist-Leninist regime in Ethiopia, I expected the situation there to be even worse, but was greatly surprised to find many direct ties to the early work of people who served there. In 1983, the law school was composed of those whom we had helped educate at the law school, and who had taken over as leading educators and senior government officials upon our departure." *Id.* at 18. More recently, one scholar has noted, "[t]he downturn in the continent's economic fortunes has taken a heavy toll on African universities and their law schools. Recruitment, and particularly retention, of able African law teachers by impoverished universities has become increasingly diffi-

the "law and development" theory that underlay the early efforts to establish Western-style law schools in Africa was responsive to the needs of Africa.[8] The participants in the 1986 conference, "Twenty Years After: A Conference of Law Teachers Who Worked in Africa,"[9] convened by Professor John Bainbridge, a leader in efforts to support legal education, reached no consensus regarding the future of legal education in Africa or of the role of ex-patriot participants in that future.[10]

Since 1986, there has been no organized effort among American law teachers, in cooperation with their African colleagues, to again reassess the efforts of the 1960's and 1970's to provide assistance to legal educators in Africa, or to attempt to chart a new course that might address the concerns of the critics of the "law and development" movement. The time is now ripe for such a reassessment and for the development of new strategies for supporting legal education in Africa. We argue that this is an appropriate and, indeed, a critical time for such a reassessment, because of the importance of international human rights norms and practices in Africa, and because of the forces of globalization. New strategies must be the result of close collaboration with African law faculties, with our

cult, and that problem has affected the quality of some of today's legal education." Muna Ndulo, *Legal Education in Africa in the Era of Globalization and Structural Adjustment*, 20 PENN. ST. INT'L L. REV. 487, 502 (2002).

[8] Another participant in the TWENTY YEARS AFTER conference remarked, "I have suggested that we were all moved by the spirit of the times, a Zeitgeist, when we set forth to build legal education and research in Africa. The times change, and with it their prevailing spirit. The years since . . .have been full of doubts and criticisms of what we tried to do. We have read and heard charges of legal imperialism and chauvinistic devotion to American law and legal education directed at efforts not only in Africa but all over the world. There was certainly naiveté and ignorance that was quickly recognized and led to the efforts to make law and development into a serious field of research. But I believe that the rise of criticism had less to do with errors and follies we may have committed than with a broad change in the Zeitgeist. The whole conception of development that guided us in the early years came to be seriously questioned or rejected by the turn of 1970's. Governments were less benevolently regarded, planning was 'in crisis', and faith withered in the powers of foreign assistance to build national institutions. We came into a time of emphasis on equity and direct efforts to meet the basic needs of the poorest. University development was criticized as favoring national elites and foundation interests in law shifted toward legal aid to the poor and human rights." Remarks of Francis X. Sutton, TWENTY YEARS AFTER, *supra* note 7, at 23-24.

[9] *Id.*

[10] In his remarks at the 1986 TWENTY YEARS AFTER conference, Jim Paul noted that the then Dean of the law School in Ethiopia had recently written him saying that "all who participated in the law school endeavor, 'set a standard that we have never forgotten and that we only wish we could reproduce today,' TWENTY YEARS AFTER, *supra* note 7, at 57. But this did not mean to Dean Paul that a new initiative should imitate the old: ". . .[A] more basic understanding has been occurring during recent years, and it is I think, a very important, very enduring perspective. People, including, I believe, people at the Ford Foundation. . .have become much more interested in 'development' as a process of helping the poor, not only to realize 'basic needs' but to realize self-reliance, dignity, and the kinds of empowerment and initiative which come when people enjoy rights. A big task of development, as conceived today, is to help self-help activities, to help people become legally empowered to shape their own futures and not be pawns for the state's or someone else's concept of 'development.'" *Id.* at 59. Another participant at in the Conference noted that future initiatives should "focus on the need for material resources to be given to the African law faculties, a fairly easy thing to do. . .but I am frankly somewhat skeptical about the effectiveness of the role which can be played by Americans, and by Westerners in general in the political process that is going on in Africa today. Remarks by Gary E. Davis, United Nations Development Program, *Id.* at 74.

African colleagues in the lead.[11] They and we should be cognizant of the need to support the training of lawyers and of other legal professionals who can expand access to justice efficiently and economically.[12]

African law schools have similar potential to produce the next generation of leaders committed to promoting human-rights through ethical and social responsibility.[13] This critical potential remains unrealized and is in jeopardy due to a lack of resources. Despite legal educators and university administrators' best efforts in Africa, African law schools are starving.[14] This means that young lawyers graduating from African law schools often lack meaningful training in key ethical, professional, commercial, and human rights-related subjects.[15] These students also lack exposure to new teaching methodologies, and due to limited access to legal information, the most recent developments in national and international law.

Although there was once a recognition in the philanthropic community that support of legal education in Africa was a critical element in the support of humane, efficient, and predictable justice systems, external donors (non-African governments and foundations) have all but abandoned their support of African legal education.[16] This article argues that despite the prevailing consensus in the

---

[11] The ABA announced in October 2007 that its Rule of Law Program had received a $2.5 million grant from USAID to support legal education and judicial education in Ethiopia. *New Ethiopia Program Part of Growing Work in Africa*, ABA, Oct. 10, 2007, http://www.abanet.org/rol/news/news_ethiopia_new_aba_roli_office.shtml. This program should provide new information about effective approaches to providing support for legal education in countries in which law schools lack resources.

[12] *See* Malawi Prison Service: Paralegal Advisory Service, *available at* http://www.mps.gov.mw/paralegal.htm (last visited Feb. 25, 2008).

[13] This does not mean, however, that the provision of justice at the grassroots level can or should always be provided by formally trained lawyers and judges. Indeed, many argue that the legal profession in resource-starved countries is not particularly inclined or particularly well-suited to deliver legal services to the poor or at the community level. *See, e.g.*, Adam Stapleton, "Introduction and Overview of Legal Aid in Africa," *in* ACCESS TO JUSTICE IN AFRICA AND BEYOND, MAKING THE RULE OF LAW A REALITY, 1-35 (Eds. Penal Reform International and the Bluhm Legal Clinic of the Northwestern University School of Law, 2007). This being said, formal justice systems require well-trained lawyers to run them and to make informed policy decisions, as well as to act as advocates and judges in human rights and commercial cases that have far reaching effects on individuals, communities, governments, and businesses.

[14] Laure-Helene Piron, *Time to Learn, Time to Act in Africa, in* PROMOTING THE RULE OF LAW ABROAD, 275, 276-78 (Thomas Carothers ed., 2006).

[15] Indeed, one commentator has noted recently that the "Red Terror" trials in Ethiopia were hampered by lack of skilled personnel in both the Special Prosecutor's Office and in Ethiopia's Public Defender's Office. With respect to the services provided by public defenders to the defendants in the "Red Terror" trials, this commentator notes that, "[p]ublic defenders lacked formal skills to deal with the complex national and international concepts involved in the trials." Girmachew Alemu Aneme, *Apology and Trials: The Case of the Red Terror Trials in Ethiopia*, 6 AFR. HUM. RTS. J. 64, 79 (2006).

[16] *See* Piron, *supra* note 14, at 276-78 (demonstrating the changed focus from legal education to a more generalized attention to the concept of rule of law in donor aid to Africa); Ndulo, *supra* note 7, at 493. ("In the 1960s and 1970s American legal scholars contributed a great deal to knowledge and skills to the growth of legal education in Africa. This source of law teachers has virtually ceased because of the economic difficulties that most African countries are experiencing and the lack of international support for funding for such law teachers."); The Partnership for Higher Education in Africa, launched in 2000 by the Carnegie Corporation, the Ford Foundation, the John D. and Catherine T. MacArthur Foundation, and the Rockefeller Foundation (which now includes the Kresge Foundation, the William and Flora Hewlett Foundation, and the Andrew Mellon Foundation) has not provided support for legal education in

United States regarding the importance in educating future judges, legislators, and lawyers, the same consensus has not been evident in the external funding of justice initiatives in Africa. This situation demands change.[17]

Historically, the legal profession in Africa was seen primarily as an aid to the developmental efforts of the respective governments.[18] Consequently, the overall objective of legal education at the inception of independence in African states was to train lawyers to serve the manpower needs of the newly formed countries.[19] Over the years this objective has been maintained despite changes in the domestic and international circumstances of African countries.[20] As a matter of colonial policy, legal education was discouraged due to its potential for producing political agitators.[21] Consequently, emphasis has been placed on the training of other professionals, such as engineers, doctors and agriculturalists, to the detriment of the legal profession.[22]

The need of these nascent independent countries for lawyers was relatively acute.[23] Governments, in their desire to accelerate the growth of the legal community, funded legal education in the context of the overall development of higher education.[24] Scholarships for legal education were awarded dependent

Africa and appears to have no plans to do so. *See* The Partnership for Higher Education in Africa, http://www.foundation-partnership.org/ (last visited Feb. 25, 2008).

[17] *See* Mark K. Dietrich and Nicolas Mansfiield, *Lessons Spurned: Legal Education in the Age of Democracy Promotion* 1 (East West Management Institute's Occasional Papers Series, Spr. 2006), *available at* http://www.ewmi.org/Pubs/EWMILegalEducationReform.pdf (". . .the failure of reformers and donors to emphasize legal education reform in their programs constitutes a major mistake, critically undermining the effort to establish the rule of law in the developing world. The inability or unwillingness of donor organizations in the United States to tackle legal education in meaningful way also tells us something about America's overall approach to promoting the rule of law; that we are often myopic, looking only for short-term results in an area where long-term vision and commitment is necessary, and where change is likely to be generational. As America tackles legal reform in the even more complex and daunting context of the Muslim world, this is an error that it cannot risk repeating.") *Id* . at 2.

[18] Dr. Kwame Nkrumah, Speech at the Opening of the Ghana Law School: Ghana Law in Africa, 6 J. AFR. L., 103, 107 (1962).

[19] *See id.* at 107-108; *see also* Emmanuel Kwabena Quansah, *Educating Lawyers for Transnational Challenges: Perspectives of a Developing Country-Botswana*, 55 J. LEGAL EDUC. 528, 528-33 (2005) [hereinafter *Educating Lawyers*].

[20] For example, the minimum academic standards for legal education in Nigeria approved by the National University Commission states the main objective of legal training in Nigeria to be, *inter alia*, "specifically aimed at producing lawyers whose level of education would equip them properly to serve as advisers to governments and their agencies, companies, business firms etc. . ." *See* M.O. Adediran, *Transnational Curriculum for Tomorrow's Lawyers,* Written for the Association of American Law Schools conference on Educating Lawyers for Transnational Challenges at Oahu, Hawaii, U.S.A (May 26-29, 2004).

[21] *See* W. A. Twining, *Legal Education within East Africa, in* Commonwealth Law Series No. 5 115, 116 (1966).

[22] *See id.*; Piron, *supra* note 14. (Even in a post-colonial context, "justice programs have not benefited from the same rhetorical push that the [Millenium Development Goals] have provided for other sectors such as health or education."); M. Ndulo *Legal Education, Internationalization and African Law School*, 2 J. OF COMMONWEALTH L. AND LEGAL EDUC., 22, 31 (2004).

[23] It has been pointed out that the situation was better in West Africa than in East Africa. *See* L.C.B. Gower, "The Legal Profession" in INDEPENDENT AFRICA – THE CHALLENGE TO THE LEGAL PROFESSION, 108, 116-117 (Cambridge, Harvard University Press 1967); *see also* Twining, *supra* note 21.

[24] John Seaman Bainbridge, THE STUDY AND TEACHING OF LAW IN AFRICA, 53, 68-69 (1972).

upon the manpower needs of the country with some countries being more progressive than others.[25] Growing decline in the economic fortunes of African countries has forced funding for legal education to compete with other pressing national priorities, causing a considerable continental deterioration of legal education.[26] Accordingly, funding of universities, including law schools, has taken on an increasingly regional and international dimension.[27]

Several international partners have been active in funding or implementing programs aimed at enhancing the transformation of the African education system, in general, and higher education, in particular.[28] The African Higher Education Activities in Development (AHEAD) database, developed by the Association of Commonwealth Universities (ACU), in support of the Association of African Universities (AAU), ACU, and the South African Universities' Vice-Chancellors Association (SAUVCA) ten year partnership program, has compiled data on 349 externally-funded projects in African higher education.[29] An analysis of the database shows that the main thematic areas that draw the highest funding are: (1) sector governance projects (by the World Bank); (2) human resource development projects (by the Canadian International Development Agency (CIDA) and the Japan International Cooperation Agency (JICA)); (3) institutional strengthening as well as HIV/AIDS projects (by Ford Foundation); and (4) quality enhancement/curriculum development, science and technology, and research collaboration (by The Norwegian Programme for Development, Research and Education (NUFU) and JICA).[30] In analyzing this database it becomes clear that legal education is not featured in any measure of importance.[31]

There have been several U.S. national organizations and private foundations engaged in funding higher education in Africa, but here again little funds are channeled specifically towards legal education.[32] As a consequence, there is a

---

[25] *See id.* at 54-55 (detailing the different approaches taken by African nations to the issue of offering scholarships: Tanzania provided full scholarships, Malawi offered 9 out of 10 students scholarships, but Nigeria and Liberia offered none); *see also* Gower, *supra* note 23, at 140 (The first time the Nigerian Federal Government gave scholarships for law studies was in 1964. These were six out of the total of 606 scholarships granted to students to study various courses).

[26] *See* Akilagpa Sawyerr, *Challenges Facing African Universities: Selected Issues*, 1, 8, 36-37 (Feb. 2004) (unpublished paper, on file with the Association of African Universities (AAU)), *available at* http://www.aau.org/english/documents/asa-challengesfigs.pdf (last visited Feb. 25, 2008); *see also* David Court, *Financing Higher Education in Africa: Makerere, the Quiet Revolution* (The World Bank and Rockefeller Foundation, Working Paper No. 22883, 2000).

[27] *See* African Union [AU], *Record of Proceedings of the 2nd African Union Meeting of Experts*, (February 27-28, 2006), *available at* http://www.aau.org/au_experts/docs/after_conf/proceedings.pdf; *see also* AU, *Second Decade of Education for Africa (2006-2015) Plan of Action, Revised* (August 2006), *available at* http://www.education.nairobi-unesco.org/PDFs/Second%20Decade%20of%20Education%20in%20Africa_Plan%20of%20Action.pdf (last visited Feb. 25, 2008).

[28] *See* Joel Samoff & Bidemi Carrol, *The Promise of Partnership and Continuities of Dependence: External Support to Higher Education in Africa*, 47 AFR. STUD. REV. 67 (2004).

[29] JAY KUBLER, AFRICAN HIGHER EDUCATION ACTIVITIES IN DEVELOPMENT: THE AHEAD DATABASE (Association of Commonwealth Universities Sept. 2005), *available at* http://www.acu.ac.uk/policyand research/publications/aheadpaper.pdf (last visited Feb. 25, 2008).

[30] *Id.* at 18.

[31] *Id.*

[32] *Id.*; *see also* Samoff & Carrol, *supra* note 28.

need to push legal education to the forefront of international aid to higher education in Africa. The overarching goal of this effort is to attract the requisite funding necessary to sustain reform and modernization of legal education in Africa.

This debate raises many questions. For instance, has African legal education been ignored by western governments and foundations that favor other means of promoting the rule of law? If so, why have African law schools failed to receive the extent of funding that supports other Rule of Law initiatives? Should African legal education receive more support from external sources? Finally, what types of initiatives and collaboration should characterize on-going support for legal education in Africa? Before we suggest answers to these questions, we shall provide a brief history of external aid to legal education in Africa.

II. Brief History of Western Partnerships with English Speaking African Law Schools

Since the mid-twentieth century there have been various modes of interactions among Western lawyers and law professors and their African counterparts. The "Law and Development" movement of the 1960's and early 1970's was an attempt by American law professors and foundations to teach and import Western legal codes, educational, and legal systems to Africa to support economic development.[33] This movement has been criticized for its perceived insensitivity to the particular political, economic, and social needs of African communities.[34]

---

[33] JULIO FAUNDEZ, LEGAL REFORM IN DEVELOPING AND TRANSITION COUNTRIES–MAKING HASTE SLOWLY, (Law, Social Justice and Global Development (LGD) Jan. 8, 2001), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez/ ("The role of lawyers in the process of development was a matter of great concern for the group of American law professors who in the 1960s launched the well-known, but short-lived law and development movement. In their view, legal education in developing countries was inadequate as it placed excessive emphasis on rote learning of legal rules and doctrine, a method which, apart from dull, did not enable the students properly to understand social and economic reality. . .As these law professors believed that lawyers had a major role to play in the development process they set out to help a select number of developing countries reform legal education. As we know, the enterprise was cut short because funds dried up and the professors became aware that it was futile to attempt to export legal liberalism." *Id.* at 8.5.; *see also* Leah Wortham, *Aiding Clinical Education Abroad: What Can be Gained and the Learning Curve on How to do so Effectively*, 12 CLINICAL L. REV. 615, 632-644 (2006) [hereinafter *Aiding Clinical Educations Abroad*].

[34] FAUNDEZ, *supra* note 33, at 6.2. ("In addition to the immediate political impact that any technical assistance project is bound to have, legal reform projects also generate resentment as they are often depicted as tools designed to impose alien legal regulatory schemes which undermine the indigenous legal culture."); *see also* Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, Global Jurist: Frontiers Vol. 7: Iss. 2, Art. 1. (2007), *available at* http://www.bepress.com/gj/vol7/iss2/art1/. *But see*, Hon. J. Clifford J. Wallace, *Globalization of Judicial Education*, 28 YALE J. INT'L L. 355 (2003) ("A globalized judicial education would supplement, not replace, existing local education efforts. Despite countries' differences, judicial education principles are generic, and a globalized judicial education system based on those universal principles will improve and enhance court systems, irrespective of the country's legal system, size, wealth, or age.") *Id.* at 358; *see also* Bryant G. Garth, *Building Strong and Independent Judiciaries Through The New Law and Development: Behind The Paradox of Consensus Programs And Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002) ("The setting for today's law and development is quite different. . .the consensus is far stronger in favor of reform and the legal approaches identified with the United States, including the core idea of a strong and independent judiciary. Lawyers do not have to fight for their role this time. Economists have come to see the importance of legal institutions to the markets that they now promote [footnote omitted]." *Id.* at 385. Garth also notes that the character of proposed legal reform initiatives has a lot to do with the political and economic philosophies of the U.S. power elite: ". . .the process is a hegemonic one

During the period from 1975 to 1990, attention shifted to support of legal infrastructure, particularly the training of judges and legal officers, and attention to community-based programs, particularly those that made legal services available to the poor.[35] Since 1990, a new movement devoted to the support of legal system improvement, dubbed "Development Law," has emerged.[36] The movement is primarily supported by multilateral and bilateral institutions.[37] Recently, the US government has been active through the United States Agency for International Development (USAID) in supporting Rule of Law programs in Africa, with a heavy focus on the training of judges.[38]

The ABA's African Law Initiative Sister Law Program sought to establish a framework for cooperative relationships by achieving a number of goals.[39] These goals included gaining an overview of legal education in Africa and the United States, exploring areas of mutual and special interest such as educational programs, libraries, and responsibilities to the bar and the public, and developing

that focuses on the business of exporting and importing on debates and issues that have salience in the north (here in the United States) at a particular time and place. We export our own palace wars." *Id.* at 395-96).

35 *See, e.g.*, MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub eds. 2000) [hereinafter MANY ROADS TO JUSTICE]; Open Society Justice Initiative, *Clinical Legal Education in Africa, available at* http://www.justiceinitiative.org/activities/lcd/cle/cle_africa (last visited Feb. 25, 2008). Prof. Geraghty has participated in U.S. Dept. of State/American Bar Association programs, including a program in Ethiopia designed to provide information about clinical legal education and a State Department/ABA project designed to provide American and African children's rights advocates opportunities to learn from each other about children's rights, juvenile court, and child protection systems, and the implementation of the UN Convention on the Rights of the Child. Each of these programs involved exchanges between African and American law faculties. Professor Cynthia Bowman of the Northwestern University School of Law led a State Department funded program which was a collaboration between Northwestern Law School and the Faculty of Law at the University of Ghana, Legon. A product of this collaboration is a book on women's rights co-authored by Prof. Bowman and Prof. Akua Kuenyehia, a former Dean of the Faculty of Law, Ghana and currently a judge of the International Criminal Court at The Hague, Netherlands. The Northwestern Law School has also worked with Ghanaian faculty to develop a clinical program and a children's law curriculum. Northwestern Law librarian Chris Simoni has traveled twice to Ethiopia to consult regarding law library development and to the Law Faculty at Legon, Ghana for the same purpose. Northwestern Law School has provided opportunities for our colleagues from Ghana to pursue their research in our library.

36 Grady Jessup, *Symbiotic Relations: Clinical Methodology–Fostering New Paradigms in African Legal Education*, 8 CLINICAL L. REV. 377, 397 (2002) [hereinafter *Symbiotic Relations*] (citing Lan Cao, *Law and Development: A New Beginning?* 32 TEX. INT'L L.J. 545 (1977)) ("The emergence of Development Law provides a new construct following the demise of the law and development movement which was attributable to deficiencies in modernization and dependency theories of law reform. [footnote omitted]. Development Law is a fresh approach to evaluating the impact of existing national laws governing political and economic development of developing nations by adapting laws, policies or customs to meet the unique national needs without the baggage of imposed laws and norms of the modernization theory or exploitation of natural and human resources of the dependency theory."); *see also* Richard Bilder & Brian Z. Tamanaha, *Law and Development, Law and Crisis in the Third World*, 89 AM. J. INT'L L. 470, 472 (Apr. 1995).

37 *See* Thomas Carothers, *The Rule of Law Revival, in* PROMOTING THE RULE OF LAW ABROAD, 10-11 (ed. Thomas Carothers, 2006); *see also*, FAUNDEZ, *supra* note 33.

38 *See* Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance, U. S. Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality* (rev. ed. Jan. 2002), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

39 Steven Keeva, *To Africa, With Law*, 81 A.B.A. J. 89 (Feb. 1995).

an action plan for the future.[40] However, this program is no longer in existence.[41] The ABA's Africa-related projects are now managed by its Rule of Law Initiative.[42] The initiative's webpage references the ABA's support of various projects, such as the Louis Arthur Grimes Law School in Liberia and support for the Liberian National Bar Association.[43] Likewise, the British Commonwealth Legal Education Association (CLEA), through its West African and Southern African chapters, has sponsored law paper competitions, moot courts, and a legal research center in Cameroon.[44]

The World Bank has also taken the lead in promoting judicial reform with the objective of improving conditions for sustainable development.[45] World Bank programs supporting the improvement of legal infrastructures are likely to continue to take center stage with a growing recognition that such programs must walk the fine line between supporting "reform" and being sensitive to African cultural, social, and legal norms and expectations.[46] The legal and judicial sector studies that precede large scale funding of legal and judicial reform projects contribute to the overall understanding of the African justice system's strengths and weaknesses.[47] The support for these programs will inevitably be substantial due to the comprehensiveness of World Bank-funded projects, and the perceived and actual links between a stable and predictable legal system and economic progress.

---

[40] *Id.*

[41] *See* M. Wolf, *Summary of Proceedings,* 2, *American Bar Association Section of Legal Education and Admission To The Bar, African Law Initiative Sister Law School Program* (1997).

[42] *See* American Bar Association, Promoting the Rule of Law, http://www.abanet.org/rol/ (last visited Feb. 25, 2008).

[43] *See* American Bar Association, Current Events/Updates, http://www.abanet.org/aba-africa/events updates.shtml (last visited Feb. 25, 2008).

[44] Commonwealth Legal Education Center, *Developing the CLEA Legal Resource Centre in Cameroon, available at* http://web.archive.org/web/20040205210350/http://www.ukcle.ac.uk/clea/newsletter/87/cameroon.html (last visited Feb. 25, 2008); *see also* Commonwealth Legal Education Centre, *Developing Legal Education in the Commonwealth: Some Current Issues* ("*Developing Legal Education*"), *available at* http://ltfiledown.qut.edu.au/download.asp?rNum=3384545&pNum=2522503&fac=law&OLTWebSiteID=CLEA&dir=gen&CFID=579781&CFTOKEN=38933363 (last visited Feb. 25, 2008) [hereinafter *Developing Legal Education*].

[45] *See* Swithin J. Munyantwali, T. Mpoy-Kamulayi, & Paati Ofosu-Amaah, *Legal and Judicial Reforms Activities in Africa: Experience to Date and Prospects for Further Improvement* (Feb. 2003) (unpublished manuscript presented at the All Africa Conference on Law, Justice, and Development, Abuja, Nigeria, on file with authors).

[46] *Id.*

[47] Legal Vice Presidency, The World Bank, *Legal and Judicial Reform: Strategic Directions* (Jan. 2003), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/10/24/000160016_20031024092948/Rendered/PDF/269160Legal0101e0also0250780SCODE09.pdf (last visited Feb. 25, 2008) [hereinafter *Legal and Judicial Reform*]; *see e.g.* Linn Hammergren, The World Bank, *Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs* (Nov. 1999), *available at* http://www1.worldbank.org/publicsector/legal/HammergrenJudicialPerf.doc (last visited Feb. 25, 2008); *see also Order in the Jungle,* THE ECONOMIST, Mar. 13, 2008, *available at* http://www.economist.com/displaystory.cfm?story_id=10849115.

III. Observations

It is interesting to note that African legal education has been largely left out of the mix as far as large-scale funding from foreign governments, foundations, and banks are concerned.[48] Presently, Rule of Law projects say little about initiatives to support legal education in Africa.[49] In part, this lack of attention may be the result of the belief that American initiatives to support legal education in the late 1960's and early 1970's were a futile attempt to "export legal liberalism."[50] However, this belief alone could not have prevented those who wished to support legal education in Africa from continuing with programs that sought to improve the quality of Africa's legal education. There must have been other reasons why the outreach of the 1970's did not continue.

These reasons could include a lack of faith in the political environments in which many African law schools and universities operated, the notion that Westerners had "shown the way" and that it was time to let African law schools sink or swim on their own, or that African law faculties rightly wanted to Africanize their institutions to the extent that large scale foreign presence was incompatible with the goal of developing autonomous, truly African law schools.[51] Indeed, the African Union's plan for higher education states that, "[i]t is the wish of the African Union that the Plan will be largely self-funded, from the internal resources of the member states. It is also expected that intra-continental support for the poorest countries by wealthier African countries will become institutionalized as regular practice."[52]

Although support for legal reform in Africa was aggressively pursued by governments, foundations, and banks, the question remains why different means of support for African law schools were not pursued. For example, governments, foundations, and banks could have reached out to African law schools with the same sensitivity that characterized the new approaches to undertaking Rule of Law initiatives in the late 1980's and 1990's.[53] Significant resources could have

---

[48] *Legal and Judicial Reform, supra* note 47. (focus of "Legal Training" is not centered around the education of lawyers but is focused on development of civil society and the knowledge of the citizenry). The World Bank does acknowledge the importance of legal education but does draw attention to the need for additional or increased funding. *Id.*

[49] *See e.g.* FAUNDEZ, *supra* note 33, at 17. ("[T]he quality of legal education in developing countries has not significantly improved since the mid-1970's. Although it is self-evident that a well-trained legal profession is essential for ensuring the long-term sustainability of legal reforms, the issue of legal education is notoriously absent from current debates on legal reform.").

[50] *Id.* (citing John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); *see also*, Peter Sevareid, TWENTY YEARS AFTER, *supra* note 7, at 107-08.

[51] *See* Wortham, *supra* note 33, at 637-40 (citing Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L. L. 470 (1995) (arguing that many of the failures of the Law and Development movement stemmed from failure to meet the specific needs of the respective African nations – whether specific to ethnic or tribal concerns or the unsettled political climate).

[52] *Second Decade of Education for Africa (2006-2015), supra* note 27, at 2.

[53] Richard J. Wilson, *The New Legal Education in North and South America*, 2 STAN. J. INT'L L. 375 (1989) (demonstrating the changed focus of legal education in South America in the 1980s towards increased efforts to assist the poor with knowledge of their legal rights and increased access to justice programs).

been devoted to collaborations that would have supported curriculum design, consideration of new teaching methodologies including clinical education, and faculty development.[54] Such initiatives could arguably have made law schools at African universities more significant players in promoting the rule of law than they have been in recent years.[55] After all, many of the leaders of the judicial systems, which outsiders sought and still seek to reform, are graduates of African law schools. However, it seems that a collective decision was made that African law schools did not have as much to contribute to the promotion of the rule of law as did already existing judicial systems, provided that those systems could be reformed.[56]

If, indeed, this decision was made, we argue that it was a bad decision. African law schools and African legal systems would be relatively better off today if substantial funding had been committed with proper sensitivity to indigenous culture and values. The impact of effective legal education upon emerging African lawyers and political leaders could be substantial. Despite the energy and commitment of Africans and Americans who have continued to work to support legal education in Africa,[57] African law facilities continue to be under funded. This

[54] *See* Wortham, *supra* note 33, at 640-44 (citing the examples of financial assistance to clinical education programs in Vietnam, South America, and South Africa that proved successful).

[55] One commentator has observed, "[t]he lawyers produced by the present system of legal education in Africa are trained to become legal technicians. They are encouraged to have little or no interest or comprehension of policy issues inherent in the law. They are generally reluctant to criticize current law. Even as technicians, they have limits, for few are competent to represent national and commercial interests in international business transactions, involving complexities of taxation and international finance." Ndulo, *supra* note 7, at 500.

[56] It should be noted, however, that there has been government and foundation support for a number of collaborations between American clinical faculty and African law schools. USAID and the Fulbright Program have sent American clinical faculty to Botswana, Eritrea, Mozambique, Kenya, and Nigeria. American law schools have granted sabbaticals to faculty who have taught in South Africa. The U.S. Information Service (U.S.I.S) (now part of the U.S. Department of State International Information Programs) has funded American law school clinical faculty to teach in Ethiopia, South Africa, Malawi, and in Kenya. The Ford Foundation has funded clinical teachers in South Africa. An author of this paper, Prof. Geraghty, was one such teacher. In 1968, as part of a Ford Foundation initiative, he traveled to the Addis Ababa University School of Law under the supervision of a law professor studying the court system in Ethiopia. In 1996, he returned to that law school as part of a U.S. State Department/ABA funded program to collaborate on a clinical curriculum for that law school. Through the Northwestern University School of Law's International Team Project program, he has traveled with law students to visit Botswana, Namibia, Malawi, Tanzania, and Uganda; *See generally* Roy Stuckey, *Compilation of Clinical Law Teachers with International Teaching or Consulting Experience, available at* http://law.sc.edu/clinic/docs/internationalsurvey2005.pdf (last visited Feb. 25, 2008).

[57] MANY ROADS TO JUSTICE, *supra* note 35, at 3. The University of Addis Ababa School of Law, under the leadership of Acting Dean Taddese Lencho, has drafted an ambitious strategic plan for its law faculty. This plan includes upgrading law school facilities, professional development opportunities for its faculty (including access to PhD programs), and renewed emphasis on the production of scholarship. *Draft Strategic Plan*, June 2007 (on file with author). This program will be supported in part by the international law firm DLA Piper and by the Northwestern University School of Law. Prof. Norman Singer of the University of Alabama School of Law has obtained funding to send young lawyers and law teachers to teach in Ethiopian law schools. There are now several American lawyers teaching full-time in law schools in Ethiopia.

reality means law teachers in Africa simply cannot afford to devote their full-time to teaching and scholarship.[58]

African law faculties cannot afford to implement new teaching methodologies because they do not have access to new materials and technologies.[59] The Commonwealth Legal Education Association (CLEA) has identified the following constraints, among others, facing a number of Law Schools in the Commonwealth: (1) resource constraints; (2) staffing constraints; (3) retention of professors; (4) lack of local legal materials; (5) lack of access to electronic resources; and (6) outdated law curricula.[60] These constraints are relative and they are more acute in Commonwealth African countries than in other parts of the Commonwealth.[61] In some African countries, such as Liberia, law schools do not have access to any materials because of civil strife.[62]

The time has come to design a new program of massive aid to African law schools. This program should follow an in-depth study of the needs of law schools in Africa in order to ensure the design and implementation of appropriate initiatives. However, even before such a study is undertaken, it is possible to predict some of the serious problems that such a study would identify.

IV. A Study of Legal Education in Africa: Expected Results

A. Faculty Salaries

After a study is completed we predict that a consensus will emerge, stating that one key problem is the inadequate amount of money allotted for faculty salaries. Interactions with faculty members in Ethiopia, Tanzania, Uganda, Malawi, and Ghana reveal that the average professors' salary ranges from $400.00 to $500.00 per month.[63] At the same time, members of African law faculties are highly sought after by governments, corporations, and by private

---

[58] Professor Ndulo observes, "Few really able people want to work for long in situations that offer no rewards in either money or prestige—and such is the case with law teaching in Africa today." Ndulo, *supra* note 7, at 502.

[59] *Id.* at 492-495 (describing the general state of African legal education in former British colonies as one focusing on the learning of general holdings of British law and the marked absence of law reports detailing recent rulings in African courts as well as the dearth of practical experience); *see also* KUBLER, *supra* note 29.

[60] *See*, CLEA, *Developing Legal Education*, *supra* note 44, at 21-31; *see also* Addis Ababa University Faculty of Law, *Reform on Legal Education & Training in Ethopia* (Draft) (on file with authors).

[61] *See* CLEA, *Developing Legal Education*, *supra* note 44, at 21-31.

[62] *U.F. Law Students Act to Replace Legal Texts Destroyed by Liberia Civil War*, Press Release, University of Florida, Levin College of Law (on file with the authors).

[63] It must be noted that the structure of academic posts in African Law Schools differ from that of American Law Schools. In Botswana, for instance, the structure starts from Lecturer to Senior Lecturer, to Associate Professor and ending with full professor. In Nigeria the structure starts with Lecturer II and goes on to Lecturer I, Senior Lecturer, Associate Professor, and Professor. Salaries attached to these academic positions vary considerably. In Ethiopia, full professors are paid about $350 per month. Boston College Ctr for Int'l Higher Educ., Int'l Network for Higher Educ. in Africa, *available at* http://www.bc.edu/bc_org/avp/soe/cihe/inhea/profiles/Ethiopia.htm.

law firms.[64] The consequence of this dynamic is that many law faculty members in Africa find it impossible to devote their full-time to teaching.[65] We concede that we do not know how to solve this problem other than by providing support for research and program initiatives that would augment the salaries of the African law faculty engaged in such projects. However, subsidies from outside sources that single out law professors might be politically unacceptable to African universities.[66] This is especially true due to the peculiar salary structure of faculty members at African universities. African universities pay equal salaries to professors of all disciplines, and singling out law professors for additional subsidy may lead to upheaval among staff unions in the universities.[67] However, increasing the resources available to these faculty members and generating enthusiasm about the process and importance of legal education may have some impact on the situation. Additionally, giving frequent opportunities to African law professors to undertake short research and teaching visits (or what has been dubbed "Cooks Tours")[68] to American law schools, for which they may be given a stipend, could also have a positive impact.

B. Law Libraries

We argue that funds to support law teachers in Africa in a scholarly capacity should be a high priority at African universities. Law libraries in many African law schools are in a sad state. This knowledge is borne out of experience in connection with Northwestern University School of Law's collaborations with the libraries in Ghana, Ethiopia, and Uganda.[69] In order to accomplish effective scholarship, African legal academics must often leave their countries for law schools in Europe or the US.[70] Law students in these and other African countries have little access to the most recent developments in the laws of their own country, and virtually no access to current news concerning international law and human rights.[71] Creating and maintaining highly developed and innovative libraries in African law schools could make those schools models for the establishment of consensus based legal systems.

---

[64] *See* Akilagpa Sawyerr, *Challenges Facing African Universities – Selected Issues*, at 23-25, *available at* http://www.aau.org/english/documents/asa-challengesfigs.pdf (last visited January 16, 2008) (noting the general challenges of African universities of maintaining faculty because of the lure of private sector professors).

[65] *See* Ndulo, *supra* note 7, at 502.

[66] Professor Quansah makes this observation based on his experience in teaching at universities in Ghana, Nigeria, and Botswana.

[67] *Id.*

[68] *See* D. GUSTAFSON, MANAGING ECONOMIC DEVELOPMENT IN AFRICA 224 (Warren H. Hausmen ed., M.I.T. Press 1963).

[69] Information regarding these collaborations is on file with the authors.

[70] *See* Sawyerr, *supra* note 64, at 23-26 (since faculty salaries have dried up African professors do not have sufficient time to research and use sabbatical opportunities as both a means to engage in research and help subsidize their minimal salary); *see also* Ndulo, *supra* note 7, at 502 (noting the lack of resources available within Africa to law scholars as well as the lack of critical thinking about the law).

[71] Ndulo, *supra* note 7, at 492-493 (describing lack of access to law reports of recently decided cases in African courts as well).

C. Teaching Methodologies

New teaching methodologies, particularly those based on the clinical education model, might also invigorate legal education in Africa. Initially, it would be necessary to explore the extent to which African legal educators share this view. Preliminary conclusions based upon work that Northwestern University School of Law has done in Ethiopia, Ghana, Tanzania, and Malawi suggest that interactive teaching methodologies are well-received by students.[72] However, we must be cautious not to confuse the pervasive politeness of African law students with enthusiasm for our presentations. Many African law students complain that the teaching in African law schools is mechanical in the larger classes.[73] Smaller classes employing a more interactive model might generate more enthusiasm for the learning process. This method of teaching requires resources, for instance more classrooms, a higher degree of support for faculty members, technological improvements for the multimedia presentations, student performances for review, and access to information on the internet.[74]

A clinical method of teaching could take the law student outside of the classroom and into the field. The model would involve carefully supervised student externships in government agencies, non-governmental organizations (NGO's), and human rights organizations. In these placements, students would receive first-hand experience of the shortcomings of the justice system in relation to under-served populations, as well as government and human rights organizations' responses to those needs. Law school-sponsored clinics could also be developed, allowing students and faculty to work together representing individuals and groups.[75] Such "clinics" now exist in many countries (Botswana, Ghana, Nigeria, South Africa, Sierra Leone, Uganda, Tanzania, Malawi, Kenya); however, the majority of these clinics are not formally affiliated with any law schools.[76]

---

[72] Thomas F. Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux): A History of Clinical Education at Northwestern,* 100 Nw. U. L. Rev. 231, 240, 251 (2006) [hereinafter *Legal Clinics and the Better Trained Lawyer (Redux)*]; *see also* Jessup, *Symbiotic Relations*, *supra* note 36, at 379-80 (citing >Michael Wolf, Summary of Proceedings, 2, American Bar Association Section of Legal Education and Admission To The Bar, African Law Initiative Sister Law School Program (1997)) ("The reports prepared by American and African law professors participating in the ABA African Law Initiative Sister Law School," Program provide strong evidence that Clinical Legal Education as part of the curriculum at an African Law School is an enriching and significant component of the law school experience.").

[73] Ndulo, *supra* note 7, at 500-01 (noting that African law professors are essentially legal technicians and the classes are quite rigid in nature and arguing for more imaginative degree programs and critique).

[74] *See, e.g*, Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux), supra* note 72, at 249 (from the inception of clinical programs to their expansion the programs require increased funding to ensure sufficient educators and resources for effective teaching).

[75] We acknowledge the political problems that would be posed to universities in some countries by the existence of such clinical programs.

[76] African legal clinics not formally associated with a law school: MBDHP's Legal Clinics Section (Burkina Faso), Centre for Practical Legal Studies (Mozambique), Legal Aid Clinic (Namibia), Legal Clinic (Butare, Rwanda), Legal Clinic (Saint Louis, Senegal), Legal Clinic (Somaliland), and Kampala Law Development Centre Legal Aid Clinic (Uganda). African legal clinics associated with law schools in Africa: Legal Aid Clinic (University of Mekelle, Ethopia), University of Nairobi Clinical Program (Kenya), Akungba Law Clinic (Adekunle Ajasin University – Nigeria), University of Ibadan Law Clinic (Nigeria), University of Maiduguri Law Clinic (Nigeria), Abia State University Law Clinic (Nigeria), University of Uyo Campus Law Clinic (Nigeria), Rhodes University Legal Aid Clinic (Rhodesia),

Predominately, the law students who work in these clinics do so without receiving academic credit.[77] In addition, student practice rules should be developed, allowing students to practice law under the supervision of clinical faculty.[78] However, this idea poses political problems, especially with local bar associations.[79] Regulations governing the implementation of this rule are now being considered by the Ugandan Law Commission.[80]

A major advantage of funding programs in the "clinical legal education" category is that such programs can respond to the critique of African legal education that it has been too much taken with Western values and the domestic debate that law schools provide no practical training.[81] Additionally, the clinical method of teaching is able to counter the debate over "legal imperialism" in that, if properly managed, the clinical method will always be responsive to the "real world" of legal practice and social needs.[82] This "real world" technique, whether it is brought into the classroom, into a government agency or NGO, or into a law school sponsored legal clinic, will inform and control the subject matter taught and learned.[83] In this way the clinical method most appropriately ensures that the legal education received by law students is culturally relevant and sensitive.[84]

Human Rights Clinic Fourah Bay College (Sierra Leone), University of KwaZulu-Natal Law Clinic (Durban, South Africa), Wits Law Clinic (Johannesburg, South Africa), Community Law Centre (Mmabtho, South Africa), University of Pretoria Law Clinic (Pretoria, South Africa), and University Legal Aid Centre (Tanzania). The preceding information was provided by Ms. Mariana Berbec of the Open Society Institute and is on file with the author.

77 In Botswana, clinical work forms part of the Clinical Legal Education courses which are compulsory for all fourth and fifth year students and for which a total of 12 credits are awarded. In South Africa, legal clinics are a well established part of the curricula of law schools, for example Universities of Natal and Witswatersrand, to name a few. *See* M. Wolf, *Summary of Proceedings, Workshop on Clinical Legal Education in Africa* 1, ABA SEC. ON LEGAL EDUC. AFR. LAW INITIATIVE SISTER LAW SCHOOL PROGRAM (July 8-12, 1996) at 9 (1996).

78 The following countries lack student practice rules as confirmed with professors at African Law Schools: Nigeria (email response provided by Prof. Oke-Samuel on February 2nd, 2008, on file with authors), Zambia (email response proved by Dr. Patrick Matibini on Febrary 6th, 2008, on file with authors), and Nambia (email response provided by Prof. Amoo on February 11th, 2008, on file with authors). While students at the Akungba Law Clinic at Adekunle Ajasin University in Nigeria can receive academic credits for clinical work, they are not allowed to practice in courts and can only observe with a supervising attorney. *See* email response provided by Professor Oke-Samuel, Feb. 2, 2008 (on file with authors).

79 *See* email response by Professor Ndubisi, Jan. 30, 2008 (on file with authors). In Nigeria, students have "limited opportunity to observe trial advocacy under the supervision of a qualified lawyer", but only *after* they have completed a law degree. *Id.* But, "[e]fforts are underway by university law clinics and NGOs to persuade the Bar and judicial authorities to expand opportunities for student practice." *Id.*

80 In Botswana, clinical students are typically permitted to appear in the Industrial Court.

81 Jessup, *supra* note 36, at 387-388; *see, e.g. Vanguard, Nigeria: Critical Reform Considerations for Preparing a Well Fit Lawyer of the Future*, AFRICA NEWS, Jul. 11, 2003.

82 *See* Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN. ST. INT'L L. REV. 421, 422- 24 (2004).

83 *Id.* at 423-24, 428.

84 Wortham has put forward three requisites for support of clinics abroad. These are (1) clinic programs should be based on students' live experience providing legal services to poor people or underserved interests, (2) law school faculty must play a significant role in the design, administration, and teaching of the program and (3) the funder should assess the competence and sincerity of those seeking to implement the program and make a subsequent assessment of the clinic's operation. Wortham, *supra* note 33, at 655-70.

There is a tendency in African law schools to use textbooks that usually reflect the state of the law in England.[85] In this realm, a program providing assistance in formulating local content material for teaching may be useful. For instance, in Botswana there is an inordinate reliance on South African and English textbooks.[86] While these textbooks tend to reflect the common law of Botswana, they do not reflect the statutory law to the same extent.[87] This is likely because the statutory laws inherited from the country's historical political association with South Africa and England have remained substantially unchanged, while conversely there have been tremendous legislative reforms in the two countries over the years which are not reflected in the current editions of relevant textbooks.[88] Students therefore find themselves being lectured about Botswana law, and then reading about a different law in the textbook. Whilst there has been a spirited attempt to produce local legal texts, publishers have not shown the required enthusiasm to publish them due the smallness of the Botswana's education market.[89] Thus, funding to produce local legal text is of current importance.

Clinical education is faculty intensive, labor intensive, time consuming, and exhausting.[90] Only the law schools in the United States with relatively substantial resources can support large programs in clinical education. If this is so, how can we expect African law schools to make substantial investments in clinical education? One answer is to look back on the history of the establishment of clinical programs in the United States in the late 1960's and early 1970's.[91] The Ford Foundation, through a spin-off foundation called The Council on Legal Education for Professional Responsibility, urged law schools to create clinical programs and provided substantial seed money for those clinical programs it helped

---

[85] "Legal education in Nigeria is modeled on that of England and Wales." Information provided by Professor Ndubisi of the University of Ibadan, Nigeria. For more information on Nigerian Legal Education *see* http://www.nigeria-law.org/Legal%20Practitioners%20Act.htm and http://www.nigeria-law.org/Legal%20Education.htm. *See also,* Nkrumah University of Science & Technology in Ghana, www.knust.edu.gh/law/books.php (last visted Feb. 25, 2008) (In the Faculty of Law, for example, the recommended textbook for the course on Ghana Legal System is a book on the English Legal system).

[86] For instance, in Botswana there is an inordinate reliance on South African and English textbooks. (For example, in the University of Botswana in teaching Delict (Tort), reliance is placed on the South African Text book, Burchell, *Principles of Delict.* In Succession, the South African text book by Corbett, *The Law of Succession in South Africa*, is used as a basic text and the English text of *Cross on Evidence* is required reading for the law of Evidence; *see also* G. van Niekerk, *The Application of South African Law in the Courts of Botswana,* 38 COMP. INT'L L J. S. AFR. 312 (2004).

[87] For example, the English Divorce Reform Act 1969, on which the Botswana Matrimonial Causes Act 1973 was based, has since been replaced by the Family Law Act 1996. Current English divorce textbooks, such as Cretney & Masson *Principles of Family Law*, discuss the latter Act with passing references to the former. In teaching divorce law therefore, reliance had to be placed on the repealed law of England.

[88] *Id.*; *see* Prof. Ndubisi's comments, *supra* note 85.

[89] Prof. Quansah is relating his and his colleagues' efforts at the Department of Law, University of Botswana in trying to interest local publishers to no avail in publishing manuscripts that have been prepared on various aspects of Botswana Law.

[90] *See, e.g,* Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux), supra* note 72, at 249 (noting the need for increased clinical professors and space); *see also* George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162,182-83 (1974).

[91] See, e.g, Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux), supra* note 72, at 238-44.

to develop.[92] The faculty members who populated those early clinical programs were young and relatively "inexpensive" recent graduates of law schools, who were enthusiastic about the opportunities that those programs offered to teach and to provide service.[93] Thus, the initial cost of setting up the early clinics in the United States was relatively modest. Reliance upon recent graduates was key not only to the financial viability of these early programs, but to generating enthusiasm among law students as well. These students and faculty shared common ideals and formed communities of learning, scholarship, and service.[94]

The clinical movement in American legal education has evolved to the extent that clinical education is now evident in every law school in the country.[95] Almost every American law student is exposed to the "real world" of lawyering through clinical legal education.[96] The "inexpensive" beginnings of clinical education in the United States are evident in some African countries. In Botswana, for example, the legal clinic was conceived as part of the Department of Law in implementing its mandate to provide academic as well as practical skills training in its L.L.B. program.[97] The administrator and the teaching staff of the clinic are part of the Department of Law.[98] Clinical responsibilities are part of the job description of Department staff, and as such there is no need to recruit staff specifically to operate and maintain the clinic.[99] The drawback of this arrangement is that the clinic does not have a separate budget from the Department of Law, and as a result it is severely handicapped in its operations.[100] There is also a marked reluctance on the part of staff to undertake clinical duties due to its inherent time-consuming nature.[101] In such a circumstance, funding to augment the budget of the Department, and perhaps to recruit staff specifically for the legal clinic, will help to improve and enhance the teaching of practical legal skills.

---

92 *See* Clinical Education for the Law Student CLEPR Conference Proceedings, Buck Hill Falls, June, 1973; *see also*, Selected Readings in Clinical Education, Council on Legal Education for Professional Responsibility, the International Legal Center, 1973. For the most comprehensive list of readings in clinical legal education, *see* J.P. Ogilvy and Karen Czapansky, CLINICAL EDUCATION, AN ANNOTATED BIBLIOGRAPHY (Revised, 2005) *available at* http://faculty.cua.edu/ogilvy/Biblio05clr.htm.

93 *Id.*

94 *Id.*

95 Wilson, *supra* note 82, at 421.

96 *Id.* at 421-24.

97 A very important part of the program at the University of Botswana is the Clinical Legal Education courses which were introduced in the 1986/87 academic year. The courses which are compulsory for all students are taken over a two-year period – the 4th and 5th years of the program. It consists of: (1) an eight week long internship within legal establishments during the long vacation at the end of the fourth year; (2) participation in at least one moot or mock trial session each academic year; (3) attendance at clinical seminars for a minimum of two hours a week; and (4) attending to clients and files in the legal clinic on a regular basis.

98 Quansah, *Educating Lawyers*, *supra* note 19, at 530-31.

99 *Id.*

100 *Id.*

101 Observation of Professor Quansah based on teaching experience in Nigeria and Botswana.

V. A Call to Action

This call to action is easy to make. However, it is quite another matter to figure out how to make the call effective and to follow through with a program that will produce tangible, measurable results. The difficult questions that must be addressed include how a new program of massive aid to African legal education should be structured to ensure true collaboration between Western law schools and NGO's, and how Western governments, foundations, and universities might be convinced to participate. We have some modest suggestions.

A first step might be to generate support among Americans who have taught in African law schools and who sympathize with the views expressed in this article. There are substantial numbers of law teachers, judges, and ABA members who have this experience and many African law teachers who have worked with law schools and foundations in the United States and Europe.[102] Many of this core group remain deeply engaged in and committed to finding the most effective ways of supporting legal education in Africa.[103] One example of this continuing interest and commitment is a group of law professors who taught in Ethiopia in the 1970's and 1980's, under the leadership of Professor James C.N. Paul. Professor Paul, together with these law professors, has established a foundation to support legal education in Africa.[104] Professor Norman Singer of the University of Alabama, and a former Professor of Law at Addis Ababa University School of Law, has obtained funding for a project that provides support for young American lawyers to teach in Ethiopian law schools.[105] The collective experiences of Americans who have taught recently in African law schools would be well worth documenting. In addition, African law schools should be surveyed in order to describe their needs, existing resources, and their suggestions for how collaborations between lawyers in the United States and lawyers in Africa in support of legal education should be structured.

With this collective knowledge, these American lawyers could approach the US government, its foundations, and law schools to see if substantial support could be generated. Then a planning process with the participation of African law deans, law teachers, judges, and practitioners should be convened to create programs supporting legal education.

VI. Conclusion

We conclude by issuing a warning to ourselves and others who run the risk of being perceived as telling African legal educators what to do. This must be especially galling to African colleagues who struggle everyday to maintain academic

---

[102] *See* TWENTY YEARS AFTER, *supra* note 7, at 43, 51, 52.

[103] *Id.*; *see also* Addis Ababa School Project, a joint project between DLA Piper and Northwestern University School of Law to assist Addis Ababa University in developing and expanding its legal curriculum and resources. For more information *see*: http://www.newperimeter.com/projects/addis_ababa_law_school/.

[104] Documents describing this fund are on file with Professor Geraghty.

[105] *See* MANY ROADS TO JUSTICE, *supra* note 35; *see also* Resume, Norman J. Singer, *available at* http://www.law.ua.edu/bio/nsingerresume.html.

programs in their law schools without adequate resources. The time has come for American legal educators and members of the American bar who are concerned about African legal education to shift from describing what they view as desirable changes to active participation with our African colleagues to design a process and to secure resources to support what African legal educators need. As was pointed out some 39 years ago, and that sentiment still rings true today, it is in the interest of United States (and all developed countries for that matter) to do what they can to help and support the rule of law and democratic institutions in Africa.[106] It is trite to observe that today the world is one, indivisible "global village." Instability anywhere affects stability everywhere. Africa is already one of the storm centers. If a strong legal profession is needed in Africa to preserve stability there, it is evident that it is in the interest of the United States and the rest of the developed world to ensure that Africa has such a profession.[107] We hope this appeal will not fall on deaf ears, but rather that what we have set out above will generate a renewal of interest with regard to funding of legal education in Africa.

[106] L.C.B. Gower, *supra* note 23, at 134.

[107] *Id.*