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The Internationalisation of Constitutional Law
Chair: Prof. E Smith

This plenary session seeks to explore how international norms affect constitutional adjudication within domestic or national tribunals. In essence, the enquiry explores the character of the impact of international norms on national constitutional systems. It does not take much to appreciate that in theory and in practice the response of national jurisdictions to international law differ from state to state. It is also fair to observe that as a general matter national courts are not at ease with international law. This is so even in a world where global visions of law are becoming increasingly dominant. Yet many national courts are slow at acknowledging opinions in other parts of the world and stubbornly prefer to pander to municipal standards consistent with traditional notions of national sovereignty. This they do even in the face of evolving or established international law norms.

Moreover, at a theoretical level theorist, international lawyers and courts remain divided over the two broad approaches of monism and dualism. Monism teaches that all law is one and that international law is incorporated directly into municipal law without a need for a specific act of adoption. Dualism sees municipal law as distinct and separate from international law in scope and application. International law may apply on if it is incorporated into municipal law.

Yet there are times when the overlap between national and international law becomes inescapable. In the words of Justice Albie Sachs, one of my colleagues at the Constitutional Court of South Africa: “[b]oth violence and

international norms on human rights have become globalised. Formerly rigid systems of sovereignty become porous as the enemies and the friends of the rule of law show equal and opposite disregard for state boundaries. Judges in national courts are obliged to put aside their usual text books and cases; and open their eyes to legal scholars and commentators [on international law]¹.

This general introduction should suffice. What I propose to focus on is the South African response to the interface between our newly found national constitutional system and international law as well as foreign law. A genesis of our brief constitutional history should serve as a useful starting point. By the 1980's the minority apartheid government of South Africa was beleaguered on all fronts. Through international instruments apartheid had been declared a crime against humanity. Majority of countries around the world had imposed economic, cultural and diplomatic sanctions against that government. Domestic political resistance had risen to a very high pitch and several of our leaders, including Nelson Mandela were still incarcerated on Robben Island. The national courts had become an extension of the repressive mechanism of the apartheid government. This meant that the national courts took a positivistic, insular and sometimes antagonistic stance towards international law, in particular its human rights instruments and evolving standards of decency that were being embraced by courts in open and democratic societies.

1994 ushered a new beginning for our country. A people who were at serious odds over centuries chose to negotiate peace, democracy and social justice. Acting through their representatives they established a constitutional state founded on the values of human dignity, achievement of equality and advancement of human rights and freedom. The avowed purpose of the Constitution is to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights. Our Constitution is the supreme law and any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. The Bill of

¹ Albie Sachs – War, Violence, Human Rights and the Overlap between National and International Law. Fordham International Law Journal 2005 Vol. 28 p432.

Rights applies to all law and binds the legislature, the executive and the judiciary and all organs of state. The state must respect, protect, promote and fulfil the rights enshrined in it. Courts must give effect to a right in the bill and if necessary must develop a common law. When deciding a constitutional matter within its power, a court must declare any law or conduct that is inconsistent with the Constitution invalid, to the extent of its inconsistency. All superior courts have constitutional jurisdiction, however, certain constitutional matters are reserved for decision by the Constitutional Court only and that Court is the highest court in all constitutional matters.

Our Constitution has another and very important purpose. In its preamble, it announces an intention to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. At a historical and practical level, the first object was to transform the international status of our country from a pariah or rogue state to a worthy participant in the international scene. At a jurisprudential level, our new democratic constitutional state embraces globalised standard and norms set by international law. As you will notice our Constitution has adopted a mixed approach to the incorporation of international law into our domestic law. It assumes a dualist approach in relation to treaties and a monist stance in respect of customary international law.

This the Constitution does at an interpretive and substantive level. First, it provides that “when interpreting the Bill of Rights a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law and may consider foreign law”. Clearly this provision turns international law into a mandatory canon of constitutional interpretation.

There is near general consensus in our country that Section 39(1) does not merely require a court to consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts but also to consider (a) international conventions, whether general or particular establishing rules recognised by the contracting states (b) international

custom, as evidence of a general practice accepted as law (c) general principles of law recognised by the family of nations (d) judicial decisions and writings of qualified publicists as subsidiary means of ascertaining rules of law.

As we have seen, in our jurisdiction, courts are obliged to consider applicable international law, but may consider foreign law. It must however be borne in mind that section 39(1) invokes public international law primarily for the purpose of interpreting rights and for determining their scope and not approving their existence. Further, it should be noted that the injunction to consider international law does not extend to foreign law. It is optional to consider foreign law. In *State v Makwanyane*² the Constitutional Court made it plain that comparative human rights jurisprudence will provide the necessary guidance while an indigenous jurisprudence is being constructed. However, foreign case law will not necessarily provide a safe guide to the interpretation of our Bill of Rights. Even so, those who have read any of the judgments of our Constitutional Court will know that there is hardly a judgment that goes by without extensive references to the legal positions in other open and democratic societies. It is not an overstatement to observe that our decisions read like works of comparative constitutional law.

This judicial predilection for international law norms is rooted in our stubborn determination to turn our backs on an unjust and insular past and to embrace globalised standards which are likely to represent what is just and equitable. Secondly, the Constitution itself incorporates customary international law, as law in our country, unless it is inconsistent with our Constitution or national legislation. This provision obliges courts to search for and give effect to customary international law where applicable. Again, the Constitution makes plain that international agreements bind South Africa once they have been approved by our national legislature or have been enacted into law or are self-executing. It goes without saying that any of these international treaties may be given effect to only if they are incorporated into municipal law and are

² 1995 (6) BCLR 665 (CC) available at <http://www.concourt.gov.za/files/makwanyane.pdf>

consistent with the Constitution. Thirdly, our Constitution provides that when interpreting any legislation every court must prefer any reasonable interpretation that is consistent with international law over another interpretation that is inconsistent with international law.

How have the domestic courts used international law provisions of the Constitution? Since the advent of our constitutional democracy in 1994 the Constitutional Court has had occasion to rely on international law. A few examples will suffice. In *State v Makwanyane*³ our Court was called upon to pronounce upon the constitutionality of the death penalty. International human rights norms on capital punishment and in particular on the construction of the right not to be subject to cruel and inhumane punishment played a significant role in the conclusion of the Court that the death penalty is inconsistent with our constitutional dictates.

In *Azanian People's Organisation v The President of South Africa*⁴ the facts showed that past state officials perpetrated violence against its own citizens during the apartheid era and the issue was whether in the light of international law norms, a law which grants the perpetrators amnesty is permissible. The Court concluded that the legislative amnesty is not at odds with our constitutional setting. In *State v Basson*⁵ a South African army official was charged for past violence against nationals of a neighbouring country. The question to be decided on appeal by the prosecution was whether the decision of the trial court to acquit the accused took proper account of the international duty of the state to prosecute war crimes.

In *Mohamed v President of South Africa*⁶ US authorities sought the extradition of the applicant for violence committed against the US embassy in Tanzania. The issue was whether a suspect found on South African soil could be handed over to the US FBI without access to a lawyer and without US authorities giving prior assurance that the suspect would not be subjected to

³ 1995 (6) BCLR 665 (CC) available at <http://www.concourt.gov.za/files/makwanyane.pdf>

⁴ 1996 (8) BCLR 1015 (CC) available at <http://www.concourt.gov.za/files/azapo/azapo.pdf>

⁵ 2004 (6) BCLR 620 (CC) available at <http://www.concourt.gov.za/files/basson.pdf>

⁶ 2001 (7) BCLR 685 (CC) available at <http://www.concourt.gov.za/files/mohamed.pdf>

capital punishment. The Constitutional Court declined the request for extradition.

Lastly, more recently in *Kaunda v President of South Africa*⁷ South African mercenaries had been captured in a neighbouring state and threatened with prosecution and capital punishment after a likely unfair trial in a third state approached the Constitutional Court claiming a right to be extradited back to South Africa and a right to be given diplomatic protection by South African authorities whilst detained in a foreign country. The majority of the court held that traditionally international law acknowledges that states had the rights to protect their nationals beyond their borders but were under no obligation to do so.

Our Constitution is young. So too is our constitutional jurisprudence. I have tried to demonstrate that because we have by and large started on a clean canvass it is possible to put up bold brush strokes which borrow from and are consistent with globalised notions of what is fair and just. Our Constitution permits this and in many ways imports and incorporates international law standards and our municipal courts have not hesitated to infuse their adjudication with these norms. Where appropriate our national courts have also looked to foreign case law for guidance but always recognising that caution must be exercised when considering foreign law because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared to those in our country and indeed the different historical developments against which other constitutions came into being. For instance our Constitution is avowedly transformative in its overall purpose. It represents a new beginning and brave beginning. It promises renewal. If I may repeat what I said in another context, the scaffolding is up, the edifice of constitutional jurisprudence is rising and may justice for all be the outcome.

I thank you.

⁷ 2004 (10) BCLR 1009 (CC) available at <http://www.concourt.gov.za/files/kaunda.pdf>

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