

'ALTERNATIVE CONSTITUTIONALISMS': AFRICAN PERSPECTIVES

Penelope Andrews

Valparaiso Law School (on leave from CUNY Law School)

What lessons can we learn for teaching and scholarship from the study of other forms of constitutionalism?

My paper briefly examines attempts at constitutionalism in Africa. The paper sweeps with a broad brush, focusing on a continent that comprises fifty-three countries. Because of their geographical reach, and substantial differences in history, legal systems, forms of government, legacies of colonialism, ethnicity, and state of development, my examination is somewhat simplistic, forcing general observations that do not necessarily take into account the specific realities of each country. In particular, the focus of the remarks will be on provisions in African constitutions that guarantee human rights.

I will focus on the African Union as the major formal governing institution of the continent, and, in particular, the most significant documents on governance and constitutionalism adopted since its establishment - and the impact of these documents on constitutions in Africa. This paper will then examine constitutional developments in Africa in the last two decades, namely, the legal transition in Namibia, South Africa and Mozambique. The paper argues that the South African Constitution, with its transformative potential, in many ways serves as a model for other African countries, especially those beset by war and conflict. But, as the paper suggests, even a transformative constitutional framework cannot guarantee stability and security; such a structure must be accompanied by economic and social empowerment. The South African situation today clearly demonstrates this point. There, despite a comprehensive, constitutional framework, and a highly developed legal system, poverty and crime continue to

undermine the transformative possibilities of the constitutional framework.

The African Union was established in 1999 and, in terms of the Preamble to the Constitutive Act, the organization is committed to promoting “unity, solidarity, cohesion and cooperation among the peoples of Africa,” and to “promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization.” The Preamble further commits the African Union to build partnerships between African governments and members of civil society, in particular, groups of “women, youth and the private sector, in order to strengthen solidarity and cohesion” amongst the peoples of Africa. The Preamble further laments “the scourge of conflicts in Africa,” stating that such conflicts “constitute a major impediment to the socio-economic development of the continent.” Most importantly, the Preamble notes that the organization is committed to promoting and protecting the human rights of Africans, both individually and in groups, and that it will “consolidate democratic institutions and culture,” and “ensure good governance and the rule of law.”

All of these commitments, and several others, are incorporated in the objectives of the African Union, which are extensively listed in Article 3 of the Act. The most important ones that directly affect constitutionalism include those committed to protecting human rights, and promoting democratic principles and institutions, and good governance. The Act envisages the establishment of a Court of Justice of the African Union, and in 2003 the Protocol of the Court of Justice of the African Union was adopted. To date the Court has not yet been established; the Protocol provides that it will enter into force after ratification by fifteen of the fifty-three member states.

More significantly, however, was the establishment of the African Court on Human and Peoples' Rights, a court that rules on the compliance of African

Union member states with the African Charter on Human and Peoples' Rights. The Court came into existence in 2004 with the ratification by fifteen member states of the Protocol to the African Charter on Human and Peoples' Rights that establishes the Court. As a result of a decision taken by member states at the 2004 African Union summit, the Court will be merged with the African Court of Justice.

I attempt to highlight some significant features about the African approach to constitutionalism, as compared to the American model. I especially want to identify the factors influencing the substance of African constitutions and to examine the content of some of these provisions. The first wave of African constitutionalism arose in their emerging from colonialism, the constitutions of the last decade reflect a movement away from authoritarianism towards democratic rule.

The first feature is the respective points of departure. At the time that most African constitutions were adopted, many of the rights incorporated in their texts had previously been known and generally accepted because of their incorporation in international covenants and in the United States constitution. As a result of using the international covenants as a model for the rights to be recognized in their own constitutions, one sees what is perhaps a general consensus amongst African states as to the kinds of rights that warrant constitutional protection. Some of these rights overlap what is found in the U.S. constitution, but Americans see their sources as entirely local, and in their constitutional interpretation reflect such a domestic bias. Contrary to the American practice, African constitutionalism recognizes the importance of international legal principles both in the text and in its interpretation. The South African constitution is a good example; the constitutional text mandates the courts to consider international and foreign jurisprudence. The Mocambican

constitution also accords significant recognition to international law.

The second significant point about constitutionalism in Africa is the increasing obligation placed on governments to incorporate a panoply of socio-economic rights in the constitutional text. The African constitutional model therefore embodies both the negative model of constitutional law, that is, a proscription on state intrusion, as well as the positive listing of rights. As the South African Constitutional Court has noted, its role is “not just to protect the status quo from undue unjustifiable intrusions by the state on people’s rights, but it also has to ensure that the rights promised in the Constitution are actually achieved.” In addition, most African constitutions mandate not just the regulation of relationships between the state and individual citizens (vertical relationships), but also the relationship between individuals (horizontal relationships). Many African constitutions, in addition to specifying rights, also list concomitant duties and obligations of citizens.

One interesting difference between the way in which rights are provided for in the American constitution and many African constitutions is that the African constitutions contain a lengthy enumeration of rights. This enumerated listing of rights represents a firm determination to specify the rights that are deemed to warrant protection, and not leave it to the discretion of judges.

Finally, reflecting the influence of feminist legal and critical race theorists, there is a growing willingness to eschew a formal definition of equality, in favor of one that embraces a more substantive version. Here again South Africa provides an example: Despite the historical focus on eradicating racism, the Bill of Rights makes the same absolute commitment to the eradication of sexism, and indeed all other forms of discrimination and disadvantage. For example, the protections afforded women are not just confined to the traditional categories of protection against discrimination based on sex and gender, but this protection

also includes pregnancy and sexual orientation. This is most notable as a lesson for many African states, where women labor under severe burdens because of their gender. Combined with other grounds for proscribing unlawful discrimination, including race, national origin, and language, the protection against invidious discrimination is relatively expansive. In addition, a particularly novel feature of the South African Constitution is its recognition of the interconnectedness of different forms of discrimination, providing that the state may not discriminate “on one or more grounds.” The Constitution, therefore, protects individuals on one or several grounds, hereby embracing the arguments of intersectionality made by critical race scholars and advocates, a situation accepted with great difficulty in American courts.

In considering lessons to be learnt from the study of African constitutions, the most helpful approach might be to think about convergences and divergences in both the texts and interpretation of rights - and reflect on their reasons. Some areas in which this would be most fruitful would be in the area of civil liberties such as freedom of the press, religious freedom, rights of the accused, voting rights, right of association, women's rights, and reproductive rights.