The International Association of Constitutional Law / Association Internationale de Droit Constitutionnel (The IACL/AIDC) – Cape Town Roundtable

9 to 11 April 2006

Constitutionalism after Transition

Conference conclusions from the Secretary General of the IACL/AIDC
- Theunis Roux (South Africa)

Our conference began on Sunday night with Justice Pius Langa saying that 'constitutionalism is a good thing' and that no one in Africa now disputed this. This statement was seemingly confirmed by the presentation by Waruguru Kaguongo which reported on the now almost universal adoption in Africa of constitutions containing Bills of Rights. Of course, there remains much work to be done in translating these rights into reality, but there has been clear progress in Africa since 1990 towards a situation in which government is controlled by law and political power is exercised through law. The most recent example of this is the judgment of the Supreme Court of Uganda last Thursday in which, though ultimately upholding the result of the recent election in that country, the Court nevertheless subjected the conduct of the election to constitutional scrutiny. This would not have happened 15 years ago. So there has been progress. And where there has been progress there is scope for analysis and scientific attempts to understand the constraints and possibilities of the current situation.

Four questions were posed in the concept document for this conference:

- Have constitutionally entrenched amnesty provisions succeeded in addressing both the need for a stable political settlement and the needs of victims for justice?
- Have individual rights proved to be a successful device for addressing ethnic conflict?
- Transitional constitutions may be designed to address certain political cleavages. Do they run the risk of perpetuating those divisions whilst failing to fulfil more general democratic needs?
- And finally, can constitutions provide rights to a genuinely pro-poor economic policy, or is economic policy immune to constitutional prescription?

After the last two days it seems that the most fundamental of these is the third question about political cleavages, with the other questions representing the different forms in which this question was asked in the three main sessions. It would also seem that the answer to the third question lies in thinking through the conundrum posed by Justice Langa at the end of his opening address, viz. what is the relationship between transition and transformation, or what is the difference if any, between a transitional and a transformative constitution? Recall that Justice Langa had earlier drawn a clear distinction between these two kinds of constitution, defining a transitional constitution as one that is 'meant to regulate a specific period of time and to facilitate a specific change of regime', and a transformative constitution as one that 'lays down a challenge that has no expiry date.' Phrased in this way the distinction seemed fairly uncontroversial. However, Justice Langa then sought to problematize it by saying that: 'All societies in transition should have a transformative constitution rather than one that is merely transitional'. This struck me at first as contradictory. Surely, as was the case in South Africa, a country in transition first needs a transitional constitution, for precisely the reasons Justice Langa gives in his definition, i.e. to stabilize the transfer of political power? Was he then implying that South Africa, having completed a successful transition to democracy, was in some other respect still in transition, the kind of transition which requires a transformative rather than a transitional constitution?

While I was still pondering these remarks Steven Friedman got up and said: 'South Africa is in transition and will remain in transition for some time.' And no one gasped. And Friedman himself did not seem to think he was contradicting anything Justice Langa had just said. The explanation for this

may of course be that everyone was asleep or simply being polite. But I don't think so. The better explanation is that we all intuitively recognized that the two keynote speakers were not in fact contradicting each other. Rather, they were using the word 'transition' in two different senses: in a narrow sense to mean 'transition to democracy' and a broader sense to mean 'transition towards the sort of society that the constitution envisages'. As soon as one understands the word 'transition' to have these two senses, it is not contradictory to say that a country may have completed a transition to democracy but yet still be in transition. Nor is it contradictory to define a transitional constitution as one that is meant to stabilize the transition to democracy (in the narrow sense) and yet at the same time suggest that all countries in transition (in the broad sense) require a transformative constitution.

But the paradox remains: In order to be meaningful/successful/realistic/grounded (whatever you want to say) a constitution must speak to the actually existing political cleavages in a country. And yet, in so doing, a constitution runs the risk of enforcing those cleavages, of legitimating them, such that they continue to structure a country's politics in perhaps unhealthy ways. In the session on 'accommodating ethnic differences' Githu Muigai emphasized this point by describing the successive waves of failed constitution-making in Africa. Having divided and ruled for the best part of a century on the basis of ethnic difference, he reminded us, Britain left Africa with a set of uniform constitutions that were not made by the people themselves, and which could not possibly have been expected to address the very different political dynamic in each country, but which were nevertheless expected to result in peaceful polities. That always fantastical expectation was never realized and Africa has spent the last forty years or so trying to recover from the effects of this legacy, and more latterly to understand how to make constitutions work better, to do their job of creating political stability – not because political stability is an end in itself, but because it is the first necessary step in the achievement by a country's people of their full human potential. In one way or another all the speakers in the three sessions grappled with this central challenge.

Session 1: Past political violence: truth and amnesty

Here the political cleavage to be addressed is the cleavage between the oppressors and the oppressed: on the one hand, the victims of past political violence and all those who directly feel their pain, and on the other the perpetrators and all those whose ability to carry on living is dependent on a certain amount of forgiveness, a certain amount of reparations, and a certain amount of pragmatic public forgetting. To my mind, the lesson that we learned from this session is that the way through the paradox in this case is to recognize that pragmatic compromises made in the interests of transition in the narrow sense need not be forever. During the session it thus became apparent that the stumbling block in our thinking on this issue has been to assume that a concession made for pragmatic purposes, such as the protection given to Charles Taylor by Nigeria, or the initial decision not to prosecute General Pinochet in Chile, need not be one to which we are morally bound forever. Our hesitation has been that, if we go back on a transition deal, we, the friends of liberty and justice, will somehow become like our enemies. What we learned from the session is that this is not necessarily the case, and that a transitional deal made for pragmatic purposes is only cast in stone to the extent that the agreement expressly contemplates some sort of permanent amnesty and, if not, to the extent that the ***current*** need for political stability requires that the transitional deal be respected. Where these conditions do not apply, the search for non-vindictive justice continues, and the truth that promotes healing must be allowed to emerge.

Session 2: Accommodating ethnic differences

In many ways this session's version of the political cleavages paradox is the paradigmatic case in Africa. How do we deal with the colonial legacy of politicized ethnicity without perpetuating ethnicity as a relevant political category for ever more? We had a number of suggestions here about how to solve this: Justice Kanyeihamba simply said that we must stop thinking of people first in terms of ethnicity and only afterwards in terms of their separate moral worth as human beings. I am afraid that this approach won't get us around, for example, the thorny question of affirmative action, of the need sometimes o discriminate according to the oppressor's categories in order to undo the effects of past discrimination. However, the force of Justice Kanyeihamba's is that there should be a time limit to this kind of restitutionary discrimination. At least theoretically, we need to hold out the hope and expectation that the need for state intervention in the economy in order to assist historically disadvantaged ethnic groups will eventually disappear. Rassie Malherbe, for his part, said we needed to embrace diversity, not to seek to eliminate it but to build a nation out of our ethnically diverse building blocks. And an intervention from the floor by Chris Maina Peter from Tanzania seemed to suggest that this is indeed possible. I have already mentioned Githu Muigai's resignation about needing to build the reality of ethnic power-brokering into African constitution-making processes in order to control and discipline those tendencies in a society, without any expectation that they will ever go away. Ameze Guobadia was less pessimistic, refusing to accept that ethnicity was necessarily a negative construct. In Nigeria, she argued, there was some evidence to suggest that ethnicity could be used to galvanize action for development. Like Rassie Malherbe, therefore, she seemed to think that ethnicity is not a political cleavage to be overcome but an aspect of identity that can be worked with in the nation-building and democratic consolidation project. Finally, Stu Woolman reminded us that promoting associational rights necessarily occurs at the expense of equality, in the sense of treating everyone alike, and that once again this is not necessarily a bad thing.

Session 3: Poverty alleviation and socio-economic rights

Here the political cleavage is that between the haves and the have-nots. And the paradox is that, in building this cleavage into a constitution in the form of socio-economic rights, we run the risk of giving courts a role in economic policy-making that may ultimately incapacitate the state from addressing poverty. The speakers in this session mostly dismissed this danger as hypothetical. Whilst agreeing with Steven Friedman that the enforcement of socio-economic rights could be costly, Sandy Liebenberg argued that this feature was not unique to soci-economic rights. Although courts can treat the poor as passive recipients of benefits, and in this way perpetuate poverty by contributing to a culture of entitlement, there were several ways in which socio-economic rights could serve a genuinely transformative role in society. Marius Pieterse picked up on this point by arguing that the enforcement of socio-economic rights could in certain circumstances result in the immediate satisfaction of needs. For example, socio-economic rights could be enforced against private parties in developing the common law. Nor was it self-evident that the South African Constitutional Court's decisions on socio-economic rights had not resulted in tangible benefits. Looking at the same court, Anashri Pillay argued that the variability of its reasonableness standard was both its major weakness and its major strength. The virtue of the variable standard was that it allowed the court to negotiate concerns about institutional competence and legitimacy.

Conclusion

In this way, thinking through the political cleavages paradox drove us to a reconsideration of what the project of constitutionalism might be in Africa. The traditional view is that a constitution should be transformation-neutral, i.e. that it should be about setting down relatively immutable (or relatively

more immutable) rules of the political game, leaving it to ordinary politics, over time, to determine the trajectory followed by a country. This conference suggests that in post-colonial Africa at least, constitutions needs to be continually sensitive to changing political dynamics, and to significant shifts towards or way from the path to human freedom. Constitutions ***are*** special, and there is a certain need for lawyers' mythology about these sacred texts, but lawyers' myths need to be tempered by the political scientists' view of constitutions as an ingredient in the power dynamic, as a site of contestation as much as the means by which contestation is managed.