AFRICAN BILLS OF RIGHTS IN A COMPARATIVE PERSPECTIVE

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1 Introduction

Although the issue of human rights protection is the product of a long history of the struggle for social justice and resistance to oppression in all societies, serious efforts to legally recognise and protect human rights in Africa is very much a post-1990 phenomenon. This came as part of the prolonged fit of "constitutional fever"[1] marked by new or revised constitutions that were ostensibly designed to usher in a new era of democratic governance, constitutionalism, and respect for the rule of law and human rights and end decades of often harsh and inhumane dictatorships. One major sign of the apparent desire of African governments to align with the trend towards the universal recognition of human rights in domestic constitutional law has been the incorporation of bills of rights or provisions designed to protect human rights in most African post-1990 constitutions.

Bills of rights or provisions protecting human rights have particular importance in Africa because of the continent's poor human rights record dating particularly from the colonial period and probably even before then. Whilst bills of rights are not to be seen as the ultimate solution to the problem, they are a crucial part of it. For example, the bill of rights is at the very core of the South African Constitution as a direct result of the gross abuses of human rights that took place during the apartheid period and the desire to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[2] Whether or not these bills of rights will form the basis on which a human rights conscious culture will be embedded in the African polity remains an open question.

1 Glélé cited in Du Bois de Gaudusson "Introduction" in Du Bois de Gaudusson, Conac & Dessouches (eds) *Les Constitutions Africains Publiée en Langue Française* Vol 2 (1998) 9.

2 See the preamble to the Constitution of the Republic of South Africa, 1996.

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Fundamina 17 (1) 2011 ISSN: Print 1021-545X
© Unisa Press pp 33–64
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This comparative analysis of the bills of rights in a selected number of African constitutions aims to assess the extent to which they provide a solid foundation for a human rights culture to develop. It starts by considering the concept of a bill of rights and the historical background of human rights protection in African constitutional practice. It is shown that the colonial experience did not prepare the African governments to recognise or protect the human rights of their people. The *raison d'être* for adopting this comparative approach is discussed in the next section. The comparative analysis is based on five elements namely, the scope of the bills of rights, their status, their justiciability and their relationship to international law. Before considering the main lessons and other insights that can be drawn from the analysis, a few limitations that are inherent in such a comparative analysis are alluded to. When the symbolic and substantive possibilities are considered, it would seem that the fundamental objective of the 1990s endeavours to lay down a solid foundation for a human rights culture has only produced mixed results. To be able to understand the aforesaid, it is firstly necessary to see what exactly is meant by "bill of rights" and subsequently how African leaders learnt the lessons in rights violations during the colonial period all too well.

2 The meaning of bills of rights and their historical background in Africa

2 1 The meaning of bills of rights

Although the idea of fundamental human rights is rooted deep in the history of Western civilisation, their expression in a document referred to as a "bill of rights" is said to originate from England where the first attempt at a bill of rights of some sort was made in the English Bill of Rights of 1689.[3] However, modern bills of rights probably began with the 1776 Virginia Declaration of Rights, the 1789 French Declaration of the Rights of Man and the Citizen and the 1791 amendments to the United States Constitution. In spite of this long history, it is not easy to state exactly what is meant by a bill of rights.[4] One may wonder whether this really matters. It is an important issue because although the South African Constitution devotes the whole of chapter 2 (consisting of thirty two sections) to what it expressly labels as a "bill of rights" this term does not feature or

3 Long before then, there had been other documents that tried to address certain aspects of human rights violations. Eg, there was the Code of Hammurabi, a 4000 year old document of laws and punishments that applied to human beings. Elements of human rights protection were found in the constitution of ancient Athens, which established the Athenian democracy and was written by Cleisthenes (508 BC). Other pre-1689 documents include Magna Carta (1215), the Golden Bull of 1222 (Hungary), the Dušan's Code of 1349 (Serbia), the Pacta Convents of 1573 (Poland), the Henrician Articles of 1573 (Poland), and the English Petition of Rights of 1573. See, further, "Bill of Rights" *http://www.answers.com/topic/bill-of-rights-1690* (3 Mar 2011).

4 Eg, Alston "A framework for the comparative analysis of bills of rights" in Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 6 remarks that Goldwin "What is a bill of rights and what is it good for?" in Light & De Villiers (eds) *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help* fails to provide an answer to this question.

appear in many other constitutions. Does this mean these latter constitutions do not protect human rights or only do so to a lesser extent than those constitutions which have provisions which are labelled as bill of rights?

There are probably as many definitions of the term "bill of rights" as there are writers on the subject. In a 1999 study, Philip Alston reviewed the different attempts to define the term and exposed some of the difficulties of coming out with an accurate and comprehensive definition.[5] Dictionary definitions have not made things clearer.[6] The definitional problem becomes exacerbated when dealing with unwritten constitutions such as those of the United Kingdom, Israel and New Zealand. Moreover, the term is sometimes applied to a wide range of documents from short manifestoes detached from any particular institutional arrangement to detailed constitutionally entrenched and legally enforceable instruments.

As will shortly be seen, the fact that a constitution does not expressly refer to or use the term "bill of rights" does not necessarily mean that it does not recognise and protect human rights. What is perhaps of more importance is whether a constitution contains provisions which do what a bill of rights is supposed to do. From this perspective, the issue of definition is less important than what the bill of rights actually does. Even from this purely functional perspective, there are still a variety of views. For example, David Kretzmer identifies three normative functions which a bill of rights can fulfil in a legal system. The first, which he describes as the most obvious function, is to define those basic rights that are recognised and protected by the system. The second is to delimit the scope of protection of recognised rights by setting standards for decisions on whether and when they may legitimately be restricted. The third is to establish the constitutional status of the recognised rights, by determining whether legislation that is inconsistent with specific rights may be invalidated by a court or some other constitutional body.[7] Another writer, Strauss,[8] suggests that there are three different conceptions of a bill of rights. One is that it is a code of relatively specific requirements and prohibitions designed to help break up traditional practices that are in need of change; the second is that it is a means of correcting structural deficiencies in representative government by imposing limits on majoritarianism and the third is that it acts as a charter of fundamental rights. Whilst all of these attempt to explain and describe what a bill of rights is supposed to do, none of these covers the full scope.

It has been argued, and to my mind rightly so, that "the 'true' and complete constitution does not exist until it establishes the fundamental status of the individual within the state, until it contains the citizen's basic subjective rights in relation to the state, the basic rights of personal freedom".[9] This underscores the importance of a bill of rights in a

5 Alston (n 4) 6-11.

6 In fact, Alston *ibid* gives the example of the *Oxford Dictionary* which lists the following three meanings: (i) the English Bill of Rights of 1689; (ii) the American Bill of Rights of 1791; and (iii) a statement of the rights of a class of people.

7 Kretzmer "Basic laws as a surrogate bill of rights: The case of Israel" in Alston (ed) (n 4) 76.

8 Strauss "The role of a bill of rights" in Stone, Epstein & Sunstein (eds) *The Bill of Rights in the Modern State* (1992) 539.

9 Stern "Global constitutional movements and new constitutions" 2002 *SA Public Law* 156.

constitution.[10] It is therefore no surprise that the 1789 French Declaration of the Rights of Man and the Citizen in its article 16 declared that "any society in which the rights of man are not ensured, nor a separation of powers guaranteed has no constitution". This point was also reiterated by Thomas Jefferson who allegedly wrote a letter in 1787 from pre-revolutionary Paris, to James Madison opining that "a bill of rights is what the people are entitled to against every government on earth".[11]

Having said that, for purposes of this paper, the term "bill of rights" will refer to any provisions designed to introduce and protect contemporary human rights norms and standards in a constitution. Whilst many constitutions, such as the South African Constitution, group these provisions in a specific section of the constitution under the label "bill of rights", others do the same but use labels such as "fundamental rights and freedoms",[12] "rights and duties of the individual",[13] "basic rights and duties".[14] In some cases such provisions even appear mainly in the preamble to the constitution.[15] The discussion that follows is therefore concerned with all the provisions in the different constitutions that recognise and protect human rights irrespective of whether they are labelled as such. However, to understand why the issue of human rights protection only became a serious matter after the 1990s and why different African countries have approached this in different ways, a brief examination of what happened during the colonial period is necessary.

2 2 Historical background of human rights protection in Africa

Human rights as we know them today were hardly known or respected during the colonial period. Because colonial rule was neither constitutional nor democratic, there were no restrictions based on any fundamental laws on the exercise of legislative, judicial or executive powers. The colonial administration was authoritarian, repressive and harsh and the overriding consideration was to keep the population under control for maximum exploitation of the natural resources in the colonies, with scant regard being paid to the welfare of the people. The laws imposed by the "mother country" established and maintained a governmental and social system that was not only harsh and authoritarian, but was characterised by racial discrimination. The powerful administrators, who ran the colonies like private farms, were given wide discretionary powers which they regularly abused. In fact, flagrant violations of human rights through actions such as forced labour, land seizures, arbitrary arrest and detentions, and collective punishment were commonplace. Much has been written about the atrocities that were committed in Africa during the colonial period under the guise of benevolent paternalism (*mission*

10 In fact, the Virginia Declaration of Rights of 1776 and the American Declaration of Independence of the same year enshrining certain fundamental rights, all preceded the United States Constitution itself.

11 Cited by Alston (n 4) 1.

12 See, eg, s 3 of the Botswana Constitution of 1966.

13 See Title 2 of Benin's Constitution of 1990.

14 See Part 3 of the Tanzanian Constitution of 1977 (which has since been substantially amended).

15 See, eg, the preamble to the Cameroonian Constitution of 1972 as substantially amended in 1996.

civilisatrice).[16] For example, in his *Heart of Darkness*,[17] Joseph Conrad describes Belgian rule in today's Democratic Republic of the Congo as the vilest scramble for loot that had ever disfigured the history of human conscience.

When independence became inevitable, the issue of how to deal with human rights in the new constitutions being crafted for the new states became a problem. Early constitutions drafted by the British for their non-African colonial possessions initially reflected the traditional English scepticism towards the entrenchment of rights and did not contain any comprehensive statement of fundamental rights.[18] This attitude had been influenced by scholars such as Jeremy Bentham who, in commenting on the French Declaration of the Rights of Man and of the Citizen, described constitutionally entrenched human rights as "rhetorical nonsense – nonsense upon stilts".[19] Dicey[20] was able to boast that *habeas corpus* is "for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".

It was therefore no surprise that as Ghana (then known as the Gold Coast) was prepared for independence, the draft Constitution which included seven articles for the protection of fundamental rights was rejected by the British government.[21] As a result, the Ghanaian Constitution of 1957 had no bill of rights. There was, however, a dramatic change at the dawn of the 1960s.[22] It is not improbable that one of the reasons was the hope by the British government that a constitutional guarantee of fundamental rights, including the prohibition of discrimination, would protect the British citizens who had settled in large numbers in certain African countries such as Kenya, Uganda and Tanzania.[23] In December 1959, Nigeria became the first former British colony in Africa to adopt a constitutional bill of rights. Thereafter, it became the norm for the constitutions of other British colonies in Africa to have a bill of rights based on the Nigerian model.

16 See, eg, Hochschild *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (1998); Wesseling (tr Pomerans) *Divide and Rule: The Partition of Africa, 1880-1914* (1996); Fanon *The Wretched of the Earth* (1963); Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996); and, more recently, Ibhawoh *Imperialism and Human Rights. Colonial Discourses of Rights and Liberties in African History* (2007).

17 Conrad (1990) 87.

18 For comprehensive discussions of the British approach, see generally Simpson *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (2001); Parkinson *Bills of Rights and Decolonization. The Emergence of Domestic Human Rights Instruments in British Overseas Territories* (2007); and Jayawickrama *The Judicial Application of Human Rights: National, Regional and International Jurisprudence* (2002).

19 Quoted in Jayawickrama (n18) 106.

20 In his famous *An Introduction to the Study of the Constitution* (1959) at 199.

21 In fact, Parkinson (n 18) at 1 starts the introduction to his book thus: "At the 1953 conference on the constitutional future of Nigeria, a Nigerian delegate suggested including a bill of rights in the new constitution. Oliver Lyttelton, Secretary of State for the Colonies and Chair of the Conference, responded saying that the Nigerians could put 'God is Love' into their Constitution if they wished, but not while he was in the chair. Lyttelton then ridiculed the very notion of a bill of rights for the next twenty minutes".

22 See Jayawickrama (n18) 10-109; and Wesley-Smith "Protecting human rights in Hong Kong" in Wacks (ed) *Human Rights in Hong Kong* (1992) 39-43.

23 For other possible reasons, see the account of Jayawickrama (n18) 105-109.

The French Constitution refers to human rights parenthetically, by means of the preamble to the 1958 Constitution, which in turn refers to the preamble to the 1946 Constitution and the somewhat rhetorical 1789 Declaration of the Rights of Man and the Citizen. The recitations contained in these documents as interpreted by the Constitutional Council could be referred to as bills of rights. The French legacy of not guaranteeing fundamental rights and freedoms in the substantive provisions of the Constitution was, with a number of exceptions, replicated in the constitutions that it handed down to its former colonial territories in Africa.[24] The effect of this was a weak and unpredictable system of human rights protection because unlike in France, the preambles to these constitutions were not regarded as a substantive part of the constitution. The situation in South Africa was worse. For more than 300 years, a white minority had dominated the black majority and between 1948 and 1994 introduced the inhumane system of apartheid under which the most basic human rights were denied to the majority.

This brief historical background of the human rights situation in the colonial context is significant for two reasons. First, although at independence most African governments inherited constitutions which to varying degrees contained provisions that protected human rights, there was no reason to expect the new leaders who had no knowledge or experience of democracy or constitutional rule to quickly forget the lessons of authoritarianism and repression which they had learnt. As Abdullahi An-Na'im rightly points out, it was unrealistic to expect the postcolonial state to effectively protect human rights when it was the product of colonial rule which by definition was a negation of these rights.[25] Moreover, many of these constitutions were at best what Philip Alston has described as "tokenistic concessions to normative decency which bore no relationship to the realities of the society and … were accompanied by neither the political will to take them seriously, nor … the institutional means which might have made them viable".[26] It was therefore no surprise that the new rulers soon abrogated the constitutions or simply ignored their provisions and perpetuated the colonial pattern of human rights abuses.

Secondly, since the colonial powers introduced not only their culture, but their legal and political systems into their colonies at the end of the colonial era, two main constitutional models were inherited, namely the British Westminster or parliamentary system in Anglophone Africa and the French Fifth Republic presidential system in Francophone Africa. However, many Anglophone countries infused elements of the American presidential system into the Westminster model. These differences in inherited constitutional models are also to some extent reflected even today in the manner in which human rights is recognised and protected under the different modern African constitutions.

24 See, generally, Faure "Les constitutions et l'exercice du pouvoir en Afrique noire" *http://www.politique-africaine.com/numeros/pdf/001034.pdf* (3 Mar 2011) and Cabanis & Martin *Les constitutions d'Afrique: Evolutions récentes* (1999).

25 An-Na'im "The legal protection of human rights in Africa: How to do more with less" in Sarat & Kearns (eds) *Human Rights: Concepts, Contests, Contingencies* (2001) 98.

26 Alston "A framework for the comparative analysis of bills of rights" in Alston (ed) (n 4) 3.

3 The rationale for and framework of the comparative analysis and its limitations

The comparative framework adopted in this analysis and the choice of countries used have been informed by two major considerations. The first consideration regards the need to select countries that represent a cross-section of the diverse cultures, colonial and post-colonial experiences and legal systems in Africa. This also takes into account the different constitutional systems that appear on the continent in order to see whether they provide something peculiar in terms of design which could impact positively or negatively on the regime of human rights protection. In this respect, South Africa is an important choice because, until a few months ago, its hybrid Constitution, based mainly on elements of the Westminster and United States presidential systems but with some aspects borrowed from the civil law system,[27] was considered as "state of the art". The pride of being the most recent constitutions on the continent and therefore deserving of consideration belongs to the Kenyan Constitution that was approved as recently as August 2010 and the Angolan Constitution that preceded it by almost seven months. Cameroon's 1996 Constitution has been selected to illustrate the example of the Gaullist Fifth Republic constitutional model in its original 1958 form, which is in sharp contrast with the Beninese Constitution of 1990, which illustrates a revised modern version of this Gaullist model. The Botswana Constitution represents a Westminster system in the original form in which the British introduced it at independence in 1966 and contrasts with the Tanzanian Constitution of 1977, which is also of the Westminster model but has undergone significant revisions. The Angolan Constitution of January 2010 has also been selected as a variant of the Gaullist model in a Lusophone African country. The Egyptian Constitution of 1971, which has also undergone several revisions, is an example taken from a northern African Arab country.

A second aspect of the analytical framework regards a number of elements that are usually found in most constitutions that either possess a bill of rights or have provisions protecting human rights have been identified and used as a basis for the comparison. From this perspective, the following four main elements of a bill of rights are analysed, namely the scope of the bill of rights, its legal status, its justiciability and the relationship of the bill of rights to international law.[28] But before proceeding, it is necessary to preface this analysis with some of the reasons why such a comparative analysis is important.

27 The best illustration of this "hybridism" in the South African Constitution is the Constitutional Court, which in its design combines elements of both diffuse (American model) and concentrated review (civil-law model), and which provides for both abstract (civil-law model) and concrete review (American model) and thus reflects a remarkable exercise in creative imagination, pragmatism and opportunism that has been shaped by the country's history. See, generally, Fombad "African constitutional courts: Trends and challenges", unpublished paper presented at the Konrad-Adenauer-Foundation and Max-Planck-Institute Conference on "Constitutional Courts, Human Rights, Democracy and Development" in Heidelberg, Germany on 12-13 Nov 2009.

28 See Alston (n 4) 10-11 and Jayawickrama (n18) 114-125.

3 1 The importance of the comparative approach

Although the legal situation in each country is usually unique and requires that legal rules are developed in such a manner that they are able to address the specific needs of the society, a comparative study of how different countries address diverse legal problems has become very important. There are several reasons why a comparative analysis like this is essential for a proper understanding of human rights protection.[29]

First, in spite of the diverse approaches to human rights recognition and protection, the reality is that all of these are attempts to address common problems and concerns. The similarity of the experiences that African countries have gone through from colonialism and its aftermath to the challenges of dealing with ethnic, cultural and religious diversity means that they can learn from each other's experiences.

Secondly, there is what has been termed as "a global cross-pollination of human rights"[30] leading to some degree of open human rights jurisprudence as courts in the different countries frequently cite the decisions of courts in other jurisdictions as well as the decisions of international human rights tribunals. The South African Constitutional Court, especially during its first ten years, frequently cited and relied on the decisions of courts in other jurisdictions.[31] This is not usually just to blindly copy what obtains in other jurisdictions, but rather to attempt to draw inspiration from their dynamic and rich jurisprudence. Legal systems continue to innovate, experiment and adopt new solutions to the new problems that arise each day and from which others can learn. In order to facilitate this increasing global international human rights dialogue, it is important to understand the constitutional contexts in which the different decisions are made.

Thirdly, human rights protection is essentially a global endeavour. In fact, modern bills of rights all share one common ancestry – the 1948 Universal Declaration on Human Rights (UDHR) and its progeny, which itself formed the basis of most international and regional human rights instruments developed by the United Nations and regional bodies like the African Union (AU). For example, the South African Constitutional Court, in *S v Makwanyane*, pointed out that international agreements and customary international law provide a framework within which the bill of rights can be evaluated and understood.[32]Comparative studies such as this will show the extent to which there is convergence in approaches across different domestic jurisdictions and how this convergence could help to enhance the effectiveness of bills of rights in human rights protection.

Fourthly, beyond international treaty obligations, what is becoming increasingly significant today is the growing number of regional and international frameworks that have been designed to put pressure on constitutional designers to incorporate provisions that promote certain standards especially with respect to human rights protection. As a result, constitutional provisions promoting human rights are no longer merely optional

29 See Kentridge "Comparative law in constitutional adjudication: The South African experiences" 2005-2006 *Tulane LR* 245-256.

30 See Udombana "Interpreting rights globally: Courts and constitutional rights in emerging democracies" 2005 *African Human Rights LJ* 61.

31 See Udombana (n 30) 61 where some instances are discussed.

32 1995 (3) SA 391 (CC) pars 36-37.

but in many instances mandatory for any state that wants to interact and cooperate with others. Although the internationalisation of domestic human rights has increased through the adoption of international human rights standards, the practical benefits of this process are somewhat mixed. For example, the articles 3 and 4 of the Constitutive Act of the AU, unlike the Charter of the Organisation of African Unity, contain elaborate principles and objectives of the organisation which underscore the importance of human rights protection. Because of its diversity in legal and political culture, comparative studies like this will enable analysts to understand and appreciate the extent to which states are complying with their human rights obligations within the framework of such regional organisations which have now made respect for human rights a condition for membership.[33]

Fifthly, modern human rights law is a fairly recent development and many of its concepts are still stated in broad and ambiguous language. For example, there is no clarity as to what exactly is meant by or the content of many rights such as the right to education, the right to life, the right to development and the right to the environment. Such comparative studies enable judges and researchers to identify jurisdictions where similar concepts have been used in a bill of rights and see whether there is any comparative jurisprudence that could enable the judge to test his views with those of another judge dealing with similar problems.[34] In addition, as we will note, some bills of rights expressly mandate that there be a comparative approach to interpreting their provisions. Such comparative approaches can only be possible and effective with some general knowledge of the different ways in which human rights are recognised and protected in other bills of rights.[35]

Finally, for far too long, African constitutional engineers have been fixated with what was inherited during the colonial period and in many instances have tailored all reforms narrowly within the inherited colonial stereotypes. Very few studies have been carried out to investigate the extent to which different African countries have adapted and adjusted the inherited legal systems to their daily realities. If African solutions have to be provided to solve African problems, an important starting point is to see what these African problems are. The objective of this analysis is therefore to contribute to

33 See, further, Fombad "The African Union, democracy and good governance" 2006 *Current African Issues* 18-19.

34 As Judge Kriegler rightly points out in *Bernstein v Bester* 1996 (2) SA (CC) 751 at 811-812: "[W]here a provision in … [a] Constitution is manifestly modeled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision".

35 In one of the first appeals that came before the South African Constitutional Court, *S v Makwanyane* 1995 (3) SA 391 (CC), the Court had to decide the constitutionality of the death penalty for murder in the light of the bill of rights. Unlike some countries (see table below at par 3 2 1), the South African bill of rights is silent on the matter but recognises and protects other related rights such as the rights to life and dignity. The lead judgment in this case, delivered by Justice Arthur Chaskalson has been said by one of his fellow judges (see Kentridge (n 29) 249-250) albeit in an extra-cural piece, to have shown "an impressive mastery of the foreign materials, an appreciation of the differences between various bills of rights and of the differing legal, historical, and social backgrounds to the decisions of foreign courts".

the understanding of the different approaches adopted by the different African countries in the hope that African constitutional law scholars can learn from what is happening in neighbouring countries. Knowledge shared in such comparative studies on developments in Africa may show that we may not need to go abroad to look for and copy Western constitutional models or principles. Rather, we may easily borrow principles from our neighbours which have been tried and tested in an environment similar to ours. There is already some evidence that some African constitutional courts are beginning to engage in the international dialogue involved in consulting the jurisprudence not only of European courts and international courts but also the jurisprudence of other African courts.[36] Such a dialogue across the legal and language divide on the continent will certainly provide a richer and probably more refined and acclimatised source of human rights jurisprudence. I therefore now turn to the analysis itself to see what emerges.

3 2 The analytical framework

As pointed out earlier, the analysis will focus around four elements, namely the scope of the bills of rights, their legal status, their justiciability and the relevance of international law.

3 2 1 Scope

In comparing bills of rights an important question that arises relates to their scope. This raises a number of interesting questions. Do bills of rights have any particular form? What rights do they cover? What is their scope of application? To what extent are restrictions and derogations allowed and are there any criteria that limitations must satisfy?

With respect to the question whether a bill of rights must be in a particular form, the answer is negative. There is no prescribed formula on either the form or content of a bill of rights. In many constitutions, such as the Constitution of South Africa, there is a separate chapter (specifically, ch 2) entirely devoted to provisions recognising and protecting human rights with the label, "bill of rights" or some words to this effect (for example, fundamental rights and freedoms in some constitutions). In rare instances, such as in the case of Cameroon, most of the provisions dealing with human rights issues appear only in the preamble to the Constitution whilst the others are widely dispersed throughout the constitution. Be that as it may and subject to what is discussed below about the status of bill of rights, it is not usually their form but rather the substance that matters.

Aspects of the substance of a bill of rights include the wording of its provisions, and its breadth and length. These aspects usually reflect the depth of a government's commitment to human rights protection. The only guide as to what should be contained in a bill of rights are the general principles first articulated in the founding instrument of the modern regime of human rights protection, the UDHR and later reformulated in the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Nevertheless, it must be remembered that even these two covenants were not comprehensive and in many

36 See the discussion by Udombana (n 30) 59-60.

instances reflected political compromises made between the two opposing blocks at the peak of the Cold War.[37] The only comprehensive study on the scope of rights covered by bills of rights in Africa suggests that the highest numbers of rights are recognised by the constitutions of Democratic Republic of Congo as well as Uganda (each recognising twenty five rights) whilst Tunisia and Libya (with ten rights each) recognise the lowest number of rights.[38] As the table below shows, amongst the countries covered in this study, the new Angolan Constitution recognises and protects twenty four rights, the highest number of rights by the countries covered in this study, whilst the Botswana Constitution, with thirteen, protects the least. The scope of rights recognised and protected by the other constitutions are: twenty two each for Kenya and South Africa, twenty one for Egypt, nineteen for Benin, seventeen for Cameroon and sixteen for Tanzania.[39]

RIGHTS RECOGNISED IN THE BILLS OF RIGHTS

	RIGHTS	KENYA	ANGOLA	BENIN	BOTSWANA	CAMEROON	EGYPT	SOUTH AFRICA	TANZANIA
1	Right to equality and non-discrimination	art 27	arts 22 & 23	arts 8 & 26	ss 3 & 15	preamble	arts 8 & 40	s 9	art 13
	- rights of the aged	art 57	arts 82 & 84			preamble			art 11(1)
	- rights of persons with disabilities	arts 7(3)(b), 54 & 81(d)	art 83			preamble	art 15		art 11(1)
	- rights of women			art 26		preamble	art 11		
2	Freedom of opinion and expression	art 33	arts 32 &40		ss 3 & 12	preamble	art 47	s 16	art 18
	- freedom of the press	art 34	art 45	art 24	s 12	preamble	arts 48-49 & 206-211	s 16	art 18
	- right to information	art 35	art 69					s 32	

37 Thus, rights such as the right to private ownership of property and the right to seek asylum, were omitted.

38 See, Heyns & Kaguongo "Constitutional human rights law in Africa" 2006 *SAJHR* 673-717.

39 The definition of rights used is the same as that used in the Heyns & Kaguongo study (n 38) although the numbers arrived at are not the same for all the countries.

3	Freedom of movement	art 39	art 46		s 14	preamble	art 50	s 21	art 17
	- freedom of choice of residence	art 39	art 33			preamble	art 50	s 21	arts 15 & 17
	- right to entry and exit	art 39	art 46				arts 50 & 52	s 21	art 17
	- prohibition against unlawful expulsion		art 70	arts 16 & 39			art 51		art 17
	- right of asylum		art 71				art 53		
4	Right to privacy	art 31	arts 32 & 34	arts 15, 20 & 21	ss 3 & 9	preamble	arts 44 & 45	s 14	art 16
5	Rights relating to property	art 40	arts 37 & 38	arts 20 & 22	ss 3, 8 & 9	preamble	arts 29-39	s 25	art 24
6	Right to fair trial	art 50	arts 67 & 72-75	arts 16 & 17	s 4	preamble	arts 41 & 42	s 35	art 12
	- right to access to justice	art 48	arts 29 & 72-75			preamble	art 42	s 34	
	- right to administrative justice	art 47	art 75					s 33	
7	Rights related to liberty and security of the person	art 29	arts 31-32 & 36	arts 17-19	s 4	preamble	art 57	ss 12 & 35	art 12
	- right to humane treatment of those deprived of liberty (prisoners and detainees)	arts 46, 49 & 51	arts 36, 63, 64 & 66-68	arts 17-19	s 4		art 57	ss 12 & 35	
8	Freedom of association	art 36	arts 48 & 49		ss 3 & 13	preamble	art 55	s 18	art 30

	- right to form trade unions	art 41	art 50		s 13	preamble	art 56	s 23	art 20
9	Freedom of thought, conscience and religion	art 32	art 41	art 23	ss 3 & 11	preamble	art 46	s 15	art 18
10	Freedom from torture and cruel, inhuman and degrading treatment or punishment	art 29	arts 36 & 60	arts 18 & 19	s 7	preamble		ss 12 & 35	art 12
	- right to dignity	art 28	art 31	art 15	s 3		art 57	ss 10 & 12	art 12
11	Freedom of assembly	art 37	art 48	art 25	s 13	preamble	arts 54 & 63	s 17	
12	Right to work		art 76	art 30		preamble	art 13		arts 22 & 23
	- right to strike	art 37	arts 47 & 51	art 31		preamble		s 17	
	Right to form trade union	art 41	art 50				art 56	ss 22 & 23	art 20
13	Right to life	art 27	art 30	arts 8 & 15	s 4			s 11	art 14
	- prohibition of arbitrary deprivation of life		art 59		s 4				
	- prohibition of death penalty		art 59						
14	Right to education	art 43	art 79	arts 12-14		preamble	arts 18-21	s 29	art 11
15	Right to participation in government and to vote	art 38	arts 17, 51-53 & 55	art 6		art 3	arts 5 & 14	s 19	arts 20 & 21
	- right to vote	arts 38, 81 & 91-91	arts 4 & 54	art 6		art 2	art 62	s 19	art 5

16	Right to protection of the family	art 45	art 35			preamble	arts 9 & 10		art 16
	- rights of children	art 53	art 80			preamble	art 10	s 28	
	- rights of youth	art 55	arts 81				art 10		
17	Right to culture	art 44	arts 42, 43 & 79	art 10			arts 11 & 16	s 30	
18	Right to health	art 43	art 77				arts 16-17		
19	Rights to the environment	arts 69-70	art 39	arts 27-29		preamble		s 24	
20	Freedom from slavery and forced labour	art 30			s 6			s 10	art 25
21	Right to social security	art 43	art 77				arts 16 & 17	s 27	
22	Right to nationality		art 9				art 6	s 20	
23	Right to development		art 91	art 9			arts 23-28		
24	Right to an adequate standard of living	art 43	art 85				arts 17 & 23		
	- right to housing and shelter	art 43	art 85					s 26	
	- right to food and nutrition	art 43						s 27	
	- right to clean, safe water	art 42						s 27	
25	Consumer rights	Art 46	Art 78						
26	Rights of minorities	Art 56				preamble		S 31	

Effective human rights protection is more than just a question of how many rights are recognised and protected in the bill of rights. Although the scope in terms of numbers is important, this is not in itself decisive in determining the effectiveness and quality of the human rights protected under any particular bill of rights. Besides considering the other elements of the analysis mentioned above, particularly the status and justiciability of the rights, the actual type of human rights covered, is also important. From this perspective, it is to be noted that human rights are usually classified into three main categories to correspond to the so-called "three generations of rights". The full listing of what is usually considered as the three generations of fundamental human rights is not necessary. Nevertheless, it is important to note that first generation rights, usually referred to as civil and political rights, correspond to what is often referred to in the West as fundamental rights and freedoms. This is the main focus of the ICCPR. Second generation rights correspond to the protection of economic, social and cultural rights and actually require the state to make every reasonable effort within their specific contexts to put in place programmes for the full realisation of these rights. This is the principal focus of the ICESCR. Third generation rights, often defined as collective or solidarity rights, which at the international level are presently only reflected in the African Charter on Human and Peoples' Rights (ACHPR), are the newest and most controversial of these rights. Third generation rights consist of a catalogue of vague rights and duties on both the state and the citizens.[40]

Viewed from the extent to which the eight constitutions under consideration cover the three generation rights, it will be seen that whilst they all have provisions that cover the first generation rights, the Angolan, Kenyan and South African bills of rights and to a certain extent, the Egyptian Constitution reasonably cover a good number of the second generation rights as well as many aspects of the third generation rights. Whilst the Botswana bill of rights hardly deals with any of the economic, social or cultural rights, these rights are dealt with in the Tanzanian Constitution in Part One, entitled "Fundamental objectives and directive principles of state policy" which, according to article 7(2) of this Constitution, are "not enforceable by any court". Although many post 1990 African constitutions in diverse ways tried to recognise economic, social and cultural rights,[41] in many respects, the South African Constitution set a standard for constitutionally entrenching these rights by imposing on the state a duty to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".[42] A similar approach that seeks to enhance the legal enforceability of these rights has been adopted in the new Kenyan

40 Examples of these are the rights to development, to a healthy environment, to peace, to humanitarian aid and to the benefits of a common international heritage.

41 See, also, arts 14-30 of the Burkina Faso Constitution of 1991, arts 58-79 of the Cape Verde Constitution of 1992 and arts 41-55 of the Constitution of São Tomé and Principe of 1990.

42 See, eg, s 27(2) on health care, food, water and social security as well as a number of cases dealing with this such as, *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC); *President of the RSA v Modderskip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *Minister of Health v Treatment Action Group (TAC) (No 2)* 2002 (5) SA 721 (CC).

Constitution[43] and to a limited extent, in the new Angolan Constitution.[44] By contrast, the 1966 Botswana Constitution is typical of constitutions of that era which either did not recognise these second generation rights or, as in the case of Tanzania, only placed them under the heading of directive principles of state policy which are expressly stated to be non-justiciable.[45]

Since the purpose of a bill of rights is to introduce contemporary norms and standards of human rights protection into the governance of a country,[46] it is usually assumed in the absence of any provision to the contrary that its provisions must apply to all three organs of government. The assumption is that the state, as primary actor is responsible for creating the environment in which people can enjoy their human rights. The entire system is therefore based on obligations imposed on the state vis-à-vis individuals in society – a vertical system of responsibility. One of the most fundamental issues in modern constitutional law that has provoked serious debate amongst comparative constitutional law jurists is the dissatisfaction with the present system of vertical application of constitutional law. There have been extensive debates amongst comparative constitutional lawyers about the need to ensure a horizontal application of human rights to cover other actors.[47] The Angolan[48] and South African Constitutions[49] are the only ones among the

43 See arts 21(2) and 43.

44 Although the language of art 28 in particular as well as arts 76-88 appears to be fairly categorical, it is at the level of legal enforcement that problems arise with respect to the Angolan Constitution.

45 See arts 6-11 of the Tanzanian Constitution. However, there are a good number of recent constitutions which have also adopted this pattern. See, eg, arts 34-41 of the Constitution of Ghana of 1992; arts 95-101 of the Constitution of Namibia of 1990; ss 13-24 of the Constitution of Nigeria of 1999; and art 6 of the Constitution of Uganda of 1995.

46 See Jayawickrama (n18) 118.

47 See Orentlicher & Gelatt "Public law, private law actors: The impact of human rights on business investors in China" 1993 *Northwestern J of International Law and Business* 1-45; Cockrell "Private law and bill of rights: A threshold issue of 'horizontality'" in *Bill of Rights Compendium* (2001) 3A-18; and Cheadle & Davis "The application of the 1996 Constitution in the private sphere" 1997 *SAJHR* 59-60.

48 Art 28(1) states that "[t]he constitutional principles regarding fundamental rights, freedoms and guarantees are directly applicable to, and binding upon all public and private entities".

49 S 8 of the South African Constitution states:

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

In addition s 9(4) imposes a duty on private individuals not to discriminate against others on the same comprehensive set of grounds that applies to the state. See, eg, Cockrell (n 47) 3A-18; Cheadle & Davis (n 47) 59-60.

eight that provide for a horizontal application of the bill of rights. There are provisions in the Kenyan Constitution that could be interpreted to give it this effect.[50] A few other African countries such as, Malawi, Gambia, Cape Verde and Ghana also provide for such a horizontal application of their bills of rights.[51] It will suffice to point out here that the advantage of such horizontal application of a bill of rights is that it will enable private individuals and other actors such as parastatals and multinationals, who in this era of globalisation and privatisation perform many of the functions previously performed by the state, to incur responsibility for human rights violations.[52]

However, no matter how extensive and numerous the rights provided for under a bill of rights, its effectiveness can be considerably diminished not only by the language in which the rights are couched but also by constitutionally sanctioned limitations, restrictions and derogations. From this perspective, although there are numerous differences in the manner in which human rights are stated as well as the restrictions to which they are subject to in the eight constitutions studied, there are some common features which are probably a reflection of the constitutional models that have been adopted.

Perhaps the most remarkable difference is the manner in which human rights are expressed in the constitutions. Although in this regard, the Cameroonian Constitution is quite unusual in the extent to which the human rights it recognises are expressed in vague language. Similar language is also found in the Beninese Constitution, another example of a Gaullist model, and in the Egyptian Constitution. Rights are not stated in a manner that suggests or seeks to impose any obligation on the state. A common feature of these types of constitution is the widespread use of claw back clauses. For example, "the freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike shall be guaranteed under the conditions fixed by law". The extensive use of such claw back clauses actually means that whether or not citizens in those countries will effectively enjoy the human rights which the constitution purports to recognise and protect will depend on the goodwill of the legislature and there is no obligation on it to enact legislation that will promote rather than undermine human rights.

Human rights have never anywhere and at any time been absolute rights. Some limitations and restrictions are therefore necessary and inevitable. The scope of these limitations also affects the quality and quantum of human rights protection enjoyed in

50 See, eg, s 27(5) which states that "[a] person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated by clause (4)". Another example is art 29(c).

51 Art 12(1) of the Ghanaian Constitution of 28 April 1992 states as follows: "The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, *where applicable to them, by all natural and legal persons in Ghana*, and shall be enforceable by the Courts as provided for in this Constitution". (my emphasis) S 15(1) of the Malawian Constitution of 18 May 1994 contains the same provision and in almost exactly the same words that appear in the Ghanaian Constitution.

52 In fact, some of the worst human rights abuses have been perpetrated by multinational business interests with or without the connivance of the state. Further down the scale, many human rights violations are committed within the supposed comfort zone of the family through practices such as abuse of women and children.

a particular country. In bills of rights with extensive claw back clauses such as in the case of Cameroon and Benin, these act as potent weapons for restricting and limiting human rights at the pleasure of the legislature and the executive. A more direct form of limitation or restriction clause is found in the bills of rights in Anglophone Africa. The common pattern appears in the Botswana bill of rights where the enjoyment of most of the rights are expressly stated to be subject to a number of listed limitations such as the interests of defence, public safety, public order, public morality, and public health.[53] Nevertheless, the list consists of a catalogue of vague concepts which lack precise legal definition. A similar approach is adopted in the limitations contained in the Tanzanian bill of rights.[54] Both the Kenyan and the South African Constitutions provide general limitation clauses designed as checks against legislation that could undermine the bill of rights. For example, section 36 of the South African bill of rights states as follows:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

This provision lays down strict and objective conditions against which any piece of legislation trying to limit the rights in the bill of rights must be tested. Article 24(1) of the Kenyan Constitution is similarly worded but other clauses in this article impose even more restrictions. For example, clause 2 states that in spite of what is provided for in clause 1, a provision in legislation limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far as to "derogate from its core or essential content". Because of the potentially vague nature of the concepts of "core or essential content"[55] a huge responsibility is placed on the courts when interpreting these provisions. Furthermore, a number of rights, such as the right to a fair trial and freedom from slavery or servitude are expressly stated as not subject to any limitations.[56] From the point of view of checks against legislative or executive enactments that can undermine

53 See ss 4(2), 5, 7(2), 8(1), 9(2), 10(12), 13(2) and 14(2) of the Botswana Constitution.

54 See s 30(1) and (2) of the Tanzanian Constitution.

55 This resembles the "basic structure doctrine" that was developed by the Indian Supreme Court that held that the court should not accept any change to the constitution that alters the democratic essence of the constitution. See further Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2002) 6.

56 See art 25 of the Kenyan Constitution.

the rights contained in the bill of rights, it may be said that the Kenyan and South African bills of rights provide the greatest protection[57] whilst the least protection against abuse is provided for in the Cameroonian Constitution. More generally, the Gaullist model allows considerable scope for legislative and executive enactments[58] that are likely to undermine human rights.

It is generally recognised, even under international human rights instruments,[59] that there may be periods of national emergency which threaten the very existence of a state that may warrant extraordinary measures entailing the temporary suspension of certain human rights in order to effectively deal with the situation. The challenge has usually been how to provide for dealing with such exceptional situations without leaving too much discretion to a repressive government to use this as an excuse to curtail the peoples' rights. There are again marked differences in the way the different bills of rights deal with this situation. At one extreme are countries where a *carte blanche* is given to the government to take whatever measures it considers necessary to deal with the crisis. An example of this approach, which is common in Francophone Africa, is article 9 of the Cameroonian Constitution. It states that the President, "where the circumstances so warrant", may declare a state of emergency or state of siege by decree and "take any measures as he may deem necessary". The only check on the use of this power is the requirement that he should "inform the nation of his decisions by message". The new

57 It is important to point out here that even South Africa still has on its statute books, pieces of legislation dating back to the apartheid period which restrict many of the rights protected by the bill of rights. A typical example of this is the right to freedom of opinion and expression. A recent study of media unfriendly laws in nine SADC countries, including South Africa, is particularly revealing. According to this study, Botswana has fifteen such media unfriendly laws, Lesotho has nine, Malawi has eleven, Namibia has eight, South Africa has twelve, Swaziland has thirty two, Zambia has seven, and Zimbabwe has ten: see Balule, Kandjii & Louw "Undue restriction. Laws impacting on media freedom in the SADC and, more generally, Media Institute of Southern Africa (MISA) Media Directory" available at *http://www.misa.org/mediadirectory.htm* (3 Mar 2011).

58 It is to be noted that in the Gaullist system the executive is responsible for making most laws and in fact has what is usually referred to as an "exclusive executive law-making domain" which goes beyond the normal processes of delegated legislation. These laws may take the form of presidential ordinances and decrees as well as ministerial orders and regulations.

59 See, eg, art 4 of the ICCPR which states as follows:

"1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from arts 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation".

Angolan Constitution, too, may be criticised on the grounds that its article 58, dealing with national emergencies, is quite vague, particularly clause 6 which provides that a "special law shall regulate the state of war, siege or emergency".

Without sufficient constitutional safeguards, and with the rising phenomenon of dominant ruling parties in Africa, there is always a likelihood that parliaments will easily adopt emergency laws that can be used by governments as a pretext for entrenching themselves in power and suppressing their opponents. In the constitutions of Anglophone African countries (eg, arts 31 and 32 of the Tanzanian Constitution and s 17 of the Botswana Constitution) the presidents are also given extraordinary powers to act in cases of emergency but the circumstances under which these powers could be exercised are reasonably circumscribed and the exercise of the power is subject to parliamentary control. Perhaps the most elaborate provisions, with strict controls by parliament and clearly defined circumstances when emergency powers can be exercised, are found in section 37 of the South African Constitution and section 58 of the Kenyan Constitution. Both countries have gone through the painful experience of flagrant abuses of human rights under the pretext of a state of emergency. Besides this, many of Africa's repressive dictatorial regimes have been sustained by the use of emergency powers to substantially curtail human rights and put the people *in terrorem* permanently. For example, both Cameroon and Zambia have, since their independence until the 1990s, been continuously under a state of emergency.[60] Many areas of Egypt have also for prolonged periods been under a state of emergency. Clearly defined circumstances when emergency powers can be exercised are critical in appreciating the effectiveness of a bill of rights in protecting citizens against arbitrary governmental actions.

Although, as stated earlier, restrictions and limitations in bills of rights are fairly commonplace, they are legitimate only if they are worded in such a manner that they cannot be used to undermine the very rights that the bill of rights seeks to recognise and protect. A more detailed and critical analysis of the different provisions dealing with these in the constitutions under consideration is beyond the scope of this paper. Nevertheless, from this brief overview, two conclusions may be drawn. First, the language used in defining the rights being recognised and protected in the Constitutions of Cameroon and, to a certain extent, that of Egypt is rather obscure and evasive. In many instances it is couched more like aspirations, exhortations or desires from a benevolent state rather than rights which could impose certain obligations on the state. By contrast, the bill of rights in Constitutions of Kenya and South Africa as well as other Anglophone countries like Botswana and Tanzania are couched in language that is more precise and impose a sense of obligation on the state. Secondly, the scope for restrictions, limitations and derogations in the Kenyan and South African bill of rights and to a certain extent, the bill of rights of most Anglophone countries like Botswana and Tanzania is subject to the objective determination by the courts and some control by parliament. By contrast, in most of Francophone Africa, those who are prone to violating human rights, that is state

60 For Zambia, see An-Na'im "Protecting human rights in plural legal systems of Africa: A comparative overview" in An-Na'im *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* (1999) 45; Fombad "Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?" 2004 *J of African Law* 62-81.

authorities, are given the powers not only to determine the scope of the rights, but also to decide what restrictions or limitations should be introduced. In the final analysis, there is weaker control against abuses by the government.

3 2 2 Status

One of the greatest threats to the effectiveness of a bill of rights is usually posed by the legislature due to its powers to make new laws and to abrogate, repeal or override existing laws. A bill of rights may have nothing more than symbolic value if it can be ignored, casually amended or abrogated at the whim of a repressive government. This is still the case in spite of the fact that in most countries with a written constitution it is usually stated, either explicitly or implicitly, that the constitution is the fundamental law of the land and therefore that any legislation inconsistent with its provisions shall, to the extent of the inconsistency, be null and void. The distinction is usually made between, on the one hand, entrenched bills of rights, which cannot be modified or repealed through the normal legislative procedure of a country, but require a supermajority in parliament or referendum, and, on the other hand, unentrenched bills of rights. The latter may be modified or repealed through the normal legislative process. The idea of entrenching bills of rights in written constitutions seems to have been generally accepted and some will argue that this idea is the very essence of a bill of rights. As Jackson J stated in the judgement of the United States Supreme Court in the case of *West Virginia State Board of Education v Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.[61]

The question therefore is whether the entrenchment is effective to protect the bill of rights against arbitrary amendment of its provisions.

Different methods have been adopted to entrench bills of rights. For the eight countries under consideration, two main patterns may be discerned.

The first, which is common to all countries, except those with unwritten constitutions, is that any amendments to the constitution are lawful only when these are approved by a special parliamentary majority or if a special procedure has been followed. Such is the case with the constitutions of Cameroon,[62] Benin,[63] Egypt,[64] Tanzania[65] and Angola.[66] The effect of this is that the provisions in the bill of rights have the same status as other provisions in the constitution. Three observations are important here. Firstly, in the case

61 319 US 624 (1943) at 638.

62 See arts 63-64.

63 See arts 154-156.

64 See art 189.

65 See art 98.

66 See arts 233-237.

of Cameroon, almost all the rights usually protected by a bill of rights appear only in the preamble to the Constitution. Although article 65 of this latter Constitution states that "the preamble shall be part and parcel of this Constitution," it is submitted that this does not appear to make much difference. The loose, hortatory and obscure language in which these "rights" are formulated do not appear to create or impose a sense of obligation on the state or a sense of protection on the part of the citizens. Secondly, like most Francophone African constitutions, there are some provisions in the Constitutions of Cameroon and Benin that are declared to be unamendable. Such is the case with amendments relating to the "democratic"[67] or "secular"[68] nature of the state. This is however not limited to Francophone Africa, because the Namibian Constitution, in article 131, states that "no repeal or amendment of any of the provisions of chapter 3 hereof, insofar as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that chapter, shall be permissible under the Constitution, and no such purported repeal or amendment shall be valid or have force or effect". It is contended that the concept of unamendable provisions or, what is often referred to as "eternity clauses", is an illusion. One constituent body cannot draft constitutional provisions that prevent a future constituent body from repealing the constitution, even where it introduces an express provision that purports to do this. Arguably a constituent body is omnipotent in all save the power to destroy its own omnipotence.[69] A constitution or provisions in it could, in time, become antiquated. If no provision is made for procedures regarding the amendment of a constitution, or if such process is too cumbersome, this may provoke violent changes through revolutionary means. Finally, it is worth noting an important safeguard in the Angolan Constitution which states that no constitutional amendments are allowed during a state of emergency.[70]

The second and, it is submitted, better pattern for securing the entrenchment of the bill of rights, appears in the constitutions of Botswana, Kenya and South Africa. In both the Botswana and Kenyan constitutions, special procedures are put in place for amending different provisions and the bill of rights is one of the sections that may only be amended following a special and more rigorous process.[71] The South African bill of rights, too, may only be amended in accordance with a special procedure.[72] There is certainly an advantage in providing a special and more rigorous procedure for amending the provisions of the bill of rights. Strictly regulating and controlling the manner in which amendments can be made, will ensure that any amendments are done with due notice, with deliberation, not lightly and wantonly, and in consultation with the people in order to prevent the general will of the people from being subverted by a transient majority to serve its own political agenda.

67 See art 64 of the Cameroonian Constitution.

68 See art 156 of the Constitution of Benin.

69 See Sir Robert Megarry in his judgment in Manuel v Attorney-General [1982] 3 AER 833.

70 See art 237.

71 See s 89 (3) of the Botswana Constitution and art 255(1) (e) of the Kenyan Constitution.

72 See s 74(2).

3 2 3 Justiciability

A bill of rights, no matter how elaborate and comprehensive it may be, will serve no purpose if its provisions cannot be enforced or can be violated without any legal remedies or consequences. An effective bill of rights must provide a mechanism for obtaining legal redress for any violation of its provisions. In many instances, the mechanism for reviewing violations of the constitution has coincided with the mechanism for reviewing and controlling the constitutionality of laws generally. From the perspective of justiciability, three main patterns can be observed from the countries covered in this study.

First, some bills of rights reserve disputes relating to violations of their provisions for specific courts. This is in fact a common practice in the bills of rights in most Anglophone African constitutions. For example, section 30(3) of the Tanzanian Constitution states that any person alleging that any provision in the bill of rights has been, is being or is likely to be violated by any person anywhere, may institute proceedings for redress in the High Court. The High Court is given flexible powers when dealing with such violations. For instance, where it finds that a law is inconsistent with the bill of rights, it may, "if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void … decide to afford the Government or other authority concerned an opportunity to rectify the defect". In Botswana, section 18 of the Constitution also grants to the High Court the powers to deal with disputes arising from a violation of the bill of rights. It too has flexible powers under section 18(2) to "make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions" in the bill of rights.[73] Also, the new Kenyan Constitution reserves such disputes for the High Court and further provides a wide range of possible remedies,[74] but perhaps the major innovation is the expansion of the rules of *locus standi*.[75] In this regard, article 22(2) of the Kenyan Constitution states that proceedings could be instituted by

(a) a person acting on behalf of another person who cannot act in their own name;
(b) a person acting as a member of, or in the interest of, a group or class of persons;
(c) a person acting in the public interest; or
(d) an association acting in the interest of one or more of its members.

Article 22(2) goes even further to limit formalities relating to proceedings to a minimum and provide that the court shall "if necessary, entertain proceedings on the

73 See similar flexible procedures provided for under art 25(1)(a) of the Namibian Constitution. It gives the courts the power and discretion in an appropriate case, instead of declaring any law or action invalid, to allow parliament, subordinate legislative authority, executive or government agency the opportunity to correct the impugned law or action.

74 See arts 23 and 165(3)(b).

75 This has been achieved in countries such as India largely through a process of judicial activism. See, Sripati "Constitutionalism in India and South Africa: A comparative study from a human rights perspective" 2007 *Tulane J of International & Comparative Law* 49; and Bhagwati "Judicial activism and public interest litigation" 1984-1985 *Columbia J of Transnational Law* 561.

basis of informal documentation" and that "no fee may be charged for commencing the proceedings".[76] This is of tremendous importance given that a major obstacle to the effective enforcement of human rights in many African countries is the fact that too many people, whose constitutionally protected human rights have been violated due to ignorance, poverty, marginalisation or some other social or economic disadvantage, are unable to approach the courts for relief.[77] Broadening the *locus standi* access to justice in this way will considerably help to alleviate the situation of the poor who are often the main victims of human rights abuses.

The second pattern, review by a quasi-administrative or quasi-judicial body, called the Constitutional Council, is provided for in articles 46-51 of the Cameroonian Constitution. The constitutional council model, which is usually associated with continental Europe and more specifically, the *Conseil Constitutionnel* of the French Fifth Republic Constitution of 1958, was widely adopted in the constitutions of Francophone African countries before the 1990s. Most of these countries have in their post-1990 constitutions introduced some changes that attempted to remedy some of the serious defects of this model, but Cameroon in its 1996 constitutional amendment, copied the French model in its pure and undeveloped form with all its defects and weaknesses.[78] From a functional and substantive perspective, the original and congenital defect of this model is its quasi-administrative rather than judicial nature. Because it is composed of political appointees who are not necessarily judges, this compromises the chances of effective review. The fact that it can only be seised by the very politicians who are apt to make unconstitutional laws and often mainly with abstract pre-promulgation review, renders the whole mechanism potentially irrelevant and unreal.

The third pattern provides for disputes concerning the bill of rights to be settled before a constitutional court. In the case of Egypt this may be inferred from the broad jurisdiction given to such courts in constitutional matters.[79] Then again, in the case of Benin and South Africa, the mandate of the constitutional courts in dealing with fundamental human rights violations is expressly stated.[80] The South African process is probably the most flexible because certain disputes on the bill of rights can be quickly and cheaply dealt with at the local level by the ordinary courts but with the parties having the option to appeal or apply directly to the Constitutional Court which is the highest court in all constitutional disputes. However, the South African Constitutional Court has exclusive jurisdiction in abstract and concrete review of legislation that may violate the

76 The new Angolan Constitution in arts 73-75 also appears to broaden the rules of *locus standi* but the language in which this is couched and arts 228 and 230, which restrict access to certain specified personalities, cast serious doubts about the effectiveness of this.

77 Here, again, the Kenyans learned from the epistolary or open-letter jurisdiction approach developed by the Indian courts. See Bhagwati "Social action litigation: The Indian experience" in Tiruchelvam & Coomarswamay (eds) *The Role of the Judiciary in Plural Socieities* (1987) 20-21.

78 See, generally, Fombad "The new Cameroonian constitutional council in a comparative perspective: Progress or retrogression" 1998 *J of African Law* 172-186 and the same author's "Protecting constitutional values in Africa: A comparison of Botswana and Cameroon" 2003 *CILSA* 83-105.

79 See art 175.

80 See arts 121 and 122 of Benin's Constitution and ss 38, 167 and 172 of the South African Constitution.

bill of rights. The court is given the powers to suspend the declaration of invalidity for any period of time and on any conditions, to allow the competent authority to correct the defect.[81] It may also grant an interdict or other temporary relief to a party pending a decision of the court.[82]

Two important points are worthy of note about the South African approach. First, the Constitutional Court combines the power of reviewing actual violations with that of reviewing potential violations. The latter, in the form of pre-promulgation control of legislation, has probably been borrowed from the French constitutional council model. Secondly, litigants are not only provided with a remedy when the authorities violate or threaten to violate the constitution but they may even take action where the alleged "violation" consists of a failure to fulfil a constitutional obligation. This may result in a declaration of unconstitutionality for the omission to carry out a constitutional obligation.[83] It is a welcome development on a continent where the executive and legislative bodies are generally well known for regularly ignoring the implementation of constitutional provisions. This unique remedy is probably designed to cajole or force these two branches to fulfil their constitutional obligations and, for the first time, guarantees that compliance with constitutional obligations is not a matter that lies within the exclusive and absolute discretion of these two branches.

More mandatory language is used by the Kenyan Constitution when it states in article 21(4) that the "state shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms". Although article 232 of the Angolan Constitution appears to go further by expressly providing, under the heading "Unconstitutionality by omission", that the Constitutional Court may be requested to rule on unconstitutionality by omission, the fact that the *locus standi* to request such a ruling has been vested exclusively in "the President of the Republic, one fifth of the members [of the National Assembly] in full exercise of their office and the Attorney-General" renders this process illusory. These are the very people who are supposed to have made these laws and can hardly be expected to take action against themselves for doing nothing. It is appropriate to point out here that although the Angolan Constitution provides for a Constitutional Court with powers to undertake both abstract and concrete review of constitutionality, the fact that access to this court is limited under articles 228 and 230, brings it more in line with the constitutional council model rather than to the constitutional court model with an effective system for sanctioning constitutional violations.

The right to an effective and efficient remedy does not necessarily require a review only by a court of law. Nevertheless, it is imperative that the remedy provided be effective. From this perspective, the resolution of bill of rights violations through a quasi-

81 See s 172(1)(b) of the South African Constitution.

82 *Idem* s 172(2)(b).

83 For a discussion of this interesting issue, see Mendes "Constitutional jurisdiction in Brazil: The problem of unconstitutional legislative omission" *http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfDiscurso_en_US/anexo/Omisao_Legislativa_v_Ing.pdf* (3 Mar 2011); Paczolay "Experience of the execution of Constitutional Court's decisions declaring legislative omission in Hungary" *http://www.venice.coe.int/docs/2008/CDL-JU(2008)019prog-e.asp* (3 Mar 2011).

administrative body whose composition is determined wholly or partly by politicians, compromises the chances of ensuring that the constitution is not violated. If it is accepted as legitimate to establish in a constitution certain guarantees designed to protect citizens as well as control the actions of government, then it must also be considered as legitimate to build into the constitution the measures to ensure that the guarantees contained in it are respected. The post-1990 trend away from the constitutional council model in favour of control of constitutionality by courts in Francophone Africa is one of the most significant developments that will certainly enhance the implementation of bills of rights in these countries. The case for judicial enforcement was powerfully made by Judge O'Regan of the South African Constitutional Court in the *Makwanyane* case, when she said:

> It must be emphasized that the establishment of a Bill of Rights, enforceable by a judiciary, is designed, in part, to protect those who are the marginalized, the dispossessed and the outcasts of our society. They are the test of our commitment to a common humanity and cannot be excluded from it.[84]

Perhaps one of the major surprises and disappointments of the new Angolan Constitution which probably contains the most elaborate bill of rights provisions in any constitution on the continent[85] is the very weak and uncertain mechanism it provides for enforcing these rights. Be that as it may, the effectiveness of judicial intervention will also depend on the extent to which the bill of rights allows the courts to rely on international human rights standards.

3 2 4 Relationship to international law

Although most bills of rights are based on, or have been substantially influenced by, international human rights instruments and standards, depending on the scope of rights it covers, it is not imperative that there be a link, whether direct or indirect, with either these international standards or international law. Nevertheless, many bills of rights refer to international human rights instruments and the question here is whether this has any impact on their effectiveness in protecting human rights.

Some bills of rights, such as those in the Constitutions of Botswana, Egypt and Tanzania are silent on the matter.[86] The preamble to the Cameroonian Constitution does no more than "affirm" its attachment to the fundamental freedoms enshrined in the UDHR, the UN Charter, the ACHPR, "and all duly ratified international conventions relating thereto". This, it is submitted, does not render any of these instruments part of national law nor can they, on this basis alone, be invoked in the interpretation of the bill of rights. Far more significant is the Beninese Constitution which, in its preamble, refers to these international instruments and states that their provisions "make up an integral part

84 1995 (3) SA 391 (CC) at 508.

85 Sixty seven out of the 244 articles in the Constitution (that is 27,45%) are contained in the bill of rights as compared to thirty nine articles out of 264 articles in Kenya's Constitution (14,77%) and thirty two sections out of 243 sections in the South African Constitution (13,16%).

86 It must however be pointed out that art 9(f) of the Tanzanian Constitution under its non-justiciable directive principles of state policy does say that human dignity is to be "preserved and upheld in accordance with the spirit of the Universal Declaration of Rights".

of this present Constitution and of Beninese law and have a value superior to the internal law". This is repeated in article 7, and article 40 imposes on the state a duty to teach its citizens about the Constitution, the UDHR, the ACHPR and any other "international instruments duly ratified and relative to human rights". In fact, the ACHPR is attached as an annexure to the Beninese Constitution.[87]

The most significant effect is given to international law by the bills of rights in the Angolan, Kenyan and South African Constitutions. Several provisions in the Angolan Constitution underscore the importance and relevance of international instruments in interpreting and applying the Constitution.[88] The two most important ones are articles 26 and 27 which state:

> 26 (1) The fundamental rights established in this constitution shall not exclude others contained in the laws and applicable rules of international law.
> (2) Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in keeping with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and other international treaties on the subject ratified by the Republic of Angola.
> (3) *In the consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.*
>
> 27 The principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the constitution or are enshrined in law or international conventions. (my emphasis)

In the Kenyan Constitution, article 2(5) provides that "the general rules of international law shall form part of the law of Kenya". Article 2(6) further provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". To a similar effect but perhaps less far-reaching is section 39(1) of the South African Constitution which states:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum ...
> (b) must consider international law; and
> (c) may consider foreign law.

The bills of rights in many other African constitutions also expressly incorporate some international human rights instruments.[89]

87 In fact, Benin is one of the few countries in Africa that has expressly incorporated the UDHR and the ACHPR into its domestic law.

88 Other provisions which expressly refer to the applicability of international law are arts 12 and 13.

89 See, eg, art 17(3) of the Constitution of Cape Verde of 1999 and s 11(2) of Malawi's Constitution of 1994.

In the absence of either an explicit or implicit authorisation, the question arises whether it is legitimate for a court to refer to or invoke international human rights instruments or rely on comparative law. This is a fairly controversial issue on which there are strong and plausible arguments for and against such an approach.[90] It may be argued that in the globalised world of today, it would be both self-defeating and a dereliction of duty for a judge to completely ignore legal developments in the rest of the world and their actual or potential implications on national law simply because there is no express or implied authorisation to do this in the bill of rights. The fundamental values that underpin bills of rights, such as equality, dignity of the human person, non-discrimination, freedom of speech and others are now universal. Whilst there are differences, both formal and substantive in approach and implementation, it is clear that there are many areas of convergence and considerable scope for cross-systemic borrowing. The significance of the emerging trend towards the recognition of the applicability of international human rights instruments in the recent constitutions of countries such as Angola and Kenya is that this expands the scope of human rights that can be invoked under the bill of rights as well as gives the courts the power to adopt good practices from other jurisdictions. However, the extent to which this can impact on the effective implementation of a bill of rights must be appreciated with due regard to certain limitations inherent in such a comparative study.

3 3 Limitations in the comparative analysis

The analysis above shows some patterns and themes which suggest that in spite of differences and similarities, there is greater scope for convergence than for divergence. It is, however, necessary to recognise a number of limitations that are unavoidable in such an analysis and which certainly impact on the effectiveness of the different bills of rights under discussion.

The first point to note is that the analysis is limited to the provisions in a constitution. It might well be that in some countries, such as Cameroon, where the rights recognised and protected in the constitution are couched in vague and obscure language, implementing legislation may make up for such defects.

Secondly, bills of rights cannot be looked at in isolation from the overall constitutional context as well as the particular social, economic, cultural and political dynamics within which they operate. Hence, no matter how well written and entrenched a bill of rights may be, the fact that it is operating within a democracy, pseudo-democracy, transitional democracy or a dictatorship will matter considerably; and in the analysis above these factors were not taken into account. In fact, one writer has suggested that comparing bills of rights inevitably involves a comparison not only of apples and oranges "but something closer to a comparison of peas and donkeys".[91] In comparing bills of rights, it is not only the scope of rights recognised that matters, but also the legal and administrative measures in place to enforce these measures. For example, no account was taken of the possible role of a human rights commission. Yet in South Africa, the constitutionally

90 See the discussion by Udombana (n 30) 64-69.

91 See Darrow & Alston "Bills of rights in comparative perspective" in Alston (ed) (n 4) 471.

entrenched Human Rights Commission whose financial and functional independence has been guaranteed by the Constitution, has significantly complemented the legal machinery for enforcing human rights protection. By contrast, the Cameroonian Human Rights Commission, established by ordinary law, has been quite ineffective because of the control that that government exercises over it. Apart from the stipulations in a bill of rights, a variety of other factors which have not been taken into account, such as the level and quality of political commitment, the availability of human and economic resources necessary to be deployed in the task, the level of judicial activism and a host of other administrative, educational and policy issues have a significant impact on the quality of human rights protection.

Thirdly, the multi-faceted diversity of Africa, with its rich cultural, ethnic, religious and other diversities militate against any simple generalisations. For example, the differences in colonial experience, especially in terms of language, culture and perhaps most pertinently, the legal system, continues to play a crucial role in the attitude and approach towards both the domestication and implementation of international human rights standards. Thus, whilst modern courts are urged to adopt an open-minded and comparative approach which takes into account and incorporates global human rights jurisprudence of foreign national and international tribunals and courts, this in itself cannot guarantee uniformity in outcome. For example, with the exception of Cameroon, since the on-set of the new wave of constitutional reforms, most Francophone African countries have moved away from the Constitutional Council. A good example of this is Benin's Constitutional Court that has, since its establishment in 1990, decided more cases than all the Constitutional Councils in pre-1990 Francophone Africa put together.[92] In a sense, there is a certain convergence in favour of judicial review. But how substantive is this convergence? Could the Beninese Constitutional Court and the South African Constitutional Court arrive at similar conclusions when interpreting similarly worded provisions of either the Beninese or the South African Constitution? The answer is negative for three main reasons.

The first reason is that the techniques of legal interpretation that the Anglophone and Francophone courts use differ, and the weight they give to the various sources of law is different. For instance, while the opinion of legal writers is an authoritative source of law to a Francophone court, an Anglophone court will consider this merely as the writer's opinion of what the law is or should be, which may or may not be relevant to his decision in the case. The second reason is that whilst judicial precedent is of considerable importance to an Anglophone court, it is of peripheral relevance to a Francophone judge.[93] Finally, it needs to be noted that whilst in the Francophone system the final determination of a human rights dispute is often based solely on what is expressly stated

92 For a discussion of the Constitutional Court of Benin, see Rotman "Benin's Constitutional Court: An institutional model for guaranteeing human rights" 2004 *Harvard Human Rights J* 280-314.

93 The relative unimportance of judicial precedent in the French system is understandable. A typical English law judgment gives the detailed facts and provides an elaborate discussion of the law before stating the decision and the reasons for it. By contrast, a typical judgment by a Francophone court offers little in the way of factual and legal analysis. It is usually abstract and apart from referring to the applicable laws, never articulates the factors or policies that influenced its conclusion. Without any

in the bill of rights, this is not necessarily so in the Anglophone system. Common law principles relating to human rights still have relevance in those areas not covered by the bill of rights.[94] This is on the premise that common law human rights principles are residual in that they are what is left after the bill of rights principles are exhausted. In this respect, they may be used to fill any gaps that appear in the bill of rights. However, the ability of such principles to effectively fill any gaps is inherently limited precisely because of their residual character in that they can easily be overridden and extinguished by a simple Act of Parliament.

However, despite these limitations certain important conclusions may be drawn from the analysis above.

4 Conclusion

Africa's new constitutions now expressly recognise and protect human rights in bills of rights which still broadly reflect the different constitutional systems that were received during the colonial period. There are a number of conclusions that may be drawn from this analysis of a number of bills of rights which appear in the constitutions of a selected number of African countries reflecting the legal, linguistic and cultural divide on the continent.

First, one may say that a bill of rights in a constitution does not *per se* guarantee that there will be no human rights abuses, nor does it signal a country's irrevocable commitment, whether in theory or practice, to the protection of human rights. This depends on the actual effectiveness of the bill of rights which may be gauged from a number of important indicators such as the scope of rights covered, the status of the bill of rights, its justiciability and the extent to which it allows for relevant foreign and international jurisprudence to be invoked and applied.

Secondly, the table of rights above suggests that there are many rights that are recognised and protected by all the countries. Examples of these are rights to equality and non-discrimination, freedom of speech, freedom of association, right to vote, the right to privacy and the right to property. Until a few months ago, the South African bill of rights was considered to have set a very high standard as it contained the most detailed and carefully worded listing of rights incorporating not only the classic civil and political rights, but also embracing a panoply of social, economic and cultural rights.[95] It has

ratio decidendi it is understandable why judicial precedent is of such little value as a source of law in the Francophone system.

94 This situation is expressly dealt with by the South African Constitution, which in s 39(2) dealing with the interpretation of the bill of rights states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights".

95 As Byrnes "Hong Kong's bill of rights experience and its (ir)relevance to the ACT debate over a bill of rights" *http://acthra.anu.edu.au/publications/* (3 Mar 2011), put it: "If one were to pursue a car analogy, perhaps one would see the South African Constitution as the Rolls Royce of Bills of Rights, the UK Human Rights Act as the finely tuned Jaguar (built with European parts), the New Zealand version as the souped-up Mini, and the Hong Kong version might come in as a Lada, under-powered and irrelevant".

now been overtaken by the new Angolan and Kenyan Constitutions which contain even more elaborate provisions.[96] These two countries appear to have learned from the South African experience and gone even further than the South African Constitution.

Thirdly, the obscure wording of many bills of rights and the extensive use of claw back clauses mean that considerable scope is left for the increasingly repressive governments in Africa to limit or ignore those rights which the bill of rights purport to recognise. This is quite common in Francophone Africa. However, in Anglophone Africa there is also considerable scope for governments to restrict rights on the basis of limitation or derogation provisions. The general limitation clauses in the Kenyan and South African bills of rights which define the parameters of any legislation to restrict or limit the rights contained in the bill of rights are probably the best way to guard against any arbitrary restrictions and limitations.

Fourthly, in spite of anomalous cases like Cameroon's adoption of the ineffective constitutional council model, there appears to be a growing acceptance of judicial review of the application of the bill of rights. This is a very significant development because it means that contrary to the position before the 1990s in most of Francophone and Lusophone Africa, citizens can now challenge any legislative or administrative acts or actions that threaten to undermine the rights conferred in the bill of rights. Another important effect of judicial enforcement of bills of rights in Francophone Africa is that ordinary legislation, the bulk of which is made by the executive, is now, unlike in the past, subject to judicial scrutiny. Be that as it may, it must be pointed out that the new Angolan Constitution, despite its improvement on the constitutional council model, has not gone far enough. As a result, the effectiveness of its elaborate provisions recognising and protecting human rights is considerably diminished by the absence of a credible mechanism for ensuring that the courts can compel compliance with these provisions.

Fifthly, a major innovation which addresses one of the most serious weaknesses of bills of rights is the inclusion of provisions which facilitate access to courts by the poor and marginalised and the availability of flexible remedies in the Kenyan Constitution. More measures need to be introduced to make justice for human rights violations faster and cheaper.

Although, from a formal and substantive perspective, the analysis shows that the bills of rights in most Anglophone countries, especially South Africa, provide a better prospect for human rights protection, today the practical reality in almost all African countries, including South Africa, is that there remain enormous difficulties in transforming rights in a meaningful way that will improve the life of the ordinary person. Poverty, problems of access to justice, resource constraints, lack of trained legal personnel and a host of other issues continue to impact negatively on human rights protection and enforcement.

From a dark colonial period when human rights were not recognised, through a post-independence period when they were recognised but not respected, we are now in an era when they are recognised and attempts are made to enforce them. A comparative study like this is meant to underscore the point that no country has "invented" the ultimate

96 See n 85 *supra.*

solution and that countries can learn from each other's experiences in a globalised and increasingly inter-dependent world.

Abstract

A constitutional bill of rights in many respects signals a country's commitment to human rights protection. This paper examines, from a historical comparative perspective, the bills of rights in a number of selected African constitutions to see the extent to which, formally, they may help to promote respect for human rights. The paper starts by considering the concept of "bill of rights" and the historical context of human rights protection in African constitutional practice. The framework for the comparative analysis and the choice of countries used, reflect the linguistic, cultural and legal diversity of Africa. The main elements used in the comparison are the scope of rights recognised and protected in the bills of rights, their legal status, their justiciability and their relationship to international law. After highlighting some limitations as well as the advantages of such a comparative analysis, the paper concludes that such studies indicate that there is no perfect bill of rights and that countries can and should learn from the experiences of the other in a globalised and increasingly inter-dependent world.