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Constitutional Comity: Mediating the Rule of Law Divide

Catherine Adcock Admay

When he was President of the Commission on the General Assembly of the United Nations, Prime Minister Jan Smuts served as principal drafter of the Preamble to the Charter of the United Nations (Charter). South Africa went on to become a founding party to the Charter. It never sought to terminate or withdraw from its obligations under the Charter, including the human rights obligations. Indeed, under the Charter, South Africa pledged to take “joint and separate action” to bring about more effectively the “achievement of [the Charter’s human rights] purposes.”

Historically in South Africa, international law and national law have had an uneasy relationship. In 1980, when the Group Areas Act, one of the pillars of social, economic, and legal apartheid, was under consideration by the Constitutional Court of that day, the Supreme Court of Appeal declined to construe an ambiguity in that Act so as to advance, however faintly, the human rights purposes of the Charter. According to S. v. Werner, within the parameters of national law, the Charter had no legal significance.

The rule that international law must first be transformed or

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2 U.N. CHARTER art. 56. Under Article 56 of the U.N. Charter, “All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” Id.; see also Burns H. Weston, Human Rights, 6 HUM. RTS. Q. 257, 272 (1984) (arguing that because the human rights provisions of the United Nations Charter are part of a legally binding treaty, they “clearly involve some element of legal obligation”).


5 Id. at 187.

6 Id.; see also John Dugard, Some Realism About the Judicial Process and Positivism: A Reply, 98 S. Afr. L.J. 372, 385-86 (1981) (arguing that the court could have limited the Group Areas Act by invoking internationally protected human rights).
incorporated into national law in order for it to be national law kept the government from being forced to address the hypocrisy of Jan Smuts’s legend. South Africa could be bound by international law at the international level, and not bound at the national level. The Charter was a compact in bad faith.

This sort of uneasiness between international and domestic law holds true across many national legal systems (also committed to the incorporation method for reception of international law) and is why any discussion about international law’s “authority” in a domestic court is always fraught with difficulty. Much is at stake.

I. Paradox of the Rule of Law

From the perspective of those seeking to enforce international law, the very purpose of an international compact is to obligate “joint and separate” action among the parties. National law is the single most effective vehicle for the enforcement of international law. For it not to be put to the service of international law is for international law to remain abstract declaratory law, full of legal authority but with nowhere to go.

More troubling is the fact that legal authority coexists with lawlessness. The unmistakable lesson one learns from South Africa’s simultaneous endorsement of the U.N. and the establishment of apartheid is that there is no reliable rule of law when it comes to international-national law relations. A state can voluntarily and expressly bind itself to one set of principles, on the one hand, and simply ignore them on the other.

Paradoxically, what makes managing the relationship between international and national law so difficult is that there are powerful rule of law arguments on both sides of the authority divide. International law, which derives its authority from tacit or explicit consent of nation states, cannot accept national law as a defense to violating an international law obligation. Constitutional Courts, which derive their authority from national constitutional law, can

7 U.N. CHARTER, supra note 2, art. 56.


never be expected to prioritize international law—however authoritative—over constitutional law. To do so would be simply inconsistent with a national law system that observes the doctrine of constitutional supremacy. Therefore, whatever the Constitution says about the authority of international law will be how much authority international law is accorded.

II. Inequality of Power

A national court can turn to two sources for authority in deciding a given case, which creates the possibility of significant slippage between what a state promises to do when it enters into international obligations and what its constitution will require it to do to perform those obligations. Often international law suffers because it has no constitutional status—no *pacta sunt servanda* principle imbedded in that constitutional law. If the principle that states must comply with their obligations is only championed at the international law level, international law obligations will take on a quality of remoteness or external significance, regardless of the extent to which the law was adopted, endorsed, or even written by national actors. International law then comprises obligations to others (that may be honored or not), and constitutional law consists of obligations to ourselves (that must be honored). Having two sorts of binding law—first class law (our Constitution), and third class law (our international law obligations)—can quite easily relegate international law to the status of empty declaratory law, thinner than the paper it is written on. This may occur even in the event that the parties involved have manifestly agreed to be bound.

III. Managing the Paradox

South Africa’s 1996 Constitution self-consciously attempts to chart a course that does not easily founder in these ways. Its

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10 S. Afr. Const. ch I, § 2 (1996) ("This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.").

11 The principle of *pacta sunt servanda* is embodied in Article 26 of the Vienna Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, supra note 9, art. 26.


13 Supra note 11.
approach could broadly be viewed in these terms: We honor ourselves by honoring the obligations we have undertaken to others, and we empower our constitutional law when we empower international law within it. The legal device invented to help mediate the divide between these two systems of legal authority was the development of a Constitutional Law of International Law.\textsuperscript{14}

The success of this body of law is of no small importance to international law generally. If South African law can demonstrate that mutually supportive coexistence between international law and national law is possible in a way that does justice to the rule of law principle at the heart of both systems, it will have forged a powerful legal and political instrument, and done so with much better faith than did Jan Smuts.

The Constitutional Law of International Law adds a second locus for the authority of international law. When international law is constitutionalized, it is binding on national actors because international law is constitutional law: its source of authority is the Constitution itself. Therefore, one rule of law problem is solved.

\section*{IV. Road Map for the Enquiry}

Several questions arise. What has become of South African constitutionalization of international law? What is the effect of locating international law’s authority in constitutional law? And how do South African law and courts receive international law? To answer these questions, it will be necessary to engage in both textual analysis (what the Constitution says) and substantive analysis (what the jurisprudence says) of the role of international law in real-world South African practice. It will become clear in the course of what follows that the reception of international law occurs in a way shaped by national judges who view national context, history, and law as paramount (this is in fact the essence of constitutional law), and that it is not a foregone conclusion that this form of international law implementation (“taking ownership”) is good for international law. Whether international law’s rule of law problem is abated depends on whether international law: (1) is viewed by national courts as a body of law with an integrity of its own, apart from how it is formulated in the

\textsuperscript{14} See infra notes 15-100 and accompanying text.
South African context; (2) is treated as an exotic species of constitutional law not comfortably connected to the primary constitutional law and not truly a part of the complex web of rights the courts are spinning; or, (3) attracts the authentic interest of courts who have to go to considerable extra trouble to make sense of a system that is multiplicitous, evolving, and not under its exclusive control. Thus, my investigation of South African constitutional jurisprudence yields three basic models for relating international and national law. When international law and constitutional law meet: (1) international law is "read in;" 5 (2) international law is "read out;" 6 or (3) national law is "read up." 7

V. Constitutional Text

International law is powerfully boosted by what South African jurists call a "straight forward reading" of the text of the Constitution. 8

First, much of the Bill of Rights was influenced by consideration of international law. In its various versions (including the Interim Constitution), the drafters of the Constitution spoke in a language of human rights, a language that would sound familiar to international law and become familiar to constitutional law. 9 In this way at least the international law of human rights would not depend on arid mechanical incorporation but would represent a deep theme, a leitmotif within the Constitution itself. Such deliberate attempts to promote consonance ab initio could be viewed as a thick reading-in of international law.

In contrast, a thin reading-in of international law can be found in the principles the Constitution supplies for hierarchy (sections

15 See infra notes 38-55 and accompanying text.
16 See infra notes 56-81 and accompanying text.
17 See infra notes 82-96 and accompanying text.
18 This interpretive approach is similar to the "plain text" school of thought in American legal construction. See, e.g., In re Sch. Educ. Bill 1995 (Gauteng), 1996 (3) SALR 165, 185 (CC).
Sections 231 and 232 of the Constitution set forth the rules for deciding when treaty law or customary international law is the "law in the Republic." For international law to directly bind the Constitutional Court in any way, it must clear section 231 or 232. These sections also announce the hierarchy as between international law and national law. Constitutionally, international law can be displaced whenever international law is "inconsistent with the Constitution or an Act of Parliament."

Absent more, this approach is disheartening for international law champions. Section 231 treaties—now clothed as acts—are only as good as the next piece of legislation. Such transformation rules take us back to the familiar battleground of warring rule of law imperatives: international rule of law is incompatible with constitutional rule of law.

Under section 231, a treaty, to which South Africa has specifically expressed its consent, may never come to have the status of binding law in South Africa. If the Treaty does become law in the Republic, it does so with a pedigree that privileges not only constitutional law, but ordinary legislation as well. From an international law point of view, this hierarchical arrangement defies the basic ground rules of the Vienna Convention: first, that treaties will be honored in good faith, and second, that internal law may not be invoked to defeat a treaty obligation.

This blow to international law's rule of law core is softened by two very powerful constitutional provisions, both of which constitutionalize traditional (and traditionally poorly applied) common law rules of comity. They impose the following rules of construction:

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20 S. Afr. Const. ch. XIV, §§ 231-32 (1996). Section 231(4) reads: "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." Section 232 reads: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

21 Id. ch. XIV, § 232.

22 Vienna Convention, supra note 9, art. 26, 1155 U.N.T.S. at 339.

23 Id. art. 27, 1155 U.N.T.S. at 339.

§ 233

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. 25

§ 39

(1) When interpreting the Bill of Rights, a court . . . ,

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law. 26

This constitutionalized comity gives all international law (not just binding international law) two thumbs on the scale. First, international law cannot be ignored; it must be ascertained and considered (when interpreting the Bill of Rights or any piece of legislation). Second, international law cannot be discarded lightly, particularly where there is constitutional room to give it play. The constitutionalized rule of comity means that international law, qua international law, does have weight and its weight is protected as a matter of constitutional law, that is qua domestic law.

Such a comity rule could be viewed as seeking to constitute a new web of harmoniously read relations, not only as between rights (freedom of religion, equality, security of the person, and privacy), but as between sources of rights (international law or constitutional law). So long as national law and international law operate as different legal systems, this impulse toward mutual accommodation on grounds that preserve both the international and national law character of rights without a need for one to dominate the other, seems calculated to reinforce both systems.

The final textual reading-in of international law on which this article will focus appears only implicitly and is not clearly labeled as an invitation to consider international law and comparative practice, although the Court has been willing to see it in that light. 27 Section 36, a central pillar of South African constitutional law, gives as a relevant context for a decision about limiting

25 Id. ch. XIV, § 233 (emphasis added).
26 Id. ch. II, § 39 (emphasis added).
27 See infra notes 82-96 and accompanying text.
constitutional rights the democratic practice of other societies (not just states). It states as follows: "The rights in the Bill of Rights may be limited only . . . to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . . ." 28

A. From "Authority" to "Justification"

South African courts take pride in their ambition to move legal-political discourse from a discourse expressing the "culture of authority" to one imbuing a "culture of justification." 29 The dual location of authority for international law in international law and constitutional law might allow the Constitutional Court to move the international-law-versus-national-law debate away from warring "authority talk" and toward "justification talk." While ultimately national authority is decisive in national courts, the emphasis will be on broad inquiry into the mutual rationales and grounding for international law and national law. In this way, what counts as the relevant context or backdrop for legal analysis will expand outward from the national heartland and not retreat inward to a national laager.

B. Constitutional Court Jurisprudence

Because legal text is always given form in concrete situations where specific interests are at stake, one cannot say what the state of the constitutional law of international law in South Africa is without looking to its constitutional jurisprudence. What follows is a sample of cases drawn from two periods of constitutional jurisprudence in South Africa to illustrate the juncture of life and law. The cases selected show that the Constitutional Court has taken three basic postures toward relating international law to constitutional law: in Government of the Republic of South Africa v. Grootboom 30 the Court reads international law in; 31 in Azanian Peoples Organization (AZAPO) v. President of the Republic of

30 2001 (1) SALR 46 (CC); see also Christian Educ. of S. Afr. v. Minister of Educ., 2000 (4) SALR 757 (CC).
31 See infra notes 38-55 and accompanying text.
C. Reading In: Grootboom

The Grootboom case is of fundamental importance to South African constitutional law. It poses some of the hardest questions the Court can expect to field. How is the Court to respond to the tragedy of fundamentally inadequate housing conditions in South Africa? What sorts of standards can the Court craft to ensure that socioeconomic rights in the Constitution are not dead letters? Justice Yacoob considered as sources of law both constitutional and international law.

The constitutional cornerstone for analysis is section 26, which reads: "Everyone has the right to have access to adequate housing. . . . The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right." Justice Yacoob also turned to the International Covenant for Economic, Social, and Cultural Rights. Article 11 explains that "The States Parties to the present Covenant recognize the right of everyone to . . . adequate . . . housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the
realization of this right. In addition, Article 2 states that “Each State Party . . . undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized . . .”

Taking pains to point out differences in the plain text of both these sources of law, Justice Yacoob nevertheless canvassed the work product of the U.N. Committee on Economic, Social, and Cultural Rights. When he came to the point where he had to decide whether the legislative measures undertaken by the state to realize the rights protected by section 26 were reasonable, he incorporated into the standard of reasonableness two principles emerging from the Committee’s own work overseeing the implementation of the Covenant. First, “a program that excludes a significant segment of society cannot be said to be reasonable.” Second, a program that disregards the needs of the most vulnerable or “leaves out of account the immediate amelioration of the circumstances of those in crisis” cannot meet the reasonableness test.

International law institutions, in particular the Committee that monitors the implementation of the International Covenant for Economic, Social, and Cultural Rights, have proceeded down a messy legal path by developing a “concept of minimum core obligation.” The Court recognized that this work could serve as a conceptual guide for a constitutional court wanting to move cautiously into the nearly untrodden territory of justiciable socioeconomic rights. As Justice Yacoob put it, such a working relationship with the Covenant’s Committee makes sense at a minimum for textual reasons; the language of “progressive steps” in the Constitution was actually inspired by the Covenant. What should not be missed here is that South African jurisprudence will

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44 Int’l Covenant on Economic, Social, and Cultural Rights, supra note 43, art. 11, 993 U.N.T.S. at 3 (emphasis added).
45 Id. art. 2 (emphasis added).
46 Grootboom, 2001 (1) SALR 46, 64-65.
47 Id. at 69.
48 Id.
49 Id. at 78.
50 Id. at 65.
51 Id. at 69-70.
represent another sort of progressive step for international law and will in turn become fertile ground for the workings of the Committee. What was aspirational only in international law is now enforceable in a leading Constitutional Court.

In the same judgment, the Constitutional Court also considered the relationship between the International Convention on the Rights of the Child and section 28 of the Constitution. Justice Yacoob explained: “The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. Section 28 is one of the mechanisms to meet these obligations. The section encapsulates the conception of the scope of care that children should receive in our society.” In both enquiries, constitutional law is read in the light of international law, but international law enters most powerfully, first, as a domestic standard (reasonableness test) and second, as the substantive source of obligation which domestic law honors on its own terms in its own context, specific to section 28.

It is worth noting that only the International Convention on the Rights of the Child is directly binding on South Africa in the international law rule of law framework. Thanks to the invitation of section 39, the Covenant—not binding law as a matter of international law or of domestic law—isa nevertheless still given considerable play.

D. Reading Out: Coetzee, Gauteng, et al.

Constitutional Court jurisprudence is not always so comfortably connected to international law. There is a line of jurisprudence that gives little quarter to international law. In this line the Court can be seen as leaning away from comity and toward hostility. A few important cases go so far as to read international law out of any serious constitutional inquiry at all.

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53 Grootboom, 2001 (1) SALR 46, 80-82.

54 Id. at 81-82 (emphasis added).

55 Justice Yacoob explicitly points this out in his judgment. Id. at 63 n.29, 81.

In *Coetzee*, Justice Kriegler held that an act imprisoning judgment debtors for contempt of court was unconstitutional.\(^{57}\) Justice Kriegler stated as follows: “Because I base my decision on the examination of the specific provisions of the sections at issue . . . I do not find it necessary in this judgment to comment on the procedure of other countries. . . . Nor do I find it necessary to consider the impact of . . . international human rights instruments . . . .”\(^{58}\) Clearly, international law was not law Justice Kriegler felt that he must consider. Section 39's invitation to have regard for international law was declined, at least in the public realm where the judgment served as the only indication that international law was considered.

It should be noted that *Coetzee* technically was decided outside the section 39 framework. It was considered under the Interim Constitution where the provision homologous to section 39 read: “In interpreting the provisions of [the Bill of Rights,] a court of law . . . shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter.”\(^{59}\) It is possible that Justice Kriegler read out international law on the theory that it was inapposite in a case examining domestic legislation.

Justice Sachs viewed such an understanding of “applicable law” as too narrow. He wrote a separate judgment, concurred in by Justice Mokgoro, arguing that section 35 (the homologous provision to section 39) “invites us to have regard to international experience where applicable when seeking to interpret provisions relating to fundamental rights” and, in this, it “requires us to give due attention to such experience with a view to finding principles rather than to extracting rigid formulae, and to look for rationales rather than rules.”\(^{60}\)

At stake was the culture of justification. “In deciding whether or not sending people to [jail] for not paying their debts is justifiable in an open and democratic society . . . we need to locate ourselves in the mainstream of international democratic

\(^{57}\) *Coetzee*, 1995 (4) SALR 631, 640.

\(^{58}\) Id. n.7.


\(^{60}\) *Coetzee*, 1995 (4) SALR 631, 662.
Justice Sachs might have said the Constitution itself—the bedrock of domestic law—requires an open stance toward international sources.

In re School Education Bill 1995 (Gauteng) held that a national prohibition on language competency tests for admission to public or publicly supported schools and on compulsory religious education in those schools was constitutional. A number of private Afrikaans schools had argued, on the basis of constitutional and international law, that the government must support schools that insisted on a common language and religion so long as they did not discriminate on grounds of race.

Reading Justice Mahomed's leading judgment one would not know international law arguments had been raised at all. No footnote acknowledged them. No mention was made of international law, except perhaps obliquely when the Court ordered no costs against the petitioners "notwithstanding the fact that the record was unjustifiably burdened by a large number of unnecessary documents lodged on behalf of petitioners."

Was this a South African version of a Brandeis brief, marshaling international law and constitutional law to insist on special budgetary allocations to Afrikaans schools?

The only indication that international law arguments were raised was when Justice Sachs opened his judgment noting, "We were urged . . . to approach the [task of interpreting specific provisions of the Constitution] in a . . . manner which took account both of cultural realities in this country and of internationally recognized principles relating to the protection of minorities."

Lest this assertion of international law support go unexamined (or unexamined publicly), Sachs proposed "to follow their argument through to see if applying internationally accepted principles . . . would indeed suggest a different result, even if straining against the text."

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61 Id. at 659.
62 1996 (3) SALR 165 (CC).
63 Id. at 208.
64 Id. at 171.
65 Id. at 182 (emphasis added).
66 Id. at 185.
67 Id.
The first sentence of his international law analysis, given its powerful analytical claim, understandably might strike fear in the heart of any judge sitting on a court where complex questions of constitutional and international law would arise: "A review of the literature by leading authors in the field suggests that over the years there has been a firm movement from the concept of tolerance of religious and other minorities, to that of protection of national groups, to that of guaranteeing rights of individuals."

Yet, there is no sense in which this separate judgment is indulging in ill-gotten academic virtuosity. Sachs uses the judgment as a vehicle for engagement, for providing a principled justification—in one more way, in one more medium—of the decision of the Court. A petitioner having read the judgment could not come away wondering if silence about international law should be taken to mean that the Court was not confident of its posture in relationship to international law.

The single most important constitutional case where any reader of the Court’s jurisprudence could detect a fundamental lack of ease with international law is AZAPO. Here the Court was faced with an argument from family members of those tortured and killed by the South African government that the legislation authorizing the Truth and Reconciliation Commission (TRC), especially its Amnesty Committee, was not only unconstitutional but also was in violation of international law. The international law allegedly breached by the TRC arrangement was the (claimed) requirement that states prosecute those responsible for gross violations of human rights.

It takes no imagination to understand why Justice Mahomed would have a hostile reaction to this international law condition being superimposed on a foundational “deal” responsible for the very Constitution he was interpreting. Justifying limits on a

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68 Id. at 190.


70 Id. at 680.

constitutional right from within a purely national law framework made his job hard enough. If the impugned section of the Act were unconstitutional, Justice Mahomed declared, the “inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination.”

It would be easy to read his judgment as suggesting that international law was not linked to constitutional law in any thick or thin sense. If the Constitution were correctly interpreted as authorizing amnesty, he argued, “[t]he exact terms of the relevant rules of public international law . . . relied upon by the applicants would therefore be irrelevant.” Then he dropped another footnote. This note parenthetically set out why three blockbuster sources of directly relevant international law should not be considered applicable. In essence, Justice Mahomed made a rolling argument in the alternative. First, international law is

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72 Id. at 688.
73 Id. at 689.
74 Id. n.29.
75 Id. This note reads in full:
The Geneva Conventions of 1949 apply only to cases of “declared war or of any armed conflict which may arise between two or more of the High Contracting Parties.” (No High Contracting Parties were involved in the South African conflict.) The Conventions were extended by art. 1(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted on 8 June 1977) to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against regimes in the exercise of their rights of self-determination.” Even if the conflict in South Africa could be said to fall within this extension (this was not accepted by the Cape Supreme Court in the AZAPO case referred to in footnote 56, supra), Protocol I could only become binding after a declaration of intent to abide thereby had been deposited with the Swiss Federal Council in terms of art. 95 as read with art. 96 of this Protocol. This Protocol was never signed or ratified by South Africa during the conflict and no such “declaration” was deposited with that Council by any of the parties to the conflict. As far as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (also adopted on 8 June 1977) is concerned, it equally cannot assist the case of the applicants because it is doubtful whether it applies at all (see art. 1(1) to Protocol II), but, if it does, it actually requires the authorities in power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict.

Id.
irrelevant. Then, if it is relevant, it does not apply. Finally, if it applies, it does not assist the applicants' case.

On the least charitable reading, Justice Mahomed's comments on international law could be viewed as bare conclusory arguments. His judgment's high focus on hierarchy (using section 231 as the crucial starting point of analysis) evidences no sensibility for comity and little desire for grounding judgment in a broader international law context. It is often the case that international law is read out precisely when the specter of conflict between international law and national law appears to loom irreconcilably—when some aspect of international law, if fully ventilated in Sachs's fashion, might too greatly strain the words, structure, and history of the Constitution.

What is problematic about this response to possible slippage between international law and constitutional law is that when international law is constitutional law, slippage operates to undermine national law much more than international law. Failing a constitutional precept that accords weight to international law

\[76 \text{Id. at 688.} \]
\[77 \text{Id. at 689.} \]
\[78 \text{Id. at 688.} \]
\[79 \text{Id.} \]
\[80 \text{A more charitable reading would take account of the enormous effort Mahomed had mounted to defend a political settlement that had taken on a constitutional cast both structurally and textually. The AZAPO judgment was issued under pressure in less than two months and no judges, not even the most international-law inclined, wished to add to their jurisprudential worries. Only Didcott chose to write a separate judgment, which clearly revealed the amount of worrying at least one judge had already done on the national law-constitutional law issues. He concluded: "It is therefore with a sigh of relief that I find myself free to say, as I end this judgment, that [I can join in the basic holding of the leading judgment]." Id. at 704.} \]
fails the Constitution itself.

E. Reading Up: Fitzpatrick

A case decided in May of 2000 could well have gone the way of the Coetzee, Gauteng, AZAPO line of cases.82 In Fitzpatrick, the Court was asked, in the name of international law, to allow a constitutional violation to go unchecked for two years after the Court had declared the underlying national legislation unconstitutional.83 What national court in the world would want to uphold unconstitutional national legislation in order to vindicate international law? The stage was set for a battle of warring authority where international law would strike the core principle of constitutional supremacy and emerge much the worse for the showdown.

The issue in Fitzpatrick was whether the Constitutional Court should set aside the suspension of the order of invalidity regarding legislation completely barring the inter-country adoption of South African children.84 The Minister of Welfare conceded that the legislation was unconstitutional,85 and that it did not serve the constitutional imperative of advancing the best interests of the child in any matter affecting that child.86 But, she argued, the legislation should continue in place for another two years while the Ministry of Welfare drafted new legislation that would implement South Africa’s international law obligations under the Convention on the Rights of the Child, and the standards it was preparing to undertake within the framework of the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption.87 According to the Minister of Welfare, South African law could not be relied upon to safeguard children in keeping with international law and constitutional law standards unless it was amended.88

The constitutional law was very clear: current legislation was

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83 Id. at 424.
84 Id. at 427.
85 Id. at 424.
86 Id. at 426.
87 Id. at 430-31.
88 Id. at 430.
invalid. But the international law was equally clear: current legislation must be kept in place because it allowed South Africa to meet (in an overbroad manner) its obligation to condition inter-country adoption on the exhaustion of in-country options (what the Convention of the Child calls the principle of subsidiarity).  

Justice Goldstone ended the conflict by focusing on the common core of international law and constitutional law. Both sources of law, he pointed out, were grounded in the principle of protecting the best interests of the child. This means there was no real conflict. Any deficit in national law would be cured by the background principle of international law. No ongoing constitutional violation could be justified on the purported deficit, because given the constitutional rules of comity, there was in fact no deficit. Thus, he concluded, “the concerns that underlie the principle of subsidiarity, are met [by current law].” His reasoning is provided in footnote 33:

Although no express provision is made for the principle of subsidiarity in our law, courts would nevertheless be obliged to take the principle into account when assessing the “best interests of the child,” as it is enshrined in international law, and specifically in art. 21 (b) of the Children’s Convention. This obligation flows from the imperative in section 39(1)(b) of the Constitution that “when interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law.”

Those national institutions and national officers responsible for adoption matters, Justice Goldstone maintained, would read up national law. Affected parties, both domestic and international, could rely on this declaration of fealty of national law to international law because national law (not international law) guaranteed it. The Constitution, then, operates so as to meet

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89 Id. at 427 (stating that in the Court’s “firm view” the legislation absolutely proscribing the adoption of a South African child by non-South Africans was inconsistent with the Constitution).

90 Id. at 431.

91 Id. at 432.

92 Id.

93 Id. at 433.

94 Id. n.33 (emphasis added).

95 Id. at 433.
international law obligations even when express domestic law is not yet in place.96

VI. Conclusion

We have come full circle. Recall how the Werner court, when presented with the Group Areas Act, failed to read up.97 That the United Nations charter had not been converted into South African law was the decisive legal fact.98 South Africa law existed apart from international law. Not having a foothold or source of authority internal to the constitutional order, it would exist in a vacuum of real power. Now, in the era of Fitzpatrick, whatever deficits might exist in national law vis-à-vis international obligations, more often than not, national law can be relied upon to supply the deficit through rules of construction privileging comity.99

The possibility for slippage between international law and national law has not been eradicated, but the starkness of conflict between warring systems of law, each asserting “authority” over the other, has been smoothed by according a double locus of authority to international law, in both international law and constitutional law.

As long as judges, lawyers, and parties seize on this opportunity to read in or read up (not to read out), relations between international law and constitutional law need not be uneasy. Each system can meet its rule-of-law imperative. Even more promising, each system can begin to shape what Justice Mokgoro has called a “web of mutually supporting rights,”100 ushered in now by national law, now by international law, now together.

If only the framers of international law, of international institutions, even of the United Nations Charter, had busied

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96 This operation is not simply desired without any likelihood of being fulfilled. The Fitzpatrick judgment orders the Minister to bring the Court’s analysis to the attention of children’s courts and children’s commissioners. Id. at 433, order 3.
97 S. v. Werner, 1981 (1) SALR 187 (A); see also supra notes 4-5 and accompanying text.
98 Werner, 1981 (1) SALR at 187; see also supra notes 4-5 and accompanying text.
99 Fitzpatrick, 2000 (3) SALR at 422.
100 Curtis v. Minister of Safety & Sec., 1996 (3) SALR 617, 631 (CC).
themselves building such a domestic-international web earlier in the last century, the road from apartheid to democracy might not have been so long, so brutal, so hard won.